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VOLUME 112.

(15)

CASES
IN THE
SUPREME COURT
OF
ARKANSAS.

ELDRED v. JOHNSON.

[75 Ark. 1, 86 S. W. 670.]

JUDGMENTS—Res Judicata—Landlord and Tenant.—If a landlord files a bill in equity to set aside a judgment by default rendered against his tenant, and does not ask the court to pass on his title, but only to permit him to defend his title in an action at law, a dismissal of the bill for want of equity is not a bar to an action at law by the heirs of the landlord to recover the land. (p. 18.)

JUDGMENTS—Conclusiveness—Landlord and Tenant.—A judgment in ejectment by default against a tenant is not, so far as the title to the land is concerned, conclusive against the landlord, or those claiming under him, when he is not made a party to the action, and especially is this true when he is a nonresident. (p. 20.)

P. C. Dooley and Wilson & Wall, for the appellants.

J. L. Ingram and G. C. Lewis, for the appellees.

¹ REDDICK, J. In 1893 A. H. Johnson was the owner of a tract of land in Prairie county containing about ninety-one acres. Johnson was a nonresident of the state, and the land was in the possession of his tenant, G. W. Miller. E. B. Eldred also claimed title to this land, and in April, 1893, he brought an action of ejectment against Miller, the tenant, who was in possession of the land. Miller made no defense, and a judgment by default was taken against ² him at the September term of the Prairie circuit court for the possession of the land. Afterward Johnson brought suit in equity to set the judgment aside, and to be allowed to defend his title, alleging that there was never any legal service on Miller, but that the attorney who represented Eldred procured the judgment by representing to the court that the return of the sheriff

showed a legal service upon the defendant, Miller. He further alleged that he had no notice of the suit until after the term of court at which it was rendered, and had no opportunity to appear and defend. On the hearing this complaint was dismissed for want of equity. Subsequently he brought suit at law to recover the land, but took a nonsuit, and within a year afterward this action was brought by his son and daughter, Johnson having died and they being his only heirs. Eldred, among other defenses, set up the two judgments above referred to as conclusive against the right of Johnson to recover. The circuit court overruled this contention, and gave judgment for the plaintiffs. Eldred appealed.

³ This is an appeal from a judgment against the defendant in an action of ejectment. The judgment was clearly right unless the plaintiffs are estopped by certain judgments set out in the answer of the defendant. One of these judgments was a judgment for the recovery of the possession of this land rendered in an action brought by the defendant here against a tenant of the ancestor of plaintiffs, but to which action the ancestor was not made a party. The other judgment was rendered in an action in equity brought by the ancestor of plaintiffs to have this judgment against his tenant set aside on account of fraud in the procurement of it. The prayer of the complaint in this action in equity was that the judgment at law against the tenant for possession be set aside, and that the plaintiff be made a party to the suit at law, and be permitted to take defense thereto. The allegations of fraud were denied, and on the hearing this action was dismissed for want of equity. As the plaintiff in it did not ask the court to pass on his title, but only that it should set aside and vacate the judgment against his tenant rendered in the action at law, and permit plaintiff to defend his title in the action at law, it is plain that a decision that there was no equity in the complaint did not involve the question of title to this land; for there are many reasons why the court may have concluded that the action in equity could not be maintained, regardless of whether the plaintiff had title to the land or not. That judgment may have been based on the belief of the chancellor that the former judgment against the tenant was a valid judgment for the possession of ⁴ the land as against the tenant, and that there were no grounds for a court of equity to enjoin the enforcement of it; or it may have been based on the belief that, as plaintiff was not estopped by such judgment, he had

adequate remedies at law, and that on that ground alone there was no occasion for the interposition of a court of equity. In any event, the judgment of dismissal was not a decision that the ancestor of the plaintiffs had no title and no right to the possession of the land, for the court was not asked to pass on those questions, and it did not estop plaintiffs from bringing this action, and the circuit court properly so held.

The next question is whether plaintiffs are estopped by the judgment in the action of ejectment brought by the defendant here against the tenant of their ancestor. Under our statute, ejectment, being a possessory action, may be brought against the tenant in possession; and where judgment for possession of the land is taken against the tenant, the landlord is bound by the judgment to the extent that he loses the possession of his land. Possession itself is often a valuable right, and, in order that the landlord may not lose possession without an opportunity to appear and defend his title, and that he may protect the interests of his tenant as well as of himself, the statute makes it the duty of the tenant to give notice of the action to the landlord: Kirby's Digest, sec. 4693. When the landlord is thus notified, it is his duty to defend the action for the tenant. If he fails to do so, there would be good reasons for holding that, in any future action between the tenant and the landlord growing out of the tenancy, the judgment of eviction against the tenant would be conclusive against the landlord; for where one person responsible over to another is notified by that other of the pendency of an action against him touching the subject matter for which he is responsible, then the judgment will bind him, whether he appears or not, in any future action between him and the party to whom he is responsible: *Davis v. Smith*, 79 Me. 351, 10 Atl. 55; 2 Black on Judgments, sec. 574.

But while this rule might apply in an action between the landlord and the tenant for the rents, it would not apply in an action against him touching the subject matter for which he is and was in no way bound. When the defendant in this case ⁵ brought an action of ejectment against the tenant of plaintiff's ancestor, the ancestor owed him no duty to appear and defend the action, and he has no right to set up this judgment against the tenant by default as an estoppel against the landlord or those claiming under him where he did not make the landlord a party to the action. It is true that there are decisions in other states which seem to hold that where

the landlord is notified he is bound by the judgment against the tenant. But the general rule is that judgments bind only parties to actions and persons in privity with them. While there is a contractual relation between the landlord and tenant, the landlord does not hold under the tenant, and we see no reason why a judgment by default against the tenant in an action of ejectment to which the landlord was not a party should preclude him from setting up his title to the land. We believe the correct rule to be that a judgment against the tenant is not, so far as the title to the land is concerned, conclusive against the landlord, or those claiming under him, when he was not made a party to the action: *Samuel v. Dinkins*, 12 Rich. 172, 76 Am. Dec. 729; *Smith v. Gayle*, 58 Ala. 600; *Brandt v. Church*, 110 N. Y. 537, 18 N. E. 357; *Lochner v. Garborina*, 3 Ind. Ter. 664, 64 S. W. 570; *Sedgwick and Wait on Trial of Title to Land*, sec. 537.

Some courts make an exception to this rule where the landlord appears and assumes the defense of the action, and hold that he is then bound by the judgment. But the soundness of this exception is controverted by other cases which hold that there must be record evidence of his appearance in order to bind him. But we need not discuss that point, for neither the tenant nor the landlord appeared in the action brought by the defendant against the tenant of the ancestor of plaintiffs. The judgment was by default. This case furnishes a good illustration of the evil results that might follow from a rule that would hold a landlord bound by a judgment for land in an action to which he is not a party. Plaintiffs' ancestor, who owned this land, was a nonresident of the state, and had a tenant on the land holding for him. The defendant in this action brought an action of ejectment against the tenant, and recovered judgment by default for the possession of the land. The landlord had no personal notice of the action, though the tenant testified that he "notified the agent of the landlord, but the agent denied that this was so, and testified that he knew nothing of the action until after the judgment was rendered and the court adjourned. Admitting that the tenant did notify the agent, the proof shows that the landlord was not notified, and judgment was rendered by default, and yet defendant contends that the landlord was bound by this judgment in an action which he had no opportunity to defend. If that was the law, every nonresident landlord would be exposed to the danger of losing his land by collusion

between his tenant and some other person who was willing to bring suit for it. A rule that would bind a landlord by a judgment to which he was not a party, on the mere oral testimony of the tenant that he had given him notice of the action, in our opinion, has little reason to support it, and would be very unjust to holders of real property. On the whole case, we are of the opinion that the judgment should be affirmed, and it is so ordered.

EFFECT OF A JUDGMENT AGAINST A TENANT AS RES JUDICATA.

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I. Scope of Note.

The scope of this note is indicated by the title of the subject. The question as to the effect of such judgments has naturally arisen most frequently in actions against the tenant for the possession without joining the landlord as a party thereto, though the question has also been raised with reference to the effect of such judgments when recovered by the landlord on subsequent actions by him against his tenant. The chief want of harmony in the decisions arises with respect to those cases wherein the landlord had actual knowledge of the suit or aided the tenant in its defense, even though he was not a formal party to the proceedings. The general subject was treated in the note to *Oetgen v. Ross*, 95 Am. Dec. 473, while the subject of the conclusiveness of judgments in ejectment, which has a considerable bearing on the general subject, was treated in the note to *Caperton v. Schmidt*, 85 Am. Dec. 208.

II. General Requirements Respecting the Effect of Judgments.

Though a discussion as to the general effect of judgments is foreign to this note, it may not be amiss to refer to a few of the general rules respecting them in order to more thoroughly understand the subject under consideration. The rule has been stated that the cases "seem to demand the existence of the following identities between two suits to constitute the first decided a bar to the further prosecution of the second, to wit: 1. Identity of subject matter; 2. Identity of cause of action; and 3. Identity of purpose or object. While a concurrence of these identities usually attends when one case is determined by the decision in another, yet nothing is indispensable to impart a conclusive effect to a former judgment, as will be manifest by reference to a few of the reported cases, except identity of issues or issues involved. If any question of fact has been necessarily and directly drawn in question and determined by a final judgment, such determination of it is generally conclusive in a subsequent action between the same parties and those in privity with them, whether the form or subject matter of the two actions are the same or different. On the other hand, if two actions are upon different causes, a judgment in one cannot affect the other, though the subject matter of each is the same": *Freeman on Judgments*, sec. 252. In order to make the former adjudication binding there must be identity of parties, subject matter and relief sought: *American Percheron etc. Assn. v. American Percheron etc. Importers' Assn.*, 114 Ill. App. 136. Or, as sometimes it is stated, the essential elements of the doctrine of *res judicata* are the identity of the parties to the suit and the identity of the issues necessarily involved: *Damren v. American Light etc. Co.*, 95 Me. 278, 49 Atl. 1092. The identity of parties is as essential to the plea of *res judicata* as identity of causes of action: *Fowler v. Stebbins*, 136 Fed. 365. But, of course, judgments bind not only the parties to the action, but also persons in privity with them: *Eldred v. Johnson*, 75 Ark. 1, ante, p.

17, 86 S. W. 670; *Schuler v. Ford*, 10 Idaho, 739, 109 Am. St. Rep. 233, 80 Pac. 219; *Cope v. Payne*, 111 Tenn. 128, 102 Am. St. Rep. 746, 76 S. W. 820. The judgment of a court is an adjudication upon all the matters of law and fact which are essential to support the judgment rendered: *St. Joseph's Union Depot Co. v. Chicago etc. Ry. Co.*, 89 Fed. 648, 32 C. C. A. 284. Of course, no judgment can be res judicata as to matters which the defendant had no right to have passed upon in the suit: *Bishop v. Perrin*, 4 Ariz. 190, 35 Pac. 1059. Hence where it is sought to apply the estoppel of judgment rendered upon one cause of action in another arising upon a suit upon a different cause of action, the inquiry must always be to the point or question actually litigated and determined in the original action, not what might have been litigated or determined: *Riverside County v. Townshend*, 120 Ill. 9, 9 N. E. 65. The doctrine of res judicata applies only to final judgments and not to interlocutory judgments or orders: *Smith v. Smith* (Neb.), 89 N. W. 799. A confessedly void judgment does not, of course, abate a suit founded on the same subject matter: *Zalesky v. Iowa State Ins. Co.*, 102 Iowa, 512, 70 N. W. 187, 71 N. W. 433. The record of a judgment is, however, always admissible to prove the fact that such judgment was rendered in any case where the fact of such judgment or its nature or amount becomes material: *Littleton v. Richardson*, 34 N. H. 179, 66 Am. Dec. 759.

III. Necessity for the Adjudication to be on the Merits.

In order for a judgment to operate as an estoppel, the decision upon which it was based must have been on the merits: *Armstrong v. County of Manatee* (Fla.), 37 South. 938; *Damren v. American Light etc. Co.*, 95 Me. 278, 49 Atl. 1092; *Walsh v. Walsh* (Neb.), 95 N. W. 1025. Hence a dismissal of an action without prejudice to the rights of the plaintiff to bring a new action is no bar to a subsequent action on the same cause: *Moore v. Russell*, 133 Cal. 297, 85 Am. St. Rep. 166, 65 Pac. 624; *O'Keefe v. Irvington Real Estate Co.*, 87 Md. 196, 39 Atl. 428; *Long v. Long*, 141 Mo. 352, 44 S. W. 341. Likewise a judgment dismissing a suit for want of jurisdiction cannot be res judicata as to the merits: *Adone v. Wettermark*, 28 Tex. Civ. App. 593, 68 S. W. 553; *Bunker Hill etc. Co. v. Shoshone Min. Co.*, 109 Fed. 504, 47 C. C. A. 200; *Freeman on Judgments*, sec. 264. Nor is a judgment dismissing an action for want of prosecution res judicata: *Hart v. Bank of Commerce*, 51 Neb. 486, 11 N. W. 40; *Worst v. Sgiteovich* (Tex. Civ. App.), 46 S. W. 72. And where the plaintiff fails in an action of forcible entry and detainer for want of service of the statutory notice to quit, the judgment is not a bar to another action of the same kind after such notice has been given: *Burkholder v. Hollicheck* (Neb.), 95 N. W. 860. Likewise the failure of a purchaser at foreclosure sale to recover in an action of forcible detainer before a justice of the peace by reason of his failure to comply with certain requirements in the order of sale is no bar to

a subsequent proceeding to obtain a writ of assistance: *Cochran v. Fogler*, 116 Ill. 194, 5 N. E. 383. In order to make the judgment against the tenant a bar to a subsequent action by the landlord against the person recovering the judgment, it must appear that the subject matter or question was not only the same, but that it was submitted on the merits and actually passed upon by the court: *Altschul v. Polack*, 55 Cal. 633; *Oetgen v. Ross*, 54 Ill. 79.

IV. What Persons are in Privity.

The term "privies" includes those who claim under or in right of parties or who stand in mutual or successive relationship to the same rights of property: *Lipscomb v. Postell*, 38 Miss. 476, 77 Am. Dec. 651. "All privies are in effect, if not in name, privies in estate. They are bound because they have succeeded to some estate or interest which was bound in the hands of its former owner; and the extent of the estoppel, so far as the privy is concerned, is limited to controversies affecting this estate or interest. The manner in which the estate was lawfully acquired neither limits nor extends the operation of the estoppel created by a former adjudication, and is therefore immaterial. It is well understood, though not usually stated in express terms in works upon this subject, that no one is privy to a judgment whose succession to the rights of property thereby affected occurred previously to the institution of the suit": *Freeman on Judgments*, sec. 162. Hence it is stated that a privy to a judgment or decree is one whose succession to the rights of property thereby affected occurred after the institution of the particular suit and from a party thereto: *Orthwein v. Thomas* (Ill.), 13 N. E. 564. The lessee and his assignee are in privity with the lessor and his successors in interest, and hence a judgment for or against the former before the making of the lease is evidence for or against the latter: *Hessel v. Johnson*, 124 Pa. St. 233, 16 Atl. 855. Before a third person, not a party or privy to an action, can be concluded by the judgment, it must appear that his title or interest was involved in the issue tried and he must have actually conducted or controlled the action or defense, or occupied such a relation to the controversy as that it became his duty upon receiving notice to assume control of the litigation: *Wilson v. Brookshire*, 126 Ind. 497, 25 N. E. 131, 9 L. R. A. 792. But in order to make a recovery in ejectment evidence against a third person, not claiming under the defendant, it must be shown that the third person bore such a relation to the defendant's title that it was his duty to have defended the action upon proper notice and that he had been given an opportunity to defend the action: *Calderwood v. Brooks*, 28 Cal. 151.

V. Effect of Landlord Taking Possession of the Premises Pendente Lite.

"A landlord who receives possession from his tenants pending the suit, and all persons entering under defendants, or as trespassers

pendente lite, are subject to be dispossessed under the judgment': Freeman on Judgments, sec. 171, citing Howard v. Kennedy's Exrs., 4 Ala. 592, 39 Am. Dec. 307; Sampson v. Ohleyer, 22 Cal. 200; Hanson v. Armstrong, 22 Ill. 442; Jones v. Chiles, 2 Dana, 25; Jackson v. Tuttle, 9 Conn. 233; Wallen v. Huff, 3 Sneed, 82, 65 Am. Dec. 49; Smith v. Traubue, 1 McLean, 87, Fed. Cas. No. 13,116. A judgment in ejectment against a tenant is not evidence against the landlord unless he is admitted to defend or joined in the defense, but he may be dispossessed by the writ of possession against the tenant if he received the possession from the tenant pendente lite: Wilson v. State, 115 Ala. 129, 22 South. 567. The court in Smith v. Gayle, 58 Ala. 600, in approving the rule announced above, said: "The principle is, that a party having a distinct possession of the premises, at the commencement of the suit, if that possession is to be disturbed by the judgment and writ of possession, must have an opportunity to defend, or he cannot be dispossessed. If he has not such possession—if that resides in the tenants, who are made defendants—and pending the suit he acquires possession, he is a privy bound by the judgment, and subject to be dispossessed by the writ of habere facias. The title and the right of possession may reside in him, but he must yield to the judgment, and when the plaintiff is put in possession, resort to his action of ejectment or other appropriate remedy, to assert and enforce his right."

VI. Inability of Tenant to Take Advantage of His Own Wrong.

a. **In General.**—A tenant cannot take advantage of his own wrong. Hence where he neglects his statutory duty to inform the landlord of being sued in ejectment, he cannot urge the judgment of eviction in a suit by the landlord against him for the purpose of regaining the possession of the premises: Lowe v. Emerson, 48 Ill. 160.

b. **Effect of Collusion Between the Plaintiff and the Tenant.**—In some of the states the right of the landlord to come in and defend a suit in ejectment brought against his tenant is recognized by statute or the decisions, even after judgment against the tenant, where the landlord was not notified of the pendency of the suit through fraud or collusion: Hough v. Hammond, 36 Tex. 657; Moser v. Hussey, 67 Tex. 456, 3 S. W. 688. That is, if a plaintiff in an ejectment suit which was defended by the landlord in the name of the tenant colludes with the tenant so that he withdraws his appeal with intent to defraud the landlord, the judgment in the ejectment suit is void: Rodgers v. Bell, 53 Ga. 94. But a judgment in favor of the landlord in ejectment against his tenant who is holding over after the expiration of his term does not determine the question of title or right of possession as between the landlord and a third person, even though the third person, who is claiming ownership,

was collusively placed in possession of the premises by the tenant after the action was commenced: *Calderwood v. Brooks*, 45 Cal. 519.

VII. General Rule Respecting the Effect of Judgments Against Tenants.

In a general way it may be said that a landlord is not generally affected by any litigation against or in favor of his tenant in respect to the demised premises, where he was not a party thereto: *Chant v. Reynolds*, 49 Cal. 213; *Bartlett v. Boston Gas etc. Co.*, 122 Mass. 209. Thus, in a suit for the possession brought against the tenant, the landlord is not concluded on the question of title to the premises, it being said by the court that: "It is the same as if the tenant had delivered over the possession wrongfully to another person. The landlord must bring an action of ejectment to recover it": *Stridde v. Saroni*, 21 Wis. 173. Likewise a judgment for possession of land worked on shares does not bar an action to recover the tenant's portion of the crops: *Staucer v. Roe*, 55 Mich. 169, 20 N. W. 889. The general rule, however, is quite frequently assailed, as will be seen from the decisions rendered under varying circumstances, which will be discussed in the following subdivisions.

VIII. Rule Where Landlord Had Notice of the Suit Though not a Formal Party Thereto.

a. In General.—In an action for the possession of real property it is of first importance that all the parties in possession at the commencement of the suit should be made defendants, otherwise they or or those holding under them cannot be affected by the judgment rendered in it: *Fogarty v. Sparks*, 22 Cal. 142. If the landlord did not participate in the defense and was not notified of the pendency of the previous action, the judgment therein against the tenant is not admissible against him for any purpose except to show the fact of its recovery and that the possession of the tenant was determined in that suit: *Chant v. Reynolds*, 49 Cal. 213; *Oetgen v. Ross*, 47 Ill. 142, 95 Am. Dec. 468; *Powers v. Scholtens*, 79 Mich. 299, 44 N. W. 613; *Magwire v. Labeaume*, 7 Mo. App. 179; *Bradt v. Church*, 110 N. Y. 537, 18 N. E. 357; *Samuel v. Dinkins*, 12 Rich. 172, 75 Am. Dec. 729; *Read v. Allen*, 58 Tex. 380; *Stridde v. Saroni*, 21 Wis. 173. Or, in other words, a landlord without notice or knowledge cannot be prejudiced in his title by his tenant's acts or defaults: *Redden v. Tefft*, 48 Kan. 302, 29 Pac. 157. Hence, if an action of unlawful entry and detainer is brought against a tenant alone without making the landlord a party, he is not bound by the judgment rendered therein, although he had knowledge of the pendency of the action: *Cope v. Payne*, 111 Tenn. 128, 102 Am. St. Rep. 746, 76 S. W. 820. But it has also been held that a judgment against the tenant will conclude the landlord where it appears that he knew of the suit, although he was not made a formal party: *Smith v. Gayle*, 58 Ala. 600; *Rodgers v. Bell*, 53 Ga. 94. Likewise, in an early case in

California it was said that in order for a tenant to justify his attornment to a third party who recovered a judgment against him for the possession, he must show that the landlord was notified of the pendency of the action and had an opportunity to defend: *Douglas v. Fulda*, 45 Cal. 592. So, also, a judgment by default in ejectment against a tenant is not evidence against the landlord, where neither the tenant nor the plaintiff in that suit gave the landlord notice of the action and the landlord was not a party to it: *Stanley v. Johnson*, 113 Ala. 344, 21 South. 823. The general rule on this subject was expressed in *Lochner v. Garborina*, 3 Ind. Ter. 664, 64 S. W. 570, in the following language: "While it is true that in some of the states it is held that where ejectment is brought against the tenant in possession, and he gives due and legal notice to his landlord, and the latter has an opportunity to come in and defend, the landlord is bound by the judgment against the tenant, yet we think these decisions are against the better reasoning and the weight of authority. Freeman, in his work on Judgments (volume 1, section 169), says: 'A landlord is not, in general, affected by any litigation against or in favor of his tenant in respect to the demised premises; but if the issue is such as involves the lessor's title, and he assumes the defense or the prosecution of the suit, the judgment operates upon his title as though he were named as a party to the action': See, also, Freeman on Judgments, sec. 185; *Boles v. Smith*, 5 Sneed, 105; *Stout v. Taul*, 71 Tex. 439, 9 S. W. 329; *Orthwein v. Thomas* (Ill. Sup.), 13 N. E. 564; *Smith v. Gayle*, 58 Ala. 600; *Brush v. Cook*, Brayt. 89; *Bennett v. Leach*, 25 Hun, 178; *Kent v. Lasley*, 48 Wis. 257, 4 N. W. 23; *Samuel v. Dinkins*, 12 Rich. 172, 75 Am. Dec. 729; *Valentine v. Mahoney*, 37 Cal. 389; *Chant v. Reynolds*, 49 Cal. 213; *Bartlett v. Boston Gaslight Co.*, 122 Mass. 209; *Chambers v. Lapsley*, 7 Pa. St. 24. The case of *Chirac v. Reinecker* (decided by the supreme court of the United States), 2 Pet. 613, 7 L. ed. 538, is a case in point. Reinecker was the landlord. Judgment in ejectment had been rendered against his tenant, and this judgment was offered in evidence to show title of the plaintiff in that suit. The supreme court of the United States, speaking through Justice Story, say: 'Upon consideration of the question presented by the third exception above mentioned, we retain the opinion that the record in the ejectment suit was not conclusive evidence upon persons not parties to the record; but we are also of the opinion that it was prima facie evidence of the plaintiff's title and possession against Reinecker, under the circumstances, adduced in evidence. He had full notice of the suit, and had the fullest means to defend it. The parties upon the record were his agents and tenants, and he, in effect, though not in form, took upon himself the defense of the suit.' "

b. Effect Where Landlord Assisted at or Assumed the Defense of the Former Case.—Much of the apparent confusion with respect to the effect of judgments rendered against a tenant arises in those

cases where the landlord has assisted in a trial of the case or assumed practical control of the litigation, though conducting it in the name of the tenant.

If the issue is such as involves the landlord's title and he assumes the defense or prosecution of the suit, it has been held that the judgment operates upon his title in the same manner as if he were named as a party to the action: *Valentine v. Mahoney*, 37 Cal. 389; *Tyrell v. Baldwin*, 67 Cal. 1, 6 Pac. 867; *Sevey v. Chick*, 13 Me. 141. If a tenant has notified his landlord of the action and given him an opportunity to defend it and he does appear and defend the action, the latter cannot in opposition to the judgment against the tenant insist that his eviction was not by title paramount: *Wheelock v. Warschauer*, 34 Cal. 265; *McCreery v. Everding*, 54 Cal. 168; *Chambers v. Lapsley*, 7 Pa. St. 24. "If the landlord actually takes upon himself the defense of an action brought against his tenant, and conducts the litigation to the end, he would seem, upon principle, to be bound by the final result. We have not, however, discovered any decision necessarily affirming that even under such circumstances the landlord is bound by the judgment against his tenant; and perhaps it is fairly inferable from the decisions upon the subject that it is only when the landlord is formally made a party defendant that he becomes a party, as between himself and the plaintiff, so as to be estopped by a judgment in favor of the latter": *Freeman on Judgments*, sec. 185, citing *Smith v. Gayle*, 58 Ala. 600; *Orthwein v. Thomas*, 127 Ill. 554, 11 Am. St. Rep. 159, 21 N. E. 430, 4 L. R. A. 434; *Ryerso v. Rippey*, 25 Wend. 432; *Samuel v. Dinkins*, 12 Rich. 172, 75 Am. Dec. 729; *Bolls v. Smith*, 5 Sneed, 105; *Stout v. Tall*, 71 Tex. 439, 9 S. W. 329; *Kent v. Lasley*, 48 Wis. 257, 4 N. W. 23. In *Haney v. Brown* (Tex. Civ. App.), 46 S. W. 55, the court reviewed several of the cases on this subject, and observed: "The view entertained by the learned district judge is thus expressed in his charge to the jury: 'If, in said case, said Haney, as the landlord of Adkisson, had notice of said suit, and of the issues involved therein, and if he [Haney] was present, and made for Adkisson his defense in said suit, and voluntarily brought into said suit and alleged therein his own title to said land, and caused his said title to said land to be litigated and adjudicated in said suit, under the issues made therein, in such case the plaintiff would be estopped,' etc. We think there is much force in this view and it is apparently sanctioned by some of the authorities: *Freeman on Judgments*, secs. 169, 185; 2 *Black on Judgments*, sec. 577; *Wells on Res Adjudicata*, sec. 75. One of the earliest cases cited by the text-writers in support of the proposition is that of *Sevey v. Chick*, 13 Me. 141, but there the lessor not only appeared and took part in the trial for his tenant, but also entered into an agreement 'that his title should be tried in that suit as if brought against himself.' In the course of the opinion this language is used: 'He was, indeed, at his own request, and by the consent of the other parties, and by the permission of the court

received as a party. If an action had been brought against him, his title, as compared with that of the defendant, would have been tried and determined, and he would have been concluded by the result. He agreed that his title should be tried as if it had been so brought, and it was tried accordingly. If he is not to abide by that determination, the other side was deceived and misled, and the court trifled with.' Another case cited is that of *Valentine v. Mahoney*, 37 Cal. 389, in which it was held that by employing counsel to defend the suit brought against his tenant, and by putting his title in issue, the landlord was bound by the judgment rendered against the tenant; but the opinion seems to have treated the case as not being precisely within the rule that judgments bind only parties and privies, since the landlord derives no title from, through or under the tenant; and the decision was made largely upon the authority of *Dutton v. Warschauer*, 21 Cal. 609, 82 Am. Dec. 765, in which it was held, after notice to defend, according to the rule in California the landlord would have the right to control the litigation, and prosecute an appeal in the name of his tenant. On this account the judgment was held to be binding upon the landlord as well as the tenant. Other cases are cited in this line, but, being less in point, they need not be discussed. On the other hand, in a South Carolina case—that of *Samuel v. Dinkins*, 12 Rich. 172, 75 Am. Dec. 729—in which the landlord, without being made a party to the action against the tenant, was present at the trial, and aided in the defense, it was distinctly held that the judgment did not bind him, because he was not a party. A like ruling was made in a Tennessee case—that of *Boles v. Smith*, 5 Sneed, 105; there the proof showed that on the trial of the former action Boles, though no party to the record, voluntarily appeared, produced his title papers, and was permitted to conduct the defense in the name of his tenant. It was insisted, therefore, on the trial of the second action that he was concluded by the former judgment. This contention was overruled by the court, the justice who delivered the opinion using the following language: 'But it is said that here Boles might have had himself made a party defendant in the former suit, and, having renounced the right of being made a party to the suit, he cannot be heard on this ground to object to the conclusive effect of the judgment; and more especially as on the trial he was in point of fact allowed to conduct the defense, and to avail himself of all the advantages he would have possessed if a formal party on the record.' Then, after discussing statutes substantially identical with our own (Rev. Stats. 1895, arts. 5253, 5275), giving the landlord the right to appear and make himself a party defendant, and declaring the effect of a judgment in such cases, the opinion proceeds: 'By the term "party" in general is meant one having a right to control the proceedings, to make a defense and adduce and cross-examine witnesses, and to appeal from the judgment. It is clear that Boles was no party to the former action in the legal sense of the term, and the fact that he officiously,

and by the favor of the court, was permitted to interfere in conducting the defense, does not affect the question. He had no legal right to do so.' While no Texas case has been cited or found precisely in point, the opinion of our supreme court, rendered by Chief Justice Stayton in *Stout v. Tall*, 71 Tex. 439, 9 S. W. 329, seems to accord with that of the supreme court of Tennessee from which we have just quoted." The court, then, after quoting the portion from section 185 of *Freeman on Judgments* which we have set forth in the fore part of this subdivision, continued: "We conclude, therefore, that according to the weight of authority a judgment against a tenant is not binding upon the landlord, except in so far as it works a change of possession, unless the landlord is made, or himself becomes, a party to the suit; and that he does not become such party by appearing as attorney for his tenant, and defending the suit in the name of and for the tenant. That is, we understand such to be the rule in actions brought against the tenant to recover the land, the cases above cited being of that class; and we see no reason why the same rule should not apply with equal, if not greater, force to actions brought to foreclose liens, as in the instance of *Cooper and Estes* against *Addisson*, for in such cases it is held that adverse claimants cannot be made parties to a foreclosure suit for the purpose of litigating their titles."

The same principles were asserted in *Lochner v. Garborina*, 3 Ind. Ter. 664, 64 S. W. 570, where it was held that the landlord was not estopped merely because he testified as a witness in the former ejectment suit against his tenant. The landlord was not, however, aware that his land was included in the proceedings when he testified and his testimony referred to another tract of land; besides at the time of the commencement of the former ejectment suit the defendant was not his tenant.

But, on the other hand, it was decided in an early case in Georgia that where the landlord appears in court and controverts the rights of the tenant to an exemption out of the crops or its proceeds until the rent is paid, and, having been defeated, takes no steps to set aside the judgment, he is therefore bound by it: *Davis v. Meyers*, 41 Ga. 95. And in another Georgia case it was held where the landlord employed counsel, who defended the suit in ejectment against the tenant, in the name of the tenant, he was bound by the judgment in ejectment, the court observing: "The action of ejectment would be perfectly worthless if the landlord might, after judgment against the tenant and before writ issues, resume his possession and thus defeat the judgment": *Rodgers v. Bell*, 53 Ga. 94. A judgment in ejectment in favor of a tenant of real property does not inure to and protect his landlord, though the latter employed the attorney and directed the defense. To become entitled to the benefit of a judgment as an estoppel in his favor, the landlord must appear openly in the case, and by permission of the court undertake the defense, and his appearance or substitution should be entered of

record and allowed openly upon notice to the parties: *Loftis v. Marshall*, 134 Cal. 394, 86 Am. St. Rep. 286, 66 Pac. 571.

The principles of law which govern in cases of this sort were very ably presented by Justice Mitchell in *Wilson v. Brookshire*, 126 Ind. 497, 25 N. E. 131, 9 L. R. A. 792, where it was held that a corporation was not bound by a suit brought by its tenant to enjoin the sale of the demised premises at an execution sale, even though the president of the corporation without authority from its board of trustees employed an attorney to look after its interests in the litigation. The courts in discussing the question, observed: "The general rule is undoubtedly that the prior judgment of a court of concurrent jurisdiction is conclusive only between those who were parties, or their privies. It is equally true, however, that courts look beyond the nominal parties and treat all those whose interests are involved in the litigation and who conduct and control the action or defense as real parties, and hold them concluded by any judgment which may have been rendered: *Palmer v. Hayes*, 112 Ind. 289, 13 N. E. 882, and cases cited; *Burns v. Gavin*, 118 Ind. 320, 20 N. E. 799; *Peterson v. Lothrop*, 34 Pa. St. 223. Another exception to the general rule occurs when it is shown that a third person has such a relation to the title or subject matter previously adjudicated that it was his duty, although not a party on the record, to have defended the action upon the requisite notice thereof being given, and that he had due notice and proper opportunity to make defense: *Robbins v. City of Chicago*, 4 Wall. 657, 18 L. ed. 427; *Calderwood v. Brooks*, 28 Cal. 151. Where one is bound to protect another from liability, he is bound by the result of a litigation to which such other is a party, provided he had notice of the litigation, and opportunity to control and manage it. This is the doctrine deduced from the whole current of authority on this subject. The qualification, however, is that, where it is sought to make the judgment an estoppel, the litigation must have been carried on without fraud or collusion, and conducted in a reasonable manner: *Strong v. Phoenix Ins. Co.*, 62 Mo. 289, 21 Am. Rep. 417. Before a third person, not a party or privy to an action, can be concluded by the judgment, it must appear that his title or interest was involved in the issue tried, and he must have actually conducted or controlled the action or defense, or he must have occupied such a relation to the controversy as that it became his duty, and that he had the right, upon receiving notice, to assume control of the litigation. One must either control the proceedings or he must have had the right to do so, before he can be held concluded by the judgment. A third person who neither appears nor has the right to appear and produce evidence or cross-examine witnesses or take an appeal, in case an appeal lies, regardless of the wishes of the party on the record, cannot be regarded as a party and bound by the judgment. The facts found very clearly show that the Ladoga Seminary did not take charge of and conduct the previous injunction suit, nor did it occupy such a relation to the

controversy that it was bound to appear and assume control of litigation instituted by the Indiana Central Normal College. A landlord is not bound to appear and prosecute suits instituted by his tenant, even though he may have notice of the action, and that his title is brought in question. The party who contests, or is invited to contest, this title with the tenant, in an action instituted by the latter, may in a proper case require the landlord to be made a party so that the latter may be concluded by the judgment; but unless the landlord is admitted as a party upon notice or actually assumes control of the litigation, he will not be bound. There is authority which goes much further, and holds that where a tenant was assisted by his landlord, on a trial of trespass to try the title, yet the latter will not be bound, unless a party to the record, on the ground that unless he is a party it cannot appear from the recovery against the tenant that the landlord had the full opportunity for defense he would have had if he had been made a formal party to the record. In *Samuel v. Dinkins*, 12 Rich. 172, the court said: 'A tenant, as a privy in estate, will be concluded by the acts of his landlord prior to the lease, and by a recovery had against his landlord on grounds equivalent to such acts; but the landlord claims not under the tenant, and should not suffer for his default or weakness. When, as in this case, the tenant was assisted on the trial by the landlord, still, if the landlord was no party on the record, it cannot appear from the recovery against the tenant that the landlord had the full opportunity for defense, which, as a party, he would have enjoyed. If it could, by extrinsic evidence, be shown that the landlord's efforts were in no way impeded, and that all the rights of offering testimony, cross-examining and fairly presenting his title were exercised by him, still he would not have been concluded': *Chirac v. Reinecker*, 2 Pet. 613, 7 L. ed. 538; *Wells on Res Adjudicata*, 67. Without intending to go to the length indicated in the extract above, we unhesitatingly declare that a landlord will not be bound by the result of a suit to which he was not a party on the record, instituted by his tenant, unless it very clearly appears that the action was instigated by him, and that he conducted and controlled the litigation after it was begun.'

The same principles were applied in an early case in New York where a judgment in ejectment against the tenant was held not conclusive upon the landlord, although the latter retained an attorney to defend the suit, and the court observed that it was especially true where the title, as between the plaintiff in the suit and the landlord, did not come into question: *Ryerss v. Rippey*, 25 Wend. 432.

c. Effect Where Statute Requires Tenant to Notify Landlord of Pendency of the Suit.—In the principal case (*Eldred v. Johnson*, 75 Ark. 1, ante, p. 17, 86 S. W. 670) the court, in adverting to the effect of a statute requiring the tenant to notify the landlord of the pendency of an action respecting the leased premises, said: "Possession itself is often a valuable right, and in order that the landlord

may not lose possession without an opportunity to appear and defend his title, and that he may protect the interests of his tenant as well as of himself, the statute makes it the duty of the tenant to give notice of the action to the landlord. When the landlord is thus notified, it is his duty to defend the action for the tenant. If he fails to do so, there would be good reasons for holding that in any future action between the tenant and the landlord growing out of the tenancy the judgment of eviction against the tenant would be conclusive against the landlord; for where one person responsible over to another is notified by that other of the pendency of an action against him touching the subject matter for which he is responsible, then the judgment will bind him, whether he appears or not, in any future action between him and the party to whom he is responsible."

But even where the statute provides that the landlord may be made a party defendant in ejectment against the tenant and that the tenant may, if he chooses, call upon the landlord to defend his possession, a judgment in ejectment against the tenant does not affect a grantee of the landlord where the landlord was not made a party nor requested to defend: *Power v. Scholtens*, 79 Mich, 299, 44 N. W. 613. In other words, the mere statutory privilege to defend an action of ejectment against the tenant does not make the judgment rendered in the ejectment operate as a conclusive bar upon the landlord, where the tenant did not request him to defend the action: *Baxter v. Carroll* (N. J. Eq.), 41 Atl. 407.

d. Effect Where the Landlord was a Nonresident and Could not be Notified Before Time of Default.—The danger of allowing a non-resident landlord to be bound by a default judgment rendered against his tenant in an action of ejectment was adverted to in the principal case (*Eldred v. Johnson*, 75 Ark. 1, ante, p. 17, 86 S. W. 670), the court observing in that connection that: "If that was the law, every nonresident landlord would be exposed to the danger of losing his land by collusion between his tenant and some other person who was willing to bring suit for it. A rule that would bind a landlord by a judgment to which he was not a party on the mere oral testimony of the tenant that he had given him notice of the action, in our opinion, has little reason to support it, and would be very unjust to holders of real property."

The conclusiveness of a judgment rendered against the tenant by default, as against a nonresident landlord who was not made a party defendant, nor notified in time to enable him to defend the action, was also denied in a Texas case: *Stout v. Tall*, 71 Tex. 439, 9 S. W. 329.

IX. Effect of a Judgment of Eviction for Nonpayment of Rent.

A verdict in a summary proceeding to remove a tenant for nonpayment of rent, finding that no rent is due, is conclusive in favor of the tenant in a replevin suit brought by him to recover cattle distrained by the landlord to satisfy the same claim of rent: *White*

Am. St. Rep., Vol. 112—3.

v. Coatsworth, 6 N. Y. 137. A determination of the magistrate in summary proceedings to dispossess the defendant upon a showing of a holding over after default in the payment of rent does not establish the amount of rent due but merely that some rent is due: *Jarvis v. Driggs*, 69 N. Y. 143; *Nemetty v. Naylor*, 100 N. Y. 562, 3 N. E. 497; *Reich v. Cochran*, 151 N. Y. 122, 56 Am. St. Rep. 607, 45 N. E. 367, 37 L. R. A. 805. Where an action of ejectment was maintained by the assignee of the lessor against the assignee of the lessee for nonpayment of rent under a lease containing a covenant for re-entry, the judgment is a bar to any recovery in an action by a party claiming under a purchaser at a foreclosure sale under a mortgage executed by the assignee of the lessee, subsequent to the execution of the lease but prior to the commencement of the ejectment suit, the decree of foreclosure having been entered after the suit was brought, but before it terminated: *Bennett v. Couchman*, 48 Barb. 73. Likewise, it is held that a judgment in ejectment against the occupant for nonpayment of rent, where the alleged lessor of the occupant was not made a party defendant, merely determines the right to the possession of the premises, and not any other rights with respect to such alleged lessor: *Bradt v. Church*, 110 N. Y. 537, 18 N. E. 357.

And where, in an action to recover possession of leased premises for nonpayment of rent, the defendant filed an answer denying the relation of landlord and tenant and claiming title to an estate for life in the premises in himself, but afterward withdrew his appearance and judgment was thereupon entered by default, the judgment is not a bar to a subsequent action by the defendant to recover possession of the premises on his claim of a life estate in the property: *Abdil v. Abdil*, 33 Ind. 460.

The determination of the court in summary proceedings is conclusive that no other tenancy existed than that which was claimed in the proceedings had. Hence, where the summary proceedings are based on a written lease which was sustained, the judgment therein is a bar to a suit for damages by the tenant against the landlord, based on the theory that a verbal lease existed between the parties where the written and verbal leases were antagonistic to each other and could not stand together: *Nemetty v. Naylor*, 100 N. Y. 562, 3 N. E. 497.

In *Reich v. Cochran*, 151 N. Y. 122, 56 Am. St. Rep. 607, 45 N. E. 367, 37 L. R. A. 805, the court said: "A judgment taken by default in summary proceedings by a landlord for nonpayment of rent is conclusive between the parties as to the existence and validity of the lease, the occupation by the tenant, and that rent is due, and also as to any other facts alleged in the petition or affidavit which are required to be alleged as a basis of the proceedings: *Brown v. Mayor of New York*, 66 N. Y. 385; *Jarvis v. Driggs*, 69 N. Y. 143; *Nemetty v. Naylor*, 100 N. Y. 562, 3 N. E. 497. To authorize a judgment to remove a tenant holding over, the conventional relation of landlord

and tenant must exist, and, in such a proceeding the tenant, under a denial of the facts upon which the summons is issued, may prove that the alleged lease was executed in performance of a usurious agreement, and is void, so that such relation does not exist: *People v. Howlett*, 76 N. Y. 574. The principle of the authorities cited seems decisive of the question under consideration. To establish the relation of landlord and tenant between the parties, and to entitle the defendant to a judgment in the summary proceedings, the existence of a valid lease, upon which rent was due from the plaintiff to the defendant, was necessary. The existence of such a lease was alleged in the petition and not denied. No cause was shown before the district court why possession of the property should not be delivered to the petitioner. The plaintiff neither alleged nor attempted to prove that the lease was usurious or invalid for any other reason. The question whether the lease was intended as a mortgage, and, if so, whether it was based upon a usurious contract, could have been tried in the proceedings in the district court. The determination in that proceeding comprehended and involved every question relating to the validity of the lease and the relation between the parties, and the estoppel of the judgment extends to them, even though they were not litigated or considered in that proceeding: *Gates v. Preston*, 41 N. Y. 113; *Collins v. Bennett*, 46 N. Y. 490; *Blair v. Bartlett*, 75 N. Y. 150, 31 Am. Rep. 455; *Dunham v. Bower*, 77 N. Y. 76, 33 Am. Rep. 570; *Jordan v. Van Eppo*, 85 N. Y. 427; *Griffin v. Long Island R. R. Co.*, 102 N. Y. 449, 7 N. E. 735; *Lovillard v. Clyde*, 122 N. Y. 41, 19 Am. St. Rep. 470, 25 N. E. 292. The rule, as stated by Andrews, J., in *Pray v. Hegeman*, 98 N. Y. 351, must be regarded, as the general rule in this state governing the question of estoppel by judgment. In that case it was said: 'The general rule is well settled that the estoppel of a former judgment extends to every material matter within the issues which was expressly litigated and determined, and also to those matters which, although not expressly determined, are comprehended and involved in the thing expressly stated and decided, whether they were or were not actually litigated or considered. It is not necessary to the conclusiveness of a former judgment that issue should have been taken upon the precise point controverted in the second action. Whatever is necessarily implied in the former decision is for the purpose of the estoppel deemed to have been actually decided.' This rule has been fully indorsed by the subsequent decisions of this court, as will be seen by an examination of the cases of *Griffin v. Long Island R. R. Co.*, 102 N. Y. 452, 7 N. E. 735, *Campbell Mfg. Co. v. Walker*, 114 N. Y. 12, 20 N. E. 625, *O'Rourke v. Hadcock*, 114 N. Y. 553, 22 N. E. 33, *Hymes v. Estey*, 116 N. Y. 509, 15 Am. St. Rep. 421, 22 N. E. 1087, and *Thompson v. Sanders*, 118 N. Y. 257, 23 N. E. 374."

X. Effect of a Judgment for the Rent or an Installment Thereof.

Where judgment in an action in debt for rent under a written lease under seal was rendered against the plaintiff upon the ground

that the plaintiff evicted the defendant from a portion of the premises, the judgment is no bar to a suit under quantum meruit counts in assumpsit for the use and occupation of the premises for the period set forth in the former suit, because the issues in the two cases are not the same, even though they both have reference to the same subject matter, the issue in the former case being whether plaintiff evicted defendant, and in the latter case whether the defendant had any beneficial use of the premises: *Meredith Mechanics' Assn. v. American Twist-Drill Co.*, 67 N. H. 450, 39 Atl. 330. And where a lease provides for the payment of a given sum annually, separate actions may be brought upon the lease for each year's rent, and a judgment for one year's rent is no bar to a second action for the rent of a subsequent year: *McDole v. McDole*, 106 Ill. 452. In other words, installments of rent are subject to the same rule as installments of money due, and an action may be brought as each installment falls due. Hence, where the rental is by the year, but payable monthly, a suit for one month's rent after a breach by the tenant does not bar a recovery for subsequent months as they accrue. It was, however, observed by the court: "It is not meant that a complainant can unnecessarily vex the defendant with successive small suits, for in such cases injunction will lie to prevent multiplicity of suits; and accordingly it is a well-established rule that, when an action is brought to collect installments, it should include all then due, and that those then due constitute together but one cause of action, and some of the cases go to the extent that a recovery in one suit will bar a second action to recover other similar claims or installments that were due when the first was brought": *Barnes v. Black Diamond Coal Co.*, 101 Tenn. 354, 47 S. W. 498.

But an action against a lessee to recover an installment of rent is conclusive in another action to recover a second installment that the premises had not been surrendered and accepted prior to the recovery in the first suit: *Zerega v. Will*, 34 App. Div. 488, 54 N. Y. Supp. 361. And where, in an action to recover an installment of rent due under the terms of a lease, the defendant set up as a defense that the premises had become untenable, and that by reason of that fact he was obliged to abandon them, and the court found for the defendant, the judgment bars a suit for a subsequent installment, the court saying: "The contention that the present suit is a separate and independent controversy, distinct from the one prosecuted before the justice, cannot be upheld. It is only distinct, in the sense of being brought in another court and being for other installments of rent. But the right upon which the recovery must be based is identically the same, to wit, the validity of the lease. This, as we have seen, the former judgment declared to be invalid from and after the last day of September. It is not, therefore, in a legal sense, a distinct and independent cause of action: *Gardner v. Buckbee*, 3 Cow. 120, 15 Am. Dec. 256.

“The issue presented by the pleadings before the justice raised, as we have seen, the question whether the defendant could legally, and did in fact abandon the premises. These questions the judgment shows, by its recital, were determined by the justice. It was received in evidence without objection, and is sufficient for that purpose. The case last cited is authority for the rule that, if the judgment failed of recital in this respect, parol proof would be admissible to establish the fact that the questions were litigated and determined: *Gardner v. Buckee*, 3 Cow. 127, 15 Am. Dec. 256. There it was said that the jury must have passed upon the fraud, as it was necessary and essential to the determination reached: *Lorillard v. Clyde*, 122 N. Y. 41, 19 Am. St. Rep. 470, 25 N. E. 292. In the suit before the justice he must have passed upon the question of defendant's liability under the lease, and determined that it was invalid; else plaintiff was entitled to recover for the October rent [the suit was for the rent of September and October, the premises being abandoned in September]. The judgment rendered says that he did it. That judgment is as much a denial of the right to recover further rent under the lease as of affirmance of the right to recover for the September rent. The one is as broad as the other, and both were before the court for determination. The criticism that the answer did not allege that defendant surrendered possession of the premises is unfounded. He alleged abandonment, and that implies a surrender: 1 *Burrill's Law Dictionary*, p. 4. We are not now concerned with the question whether or not the facts which were alleged in the answer or which appeared before the justice would legally sustain the conclusion reached by him. He had jurisdiction of the subject matter and of the parties, and could therefore render judgment, and such judgment remains effective while it stands”: *Burdick v. Cameron*, 10 App. Div. 589, 42 N. Y. Supp. 78.

But a judgment for possession and rent due has been held not a bar to a suit by the landlord against the tenant to recover the amount of taxes which the tenant was to pay under the terms of the lease: *Schuricht v. Broadwell*, 4 Mo. App. 160.

As is indicated by the decisions already adverted to, the rule is: “If an instrument has been judicially construed, this construction must be adopted in every other controversy between the parties, in which the effect of the same instrument is brought in question”: *Freeman on Judgments*, sec. 253. Thus, where under a lease for a year with rent payable monthly, an action is brought to recover a monthly installment of rent, the judgment therein is *res judicata*, as to the validity of the lease in a subsequent action involving the same question: *Dolan v. Scott*, 25 Wash. 214, 65 Pac. 190; *Oregonian Ry. Co. v. Oregon Ry. etc. Co.*, 27 Fed. 277. And in an action for rent under a lease all questions concerning the validity of the lease which were or might have been raised under the issues are conclusive in another action thereon for a subsequent installment of rent: *Mar-*

shall v. John Grosse Clothing Co., 184 Ill. 421, 75 Am. St. Rep. 181, 56 N. E. 807.

And after a judgment has been recovered for a quarter's rent upon a lease, no defense can be made in a subsequent action for rent alleged to be due upon the same lease, substantially involving the same points decided against the defendant in the first suit: Freeman on Judgments, sec. 253, citing Love v. Waltz, 7 Cal. 250; Jacobson v. Miller, 41 Mich. 90, 1 N. W. 1013; Kelsey v. Ward, 38 N. Y. 83; Howlett v. Tarte, 10 Com. B., N. S., 813.

XI. Effect of Judgment Foreclosing Lien for Material Furnished to the Tenant.

A judgment foreclosing a materialman's lien for material furnished the tenant is not conclusive against the landlord, where he was not made a party to the proceedings: Penfield v. Harris, 7 Tex. Civ. App. 659, 27 S. W. 762.

XII. Effect of a Judgment Against the Lessee of a Railroad Company.

A judgment against the lessee of a railroad in a suit to which the lessor is not a party, with respect to the use by the lessee of the leased property, is not conclusive as to the rights of the lessor as to matters not included in the lease or merely relating to its franchise right of existence: State v. Morgan's etc. Co., 106 La. 513, 31 South. 115. Inasmuch as a railroad company leasing its tracks is deemed the master, and the agents and servants of the lessee are regarded as the agents and servants of the lessor, their negligence in the operation of the road is imputed to the lessor road, and hence a judgment on the merits for the defendant in an action against the lessor is conclusive against the right of the plaintiff to recover in a subsequent action against the lessee: Anderson v. West Chicago St. R. Co., 200 Ill. 329, 65 N. E. 717. Undoubtedly a like judgment in favor of the lessee would have a like effect in a subsequent suit by the plaintiff against the lessor.

XIII. Effect of a Judgment in Tort in a Suit by or Against the Tenant.

A judgment in favor of a gas company in an action by a tenant in possession of premises for personal injuries caused by an explosion of gas in the basement of the house through the defendant's negligence is not a bar to a subsequent action by the owner of the house for injuries to the house caused by the same explosion: Bartlett v. Boston Gas etc. Co., 122 Miss. 209.

XIV. General Effect of Judgments in Actions of Forcible Entry and Detainer.

a. In General.—A judgment in forcible entry and detainer in no way affects the title of the parties to the land in controversy: Graham

v. Conway, 91 Mo. App. 391. And in Dale v. Doddridge, 9 Neb. 138, 1 N. W. 999, the court, with reference to the effect of forcible entry and detainer suits, said: "That the judgment of the justice is a final judgment from which error will lie there is no question, and as between the parties in that proceeding, as to the matters put in issue, it is final, until modified or reversed, there is no doubt. If a party upon being defeated in an action could immediately institute another, and, upon being defeated in that, at once bring another action, and so on indefinitely, the proceeding would be an expensive farce, determining nothing and binding no one by the adjudication. But such is not the law."

In an early case in Kansas under a statute which provided that judgments either before a justice or in the district court, in actions brought under that statute for forcible entry and detainer, should be no bar to any after-action brought by either party, it was held that inasmuch as the judgment is no bar the doctrine of estoppel by verdict did not apply: Redden v. Tefft, 48 Kan. 302, 29 Pac. 157. But in a later case the court, in construing this section, said: "This section is broad, but its meaning cannot be construed to be that a party on being defeated could immediately commence another action, and so ad infinitum. The right of possession, which is the only question that can be litigated in a case of forcible entry and detainer, when determined may be set up in a plea of *res adjudicata*. In the case under consideration the plaintiff is not seeking possession of the land, but damages for the rental value, improvements made, seed furnished, etc. It is true that it was decided in the former case that he was not entitled to possession, and it is now contended that he could suffer no damages for the use or rental value of premises to which he did not have the right of possession; but under the statute relating to judgments in actions of forcible entry and detainer, we do not think the former judgment can be set up as a bar to this action": Soden v. Roth, 9 Kan. App. 826, 61 Pac. 500.

b. Effect on Subsequent Actions of Forcible Entry and Detainer. An acquittal on a charge of forcible detainer is no bar to an action for a forcible detainer committed subsequently: Shepherd v. Thompson, 2 Bush, 176. Hence, where the record shows merely a suit of forcible detainer between the same parties for the same land, a plea of not guilty, trial by the court, a finding that the plaintiff had not made out his case and judgment for defendant, without extrinsic evidence that the same cause of action was in litigation, it is no bar to a subsequent suit of forcible detainer: Merrin v. Lewis, 90 Ill. 505.

c. Effect on Subsequent Actions in Ejectment or Other Suits Involving the Title.—Inasmuch as the action of forcible entry and detainer merely involves the right to the immediate possession of the premises, while the action in ejectment involves the question of title, a judgment in an action of forcible entry and detainer is no bar to a suit in ejectment: Fish v. Benson, 71 Cal. 428, 12 Pac. 454; Millet

v. Lagomarsino (Cal.), 38 Pac. 308; Riverside Co. v. Townshend, 120 Ill. 9, 9 N. E. 65; Buntin v. Duchane, 1 Blackf. 26; Mattox v. Helm, 5 Litt. 185, 15 Am. Dec. 64; Swanson v. Smith, 117 Ky. 116, 77 S. W. 700; Carter v. Seaggs, 38 Mo. 302; Williams v. Newcomb, 16 Mo. App. 185; Peyton v. Stith, 5 Pet. 485, 8 L. ed. 200. Hence it is said, in a general way, that an action in forcible entry and detainer being a proceeding determining the right to the possession, is no bar to any other action in relation to the title of the property: Walls v. Eudel, 20 Fla. 86; Fain v. Miles (Ky.), 60 S. W. 939; Dale v. Doddridge, 9 Neb. 138, 1 N. W. 999. Hence the judgment in an action of forcible entry and detainer is no bar to a suit to quiet title: Bishop v. Perrin, 4 Ariz. 190, 35 Pac. 1059. Nor is it a bar to an action of trespass to try title in Texas: House v. Reavis, 89 Tex. 626, 35 S. W. 1063. And where the justice in whose court the judgment was rendered in an action of forcible detainer had power to try only the right of possession, the judgment is no bar to a bill to set aside a trustee's sale and deed and redeem from the trust: Equitable Trust Co. v. Fisher, 106 Ill. 189.

d. Effect on Subsequent Suits for Damages, Trespass or the Like.—A judgment for unlawful detainer is no bar to an action for previous damages not included therein: Belshaw v. Moses, 49 Ala. 283. And a judgment against the lessee for unlawful detainer does not preclude a resort to equity for relief against the lessor's wrongful acts or breach of covenants: Abrams v. Watson, 59 Ala. 524. And since the action of forcible entry and detainer is not a common-law action, but purely statutory, where the statute makes no provision for rendering judgment in such action for either rent or damages, the inquiry whether the plaintiff was or was not entitled to damages did not, and could not, arise in such suit, but the judgment is conclusive that the plaintiff was in the actual and peaceable possession of the property where he was found entitled to be restored to the possession: Shunick v. Thompson, 25 Ill. App. 619. Likewise a judgment in forcible entry and detainer is not a bar to a subsequent action between the same parties respecting the value of a certain building on the premises which is alleged to have been converted by the tenant: Deisher v. Gehre, 45 Kan. 583, 26 Pac. 3. Nor does a judgment in forcible entry and detainer conclude the parties in a subsequent suit involving the question of mesne profits as damages: Wells v. Eudel, 20 Fla. 86. Nor is a judgment in forcible entry and detainer a bar to an action for trespass: Richardson v. Callihan, 73 Miss. 4, 19 South. 95; Wanborg v. Karst, 4 Mo. App. 563. And of course a judgment in forcible entry and detainer for the recovery of part of a lot of land is not a bar to a trespass committed on another part of the same lot: McDonald v. Lightfoot, Morris (Iowa), 450. And under a statute requiring the party removing an action of unlawful detainer to a higher court by writ of certiorari to give bond to cover the costs and damages, and providing that if on such removal the plaintiff is found entitled to recover possession that the court "shall ascertain

and find the value of the rents'' during the time that plaintiff has been kept out of the possession and the court shall give judgment against defendant and his sureties accordingly, a judgment awarding plaintiff possession and costs bars him from suing on the bond for the rents during the litigation, even though he presented no claim for them in the former action: *Simmons v. Taylor*, 91 Tenn. 363, 18 S. W. 867.

XV. General Effect of Judgments in Suits for Ejectment Brought Against the Tenant.

Ejectment being an action of a possessory character must be commenced against the person in possession: *Smith v. Gayle*, 58 Ala. 600. Under statutes making actions in ejectment possessory actions, a judgment for possession of the land brought against the tenant binds the landlord to the extent that he loses the possession of the land: *Eldred v. Johnson*, 75 Ark. 1, ante, p. 17, 86 S. W. 670. A judgment in ejectment is binding on all the parties to the action: *Van Etten v. Test*, 64 Neb. 407, 89 N. W. 1052. A judgment in ejectment against a tenant is competent evidence on behalf of the plaintiff in a subsequent action as showing, or tending to show, that the defendant's possession at that time was ended and changed by the execution of the writ of possession: *Clark v. Perdue*, 40 W. Va. 300, 21 S. E. 735. The general rule, however, is that a judgment in ejectment against the tenant is not a bar in a subsequent suit against the landlord where the landlord was not a party to the ejectment suit: *Lankford v. Green*, 62 Ala. 314; *Brush v. Cook*, *Brayt.* (Vt.) 89; *Knapp v. Town of Marlboro*, 31 Vt. 674; *Kent v. Lasley*, 48 Wis. 257, 4 N. W. 23.

And a judgment in ejectment against the tenant in possession is not conclusive upon the landlord, who was not a party, even though he refused to defend after notification of the pendency of the suit: *Bennett v. Leach*, 25 Hun, 178. In *Sanford v. Tanner*; 114 Ga. 1005, 41 S. E. 668, the court said: "It is claimed that a judgment in ejectment against a tenant, even where the real owner of the land was not a party to, had no notice of, and took no part in the proceedings in such a case, is binding on such real owner, but in our opinion this contention is not sound. In *Freeman on Judgments*, section 185, the rule is thus stated: 'If the landlord did not participate in the defense, and was not notified of the pendency of the previous action, the judgment rendered therein is not admissible against him for any purpose except to show the fact of its recovery, and that the defendant therein had ceased to hold as his tenant.' In the case of *Read v. Allen*, 58 Tex. 380, it was ruled that 'a judgment against a tenant rendered in a cause to which his landlord is not a party, and of which he had no notice, cannot affect the landlord's title.' Rulings in the following cases are also to the same effect: *Chant v. Reynolds*, 49 Cal. 213; *Stridde v. Saroni*, 21 Wis. 175; *Bradt v. Church*, 110 N. Y. 537, 18 N. E. 357; *Oetgen v. Ross*, 47 Ill. 142,

95 Am. Dec. 468; *Powers v. Scholtens*, 79 Mich. 299, 44 N. W. 613. Moreover, in several of the states from the courts of which the above cases are cited, there are statutory requirements that the tenant shall notify the landlord of such a suit when the tenant is served with the same."

In connection with this phase of the effect of judgments in ejectment, see, also, subdivision VIII.

A judgment in ejectment is *res judicata* as to the parties and the matter adjudicated upon until set aside or reversed, or its legal effect is destroyed by the result of another action of ejectment for the same land by the parties or their heirs, who were defendants therein: *Sandford v. Herron*, 161 Mo. 176, 84 Am. St. Rep. 703, 61 S. W. 839. But a judgment in ejectment against a person as tenant is not *res judicata* to a subsequent action in ejectment by the formerly ejected party brought by him on the ground of being the owner of the premises: *Huyghe v. Brinkman*, 34 La. Ann. 1179.

ST. LOUIS AND NORTH ARKANSAS RAILROAD COMPANY v. CRANDELL.

[75 Ark. 89, 86 S. W. 855.]

DEEDS—Parol Evidence of Consideration—Depots.—The consideration named in a deed is only *prima facie* evidence, and parol evidence is admissible, not to defeat the deed, but to prove the real consideration therefor, and under this rule parol evidence is admissible to show that the consideration of a deed for a right of way is the erection of a railroad depot on the land. (p. 46.)

DEEDS—Evidence of Parol Contract in Connection With.—Evidence of a parol contract carried out by executing a conveyance in furtherance of it does not offend against the rule forbidding the altering, varying or adding to a written contract by parol. (pp. 46, 47.)

RAILROADS—Contract to Maintain Depot—Breach by Abandonment—Defense.—In an action against a railroad company for a breach of its contract to keep and maintain a railway depot or station on certain land, it is no defense that such land is outside of city limits, and that the railway company may, under statutory provisions, be required to move its station within such limits when the station erected on the land under the contract has been voluntarily abandoned and removed by the railway company, and not removed in obedience to the mandate of the statute. (p. 47.)

RAILROADS—Contract to Maintain Depot—Breach by Abandonment.—If a railroad company contracts with a land owner to maintain a station on his land outside of city limits, the fact that it is thereafter required to erect a station within the city limits in compliance with a statute does not of itself relieve it from maintaining the station on such land owner's land, nor from liability for voluntarily abandoning and removing such station. (p. 47.)

G. J. Crump and J. V. Walker, for the appellant.

J. W. Story and B. B. Hudgins, for the appellee.

⁹⁰ HILL, C. J. The appellant railroad company was contemplating building from Eureka Springs east into Boone county, and the citizens of Harrison were seeking to induce it to build to that town. The railroad company required, as a condition for so doing, a certain cash bonus, the donation of right of way from the Boone county line, and stational grounds at Harrison.

The officials of the railroad visited Harrison, and while they were there a public meeting was held to further the enterprise. The object was to secure subscriptions and donations to comply with the requirements of the railroad company. Crandell owned a tract of land near the town. He was absent the day of the meeting, and was sent for, and received in the meeting with cheers, to "encourage him to make his usual donation." The meeting had been discussing various station grounds, and among others a tract owned by Mrs. Josephine Murray adjoining Crandell's land. ⁹¹ Judge E. G. Mitchell was representing her in the matter, and stated that if the depot was located on a twenty acre tract of hers she would donate ten acres and sell the other ten for one thousand dollars. Taking the evidence favorable to Crandell (although there was no serious conflicts in any of it), as the finding must be tested by the sufficiency of his evidence, the following was the course of events:

Crandell stated that he did not want the depot on his land, but wanted it by him on the Murray land; and if the Murray tract was selected, he would give one thousand dollars and the right of way through his own land. A committee was appointed to confer with the railroad officials, and Crandell conferred with them himself, and was given to understand that his proposition would be accepted, but for him to see Watkins, the president of the road. He then went to Mr. O. W. Watkins, the president of the road. Mr. Watkins was a leading lawyer of his part of the state, was raised in Boone county, and known well and favorably to all the parties connected with the transaction. Mr. Watkins told him (so Crandell testifies) that his proposition was accepted. Crandell, Murray, Judge Mitchell and Mr. Watkins went to a law office to draw a contract. In the meantime Judge Mitchell had succeeded in getting Mr. Crandell to raise the amount to be

paid Mrs. Murray to eleven hundred dollars. Mr. Watkins dictated and Judge Mitchell wrote the contract, which was signed by Mrs. Murray and Crandell. This contract was lost, and its contents shown by parol with the usual varying versions. Crandell made deed to the railroad company for the right of way through his land, reciting a consideration of one dollar. Mrs. Murray executed a deed for the twenty acres, reciting a consideration of eleven hundred dollars, and it contained this clause: "This land is granted to said railroad company for railroad purposes, and is to be used by said railroad company for the purpose of keeping and maintaining a railroad station on the same, and to be used by it for other purposes connected with said railroad and the operation thereof, and for no other purposes."

Crandell paid Mrs. Murray the eleven hundred dollars, and when the railroad fulfilled its part of the contract with the people of Harrison, and was built there within the time stipulated, the deeds were delivered to Mr. Watkins. After the agreement referred to eighty-nine of the citizens entered into contract with the railroad company ⁹² guaranteeing the fulfillment of its various requirements, including the furnishing of this right of way and station facilities procured of Mrs. Murray and Crandell. The deeds of Mrs. Murray and Crandell were executed after the written agreement with the citizens, but the agreement dictated by Mr. Watkins, which was evidently only between Mrs. Murray and Crandell, so far as it was written, was made before the citizens' written agreement. Crandell erected various improvements upon his property suitable to its then location close to the station. The railroad maintained the station it erected on the Murray land as freight and passenger station for the town of Harrison for a year, and then erected a passenger station five hundred yards distant, and abandoned the Murray depot as a passenger depot, and maintained it solely as a freight depot. No tickets were thereafter sold at the Murray depot, and no passenger trains stopped there. The Murray depot was not within the corporate limits. More than fifty citizens of Harrison signed the petition, in conformity to section 6709 of Kirby's Digest, to require the railroad to establish a stopping place convenient for the reception and handling of freight, receiving and discharging passengers, etc. This was delivered to the president of the railroad. The town authorities did not take action contemplated by section 6710, but

interested citizens raised the money necessary to defray the expenses of the railroad in establishing the new station. The new station is solely a passenger station, and freight is not received, handled or discharged there.

Crandell sued the railroad for damages by reason of removing the passenger station, and among the elements of damages claimed was the eleven hundred dollars paid Mrs. Murray, the value of the right of way through his land, the loss in value of property built by him near the depot. and other matters not necessary to mention, as the appellant admits the evidence sustains the amount found, and is only contesting the liability. The case was tried before the court sitting as a jury, and damages assessed at two thousand five hundred dollars, and the railroad company appealed.

⁹³ 1. The appellant contends that appellee had no contract with it other than what appears in his right of way deed. The evidence adduced by appellee amply sustains the finding that there was a contract between appellee and the railroad company. The propositions made in the citizens' meeting were submitted to the railroad company, and accepted by it, and then the parties, under the direction of the railroad company's president, proceeded to make a contract between themselves, so as to effectuate the propositions made and accepted. Every move of Mrs. Murray and Crandell was conditioned on the acceptance by the railroad company of that site as the station grounds. There is some difference as to the extent Mr. Watkins dictated the contract, which is wholly immaterial; it was drawn only after he notified both parties that the railroad company would accept the proposition, and this contract was between Crandell and Mrs. Murray, binding each other reciprocally to the terms agreed upon, so that it could be made effective between them when the time came to deliver the deeds to the railroad company. Later the railroad company took a written guaranty from citizens to the effect that the various matters it required would be furnished free of expense to the company. This did not in any way alter the status of the depot proposition, it merely guaranteed, *inter alia*, that it would be given as stipulated. If Mrs. Murray had conveyed to Crandell in consideration of the money paid her by him, and then he conveyed the land to the railroad company with a right of way over his other land, then the transaction would have been plainer, but not different in legal effect from the actual one. The real con-

sideration of Crandell's conveyance of his right of way and securing the Murray land was the establishment of a depot on the Murray land, so that his property would be enhanced in value thereby. The agreement of the railroad company that it would put the depot there, with full knowledge of Crandell furnishing the money for the purchase of the Murray land, the acceptance of Crandell's right of way deed with a nominal consideration, when the real one was known, constituted ⁹⁴ a contract between Crandell and the railroad company that it would locate the depot on the Murray land. So far as Crandell and the railroad company was concerned, the contract rested in parol, and was carried out by three different writings: One the contract dictated by the president of the railroad company between Mrs. Murray and Crandell, and the two deeds from Mrs. Murray, respectively, to the railroad company consummating the agreement. It is insisted that Crandell's deed alone evidences the consideration for it, but this court has often held that the consideration named in a deed is only prima facie evidence of the real consideration, and parol evidence is admissible, not to defeat the deed, but to prove the real consideration therefor, with limitations not necessary to develop here: *Jordan v. Foster*, 11 Ark. 139; *Pate v. Johnson*, 15 Ark. 275; *Vaughine v. Taylor*, 18 Ark. 65; *Barnett v. Hughey*, 54 Ark. 195, 15 S. W. 464; *Kelly v. Carter*, 55 Ark. 112, 17 S. W. 706; *Busch v. Hart*, 62 Ark. 330, 35 S. W. 534; *Davis v. Jernigan*, 71 Ark. 494, 76 S. W. 554.

It is permitted the land owner, applying this rule to these facts, to show by parol that the consideration for a right of way deed was the erection of a depot on the ground: 1 *Rorer on Railroads*, 483; *Watterson v. Alleghany etc. Ry.*, 74 Pa. St. 208. The application of these principles to the case at bar sustains a contract between appellee and appellant as having been validly made and properly proved.

2. Objection is made to the testimony of the occurrences at the citizens' meeting. This was upon the theory that Crandell's deed was all the evidence admissible, and, it being in writing, these were prior occurrences merged into it, and therefore inadmissible. As indicated in discussing the other question, the deeds were not the entire contract by any means; they were but parts of the execution of the contract between the railroad company and Crandell, which rested in parol. Evidence of a parol contract carried out by exe-

cutting a deed in furtherance of it does not offend against the rule forbidding alteration, addition or variation of written contract by parol: *Kelly v. Carter*, 55 Ark. 112, 17 S. W. 706.

3. Appellant contends that the establishment of the passenger depot within the corporate limits was required by law, and rendered unnecessary the further maintenance of the depot five hundred yards distant on the Murray place. If that be conceded, it does not help appellant. When it contracted to locate the depot on the ⁹⁵ Murray land, it knew it could be compelled to comply with the statute and maintain a depot in the corporate limits also, and it should have contracted against this possibility if it desired to avail itself of a right to abandon this one. The evidence fails to show a forced location of the depot in compliance with a statutory requirement and in fulfillment thereof. The town authorities never acted, and the railroad could not have been forced to comply with the statute till they did: *St. Louis etc. Ry. Co. v. B'Shears*, 59 Ark. 237, 27 S. W. 2. But it is insisted that the railroad could waive that, and when it accepted the money from the citizens it became in legal effect as if the statute had been fully complied with. The evidence shows that the new station is only a passenger depot, whereas the statutory requirement is "to stop all trains, freight or passenger, at some point within the corporate limits of such town most convenient for the reception and handling and discharge of freight, and the reception and discharge of passengers": *Kirby's Digest*, sec. 6709.

It is plain that the new depot is not erected in obedience to and fulfillment of the statute, but is a voluntary act, and there has been a voluntary abandonment of the Murray depot as a passenger station.

4. The question discussed in *Little Rock etc. Ry. Co. v. Birnie*, 59 Ark. 66, 26 S. W. 528, as to the length of time a depot must remain in order to be a performance of the condition of the donation, was not raised in this case.

The judgment is affirmed.

Contracts to Locate a Railway Depot at a particular place have been held invalid as against public policy: Florida etc. Ry. Co. v. State, 31 Fla. 482, 34 Am. St. Rep. 30; *Mobile etc. R. R. Co. v. People*, 132 Ill. 559, 22 Am. St. Rep. 556; notes to *Wakefield v. Van Tassell*, 95 Am. St. Rep. 223; *Williamson v. Chicago etc. R. R. Co.*, 36 Am. Rep. 814.

Parol Evidence is admissible to show the real consideration of a deed: *Breitenwischer v. Clough*, 111 Mich. 6, 66 Am. St. Rep. 372; *Moffatt v. Bulson*, 96 Cal. 106, 31 Am. St. Rep. 192.

LITTLE ROCK TRACTION AND ELECTRIC COMPANY v. McCASKILL.

[75 Ark. 133, 86 S. W. 997.]

NEGLIGENCE—Proximate Cause.—If a motorman on a street-car negligently runs over and cuts a fire hose while it is conveying water to a burning residence, thus shutting off the supply of water and causing the firemen to lose control of the fire and the loss of the furniture in such residence, the street-car company is liable for such loss on the ground that the cutting of the hose was the proximate cause of the loss. (p. 49.)

NEGLIGENCE—Proximate Cause.—If a person negligently cuts off the hose through which firemen are throwing a stream of water upon a burning building, and thereupon the building and its contents are consumed for want of water to extinguish it, his act is to be regarded as the direct and efficient cause of the injury. (p. 50.)

The trial court refused to instruct the jury as requested by defendant, that the damages sought to be recovered were too remote and speculative to be estimated by the jury, and, at the request of plaintiff, gave several instructions, only one of which bore upon the question considered by the appellate court. This was plaintiff's fourth instruction as follows: "4. The jury is instructed that if they find that the fire hose was negligently cut by defendant's car, and the flow of water was thereby diverted from the house which was being consumed by fire and in which plaintiff's goods were, and that such diversion of the water severely impaired the power of the fire company in its efforts to control and subdue said fire, and thereby rendered it impossible for the plaintiff to rescue from said fire and save a large amount of property, which, in the absence of the cutting of said hose and the consequent impairment of the water supply, the plaintiff could and would have saved, you will find for the plaintiff."

Verdict and judgment for the plaintiff. Defendant appealed.

Rose, Hemmingway & Rose and Cantrell & Loughborough, for the appellant.

J. Hallum, for the appellee.

¹³⁶ HILL, C. J. McCaskill's house was burning in the night-time, and three streams of water were playing upon

it, one from a hose crossing Markham street which lay across the street-car track. The hose was four or five inches in diameter, and the street brilliantly illuminated from the burning building which was near by. A car of appellant company ran over the hose, and cut it on each rail. There was no reason why the motorman could not have seen it for a long distance. He denies seeing the hose, but tells of watching the fire as he came near it. McCaskill's evidence tended to prove that the cessation of water from the hose stopped the work of taking furniture out of the burning house, and that the fire was in such a state of control that most of his furniture could have been rescued if this stream of water had not suddenly ceased. The evidence conflicted, and the issues went to a jury, and a verdict for McCaskill resulted.

The appellant presents the case of *Mott v. Hudson River Ry. Co.*, 1 Rob. 585, as conclusive against appellee's action. This is a decision of the superior court of the city of New York, and the case in question was heard and determined before Justices Robertson, White and Barbour, and decided in 1863. The point reaching to this case is thus stated in the syllabus: "Damages caused by the spreading of a fire, in consequence of the defendant's negligently injuring a hose actually in use in extinguishing it, whereby the only supply of water available for the purpose was stopped, are too remote to sustain an action." Justice White, in a dissenting opinion, pointed out that cutting a fire hose in an instance remotely causing loss would not be actionable, and then added: "But in the present instance the hose was actually carrying water upon the plaintiff's burning building and rapidly extinguishing the fire, when it was cut. The plaintiff was instantly deprived by this act of the flow of water upon his house, and the flames that had been going out under the action of the hose immediately rose and destroyed that and other property owned by him. It would be difficult to state a case of more direct or immediate damage resulting from a specific act." The same question came before the supreme judicial court of Massachusetts in 1872, and the *Mott* case was cited as ¹³⁷ first in a long list of cases relied upon by the appellant, but it did not receive notice in the opinion. After discussing the question and reviewing cases on proximate causes, the court said: "The law regards practical distinctions, rather than those which are merely theoretic-

cal; and practically, when a man cuts off the hose through which firemen are throwing a stream upon a burning building, and thereupon the building is consumed for want of water to extinguish it, his act is to be regarded as the direct and efficient cause of the injury": *Metallic Compression Casting Co. v. Fitchburg Ry. Co.*, 109 Mass. 277, 12 Am. Rep. 689.

The high standing of the Massachusetts court, the sound reasoning given, reenforced by the able dissenting opinion in the Mott case, impel the court to follow it, rather than the Mott case.

No other questions are presented, and the judgment is affirmed.

For Authorities on the question involved in the principal case see the monographic note to Gilson v. Delaware etc. Canal Co., 36 Am. St. Rep. 827, on proximate and remote cause.

STATE NATIONAL BANK v. HYATT.

[75 Ark. 170, 86 S. W. 1002.]

BILLS AND NOTES—Note Payable at Bank—Payment to Bank When Ineffective.—The fact that a note is made payable at a particular bank does not of itself make the bank the agent of the payee or holder to receive payment, and payment to the bank of the amount due on the note made payable there, where the bank does not have possession of the note, nor authority to collect it, does not discharge the maker. In such case the bank is treated as agent of the maker and not of the holder. (p. 53.)

BILLS AND NOTES—Payment—Agency—Estoppel.—If one bank, on obtaining loans from another, customarily sends as security notes of its customers, and, when such notes are paid, sends the money to the lender, who returns the notes paid, there is no agency so as to bind the lender by the payment of a note to the borrower, and the lending bank is not estopped to deny the authority of the borrowing bank to collect one of such notes from the maker. (p. 54.)

W. C. Rogers, for the appellant.

McRae & Tompkins, for the appellees.

170 RIDDICK, J. On the date therein named J. J. Hyatt & Company, of Ozan, Arkansas, executed the following note to the Howard County Bank, of Nashville, Arkansas, to wit:

"\$1,435.85.

Nashville, Ark., Nov. 5, 1902.

"Three months after date, for value received, we promise to pay to the order of Howard County Bank fourteen hundred

thirty-five and 85-100 dollars, at Howard County Bank, with interest at maturity at the rate of ten per cent per annum until paid.

(Signed) "J. J. HYATT & CO." f

Afterward, on the thirty-first day of December, 1902, the Howard County Bank borrowed twenty thousand dollars from the State National Bank of St. Louis, Missouri, and to secure said loan the Howard County Bank on the same day transferred to the State National Bank, along with other notes, the note of J. J. Hyatt & Company, above described. Hyatt & Company were not notified of this transfer by either bank, and, supposing that the note was still held by the Howard County Bank, they on the sixth day of February, two days before the expiration of the "days of grace" allowed ¹⁷¹ in the payments of notes, sent the following written request to the bank, to wit:

"Please charge our account with our note for \$1,400 and interest, and send note to us, and oblige."

At the time this order was sent to the bank by Hyatt & Company, they had funds on deposit there more than sufficient to pay the note. The bank charged the amount of the note to their account as directed, and indorsed on the order the words "Paid 2-6-1903."

The note was at that time in St. Louis, and was not returned to Hyatt & Company, as requested by them, but they supposed that it would be returned at the end of the month with the monthly statement of their account which the bank usually sent them, and therefore made no inquiry about it.

The bank failed on the twelfth day of February, 1903, and did no business after that date. It was totally insolvent, and its assets were placed in the hands of a receiver, and Hyatt & Company have received nothing from the bank or receiver since it failed.

Afterward the State National Bank of St. Louis brought this action against Hyatt & Company to recover the amount of the note held by that bank as collateral security for the debt due it by the Howard County Bank. The St. Louis Bank alleged that the note was taken and received by it from the Howard County Bank in the usual course of business, and for value before maturity and without notice of any defense, either in law or equity.

The defendant appeared and set up a defense to the action that the note was payable at the Howard County Bank, that defendants had no notice of the transfer thereof to the plaintiff, and that defendants on the sixth day of February paid the amount of the note to the Howard County Bank, which under the circumstances had authority to receive it, and that, on account of the negligence of the plaintiff in failing to present the note for payment, the amount paid by defendants to the bank in satisfaction of the note was lost by the failure of the bank; wherefore they allege that they are no longer responsible on said note.

¹⁷² The other facts sufficiently appear from the opinion.

On the trial the circuit court refused to give the following instruction for the plaintiff: "The jury are instructed that the note sued on being made payable at the Howard County Bank does not constitute that bank the agent of a transferee or indorsee to receive payment of same. And the fact that the defendants may have made payment thereof at the Howard County Bank would be no defense to this action unless it is shown in evidence that the State National Bank of St. Louis authorized the Howard County Bank to receive payment."

The court gave the following at the request of the defendant: "You are further instructed that if you find from the evidence that the defendants deposited the money in the Howard County Bank for the payment of the note sued on, and the plaintiff failed to present the same for payment, and that said note would have been paid at maturity if presented, and that the Howard County Bank subsequently failed, and that the money was lost by reason of plaintiff's failure to present the note, then you are instructed that the plaintiff must bear the loss, and your verdict should be for the defendants."

The plaintiff saved exceptions. It is unnecessary to set out the instructions in full, as the questions presented sufficiently appear by the two set out above.

There was a verdict and judgment in favor of the defendants, and plaintiff appealed.

¹⁷³ This is an action by the holder of a negotiable promissory note, to whom the note had been transferred for value in the usual course of business, against the maker to recover the amount of the note. The first contention on the part of the defendants is that, as the note was made payable at the

Howard County Bank, and as defendant, without notice of the transfer, delivered the money to the bank at the place of payment, and it was lost by reason of the failure of the plaintiff to present the note for payment, the loss should fall upon the plaintiff who failed to present the note. There is an authority for this contention in an opinion by Mr. Justice Scott ¹⁷⁴ in the case of *Pryor v. Wright*, 14 Ark. 189. But the question was not involved in the decision of that case, and must be regarded as only the expression of the judge who wrote the opinion. If the question was a new one, much might be said in support of the dictum of Judge Scott, for there are decisions that support it; but it seems now to be settled by the decided weight of authority in this country that the loss in such a case does not fall on the holder of the note unless the party to whom the money was paid had authority from the holder to receive the payment, or, what would be in effect the same thing, unless the circumstances under which the payment was made were such as to estop the holder from denying that the party receiving the money was its agent for that purpose. The fact that a note is made payable at a particular bank does not, of itself, make the bank the agent of the payee or holder to receive payment, and payment to a bank of the amount due on the note made payable there, when the bank does not have possession of the note or authority to collect it, does not discharge the maker; for under such circumstances the bank will be treated as the agent of the maker and not of the holder: *Jenkins v. Shinn*, 55 Ark. 347, 18 S. W. 240; *Adams v. Hackensack Improvement Co.*, 44 N. J. L. 638, 43 Am. Rep. 406; *Glatt v. Fortman*, 120 Ind. 385, 22 N. E. 300; *Bank of Montreal v. Ingerson*, 105 Iowa, 349, 75 N. W. 351; *Grisson v. German Nat. Bank*, 87 Tenn. 350, 10 Am. St. Rep. 669, 10 S. W. 774, 3 L. R. A. 273; *Cheney v. Libby*, 134 U. S. 68, 10 Sup. Ct. Rep. 498, 33 L. ed. 818; 3 Am. & Eng. Ency. of Law, 2d ed., 803; 7 Cyc. 1035; 2 Randolph on Commercial Paper, 1119; 1 Daniel on Negotiable Instruments, sec. 326.

It follows from what we have said that in our opinion the circuit court erred both in refusing to give the instructions asked by the plaintiff and in giving the one asked by the defendant, which are set out in the statement of facts.

The next contention is that the Howard County Bank had authority to receive the money for the plaintiff, and that the payment of the money to it was a satisfaction of the note; and

further, that if the Howard County Bank had no such authority in fact under the circumstances in proof, the plaintiff is estopped to deny that the Howard County Bank had authority. But the proof is conclusive that the Howard County Bank had no authority to collect or receive payment of the note. Nor do we see ¹⁷⁵ anything in the proof to estop the plaintiff from asserting that the Howard County Bank had no such authority.

The evidence shows that the Howard County Bank had been borrowing money from the St. Louis bank from time to time during several years, and that to secure such loans it deposited the notes of its customers who had borrowed money from it as collateral for the security of the loans from the St. Louis bank. The St. Louis bank never at any time permitted it to have any control over the notes deposited as collateral, or authorized it to collect the same, but kept the notes in St. Louis until they were paid or other notes deposited in their place. It was the custom of the Howard County Bank, when any of the notes which it had deposited as collateral were paid, to send the money to the St. Louis bank, which, upon the receipt of the money, would then return the note. But the bookkeeper and assistant cashier at the Howard County Bank, who was the only witness that testified on that point, said that they never notified the St. Louis bank how the money sent to the St. Louis bank to redeem the collateral was obtained, or whether in fact such collateral note had been paid, but would simply send them the face value of the note and ask them to return it. The defendants knew nothing of this method of dealing between the two banks, and when they paid the money to the Howard County Bank, or rather when they sent them an order to charge the note to their account and return the same to them, they supposed that the Howard County Bank was still the owner and holder of the note, so they could not have been misled by this method of dealing between the two banks. But if they had known of it, there was nothing in it to justify them in supposing that the Howard County Bank was the agent of the St. Louis bank, for the only thing the St. Louis bank did in reference thereto was to hold the notes until they were paid and then to return them to the other bank, and there was nothing in this to show any authority on the part of the Howard County Bank to act as agent for the St. Louis bank. The defendants have been badly treated; but the party to blame was the Howard County

Bank, which received the money of these parties without informing them that it no longer held the note and without paying the note.

On the whole case, the judgment must be reversed, and the cause remanded for a new trial. It is so ordered.

Where a Note is Made Payable at a Certain Bank, the mere deposit of money in that bank to be applied in payment of the note is not a payment, unless the holder has deposited it for collection. The bank receives the money merely as the agent of the depositor, and the holder, by bringing an action to recover the deposit, does not thereby admit payment of the note, nor is thereby precluded from afterward seeking to recover against the maker: *St. Paul Nat. Bank v. Cannon*, 46 Minn. 95, 24 Am. St. Rep. 189. See, too, *Grissom v. Commercial Nat. Bank*, 87 Tenn. 350, 10 Am. St. Rep. 669.

PATE v. CITY OF JONESBORO.

[75 Ark. 276, 87 S. W. 437.]

MUNICIPAL CORPORATIONS—Ordinances Regulating Saloons.—Under statutes conferring power on cities to license, regulate, tax, or suppress tippling-houses and dramshops, and to regulate or prohibit ale and porter shops or houses and public places of habitual resort for tippling and intemperance, an ordinance forbidding the keeping of chairs or anything for persons, except the bartender or proprietor, to sit upon in saloons, is valid. (p. 57.)

F. G. Taylor, for the appellant.

R. L. Rodgers, for the appellee.

277 **BATTLE.** J. W. T. Pate was tried and convicted in the police court of the city of Jonesboro upon information stating that Pate did unlawfully permit persons to sit down upon kegs, boxes, barrels and casks in a saloon occupied and run by him in that city in violation of one of its ordinances. He appealed to the circuit court, where he was again convicted, and he then appealed to this court.

The ordinance violated was as follows: "Section 205. It shall be unlawful for the keeper of any saloon or dramshop to keep in such saloon or bar-room any chairs, seats or stools upon which anyone can sit down; neither shall it be lawful for any saloon or dramshop keeper to allow any person to sit down upon any keg, box or barrel or beer case in such building; provided that stools or chairs may be kept behind the bar

or other inclosure for the use of the bartender or proprietor. Any person violating the provisions of this ordinance shall, upon conviction thereof, be fined in any sum not less than twenty-five dollars, and each and every violation shall be construed as a separate offense."

The evidence adduced tended to prove the information.

Was the ordinance valid? By section 5438 of Kirby's Digest, power is granted to cities to "license, regulate, tax or suppress tippling-houses and dramshops"; and by section 5454 of the same digest power is granted to them to "regulate or to prohibit ale and porter shops or houses and public places of habitual resort for tippling and intemperance."

Judge Dillon, in his work on Municipal Corporations, says: "Under a general power to pass 'any other by-laws for the well-being ²⁷⁸ of the city,' its council may, by ordinance, prohibit saloons, restaurants and other places of public entertainment, to be kept open after 10 o'clock at night. . . . It regulates, but does not deprive, the party of his rights." So the ordinance in this case regulates the saloon or dramshop, and for the same reason is a valid exercise of the power granted to it: See 1 Dillon on Municipal Corporations, 4th ed., sec. 400.

In *Commonwealth v. Casey*, 134 Mass. 194, the court sustained a statute "providing that no licensee shall maintain or permit to be maintained upon any premises used by him for the sale of spirituous or intoxicating liquor, under the provisions of his license, any screen, blind, shutter or other obstruction, in such a way as to interfere with a view of the business conducted upon the premises, or with a view of the interior of the premises."

In *Robinson v. Haug*, 71 Mich. 38, 38 N. W. 668, a similar statute was upheld. The court said: "The business of selling intoxicating liquors is one which the legislature have an undoubted right to regulate or prohibit, and they have therefore the power to impose such conditions and restrictions upon the sale as in their judgment may seem wise, where such restrictions are applied to all alike or to the same class alike. It is within the power of the legislative branch of the state government, and is a part of the police regulation such as the state may make in respect to the sale of intoxicating liquors for the prevention of intemperance, pauperism and crime."

If the state can exercise such powers, it can grant them to cities, one of its governmental agencies. The ordinance in

question was an exercise of the power to regulate tippling-houses and dramshops, and its tendency was and is to prevent the asserably of disorderly or intemperate persons, and to diminish intemperance and its evil effects by lessening the inducements to make long stays in dramshops, and by making it inconvenient, unpleasant and tiresome to do so. A customer taking his drink would not probably remain long when he finds that he cannot sit down, but would seek places more comfortable and inviting; and when out of the dramshop, his temptation would be less, and his drinks fewer. The saloon becomes less inviting and less a place for ²⁷⁹ resort, and its evil influences are reduced. The ordinance is, therefore, a valid and reasonable exercise of the power to regulate.

We are asked to decide other questions which were not raised in the circuit court, and were not, probably, because there was no foundation upon which they could have rested, and because facts would have probably been proved which would have shown no such questions existed. We will not, therefore, decide them.

Judgment affirmed.

A Municipal Ordinance requiring the removal from the doors and windows of saloons of all screens and other obstructions to the interior of the premises is held to be unreasonable and void in *Steffy v. Monroe City*, 135 Ind. 466, 41 Am. St. Rep. 436. To the same effect is *Champer v. Newcastle*, 138 Ind. 339, 46 Am. St. Rep. 390.

WILLIAMS v. BENNETT.

[75 Ark. 312, 88 S. W. 600.]

JUDGMENTS—Collateral Attack—Sale Under Attachment.—

If land is sold under judgment in attachment, the title of the purchaser cannot be collaterally attacked for irregularities in the proceedings which might have been cured by amendment. (p. 59.)

JUDGMENTS—Sister State—Collateral Attack.—

If suit is brought on a judgment of a sister state and the land of the judgment debtor is attached, an objection that such judgment is not properly authenticated is not a ground for the vacation of a sale of the property under the attachment. (p. 59.)

JUDGMENTS—Irregularities—Attack Upon.—

In a suit to recover land sold under a judgment in attachment, an objection that the bond for the sale was irregular, because plaintiff was dead at the time of the sale, cannot be raised for the first time on appeal. (p. 60.)

LACHES—Estoppel.—If heirs make no effort for thirty-five years to set aside an attachment sale of the land of their ancestor, who was cognizant of all the facts urged against the validity of such sale for eight years prior to his death, and which were open to such heirs for two years before they commenced suit, and the purchaser at the attachment sale, relying on his title thereunder, has expended a large sum in paying off tax liens on the land, such heirs are estopped by their laches from urging objections to such purchaser's title, which, if urged in time, might have been cured by amendment. (pp. 61, 62.)

LACHES—Fraud.—It is only when the opposing party misleads or the facts are successfully concealed, or other reasons render ignorance permissible, that laches are excused. (p. 62.)

H. A. and J. R. Parker, for the appellants.

P. C. Dooley, for the appellee.

315 HILL, C. J. This suit was brought in the chancery court of Arkansas county by the administrator and heirs at law of Ferdinand M. Goodrich, who died in 1878, to set aside a deed executed by the sheriff of Arkansas county to Amazon Dixon, and deeds from Amazon Dixon's heirs, under whom the appellees claim, as clouds on their title, and that they be permitted to redeem from tax liens, and have their title quieted. Goodrich, to whom both parties look as the source of their respective titles, was the owner of the land in controversy, lived in Louisiana, and a judgment was obtained against him in a court of that state. In 1867 his judgment creditor, John J. Michie, filed suit against him in Arkansas county circuit court, and obtained an attachment, which was levied on this land. The first proceedings seemed to have been based upon the attachment provisions then contained in Gould's Digest, but the attachment law was amended in 1867, which was evidently not known when these proceedings were instituted. At the next term of court, evidently discovering the proceedings were irregular, the plaintiff caused the first attachment to be set aside, and the court ordered constructive service to be made, and the lands were levied upon under alias attachment, warning order was published, and proof of publication filed. Judgment was entered November 8, 1867, and the lands ordered sold. On November 25, 1867, Amazon A. Dixon, as principal and others as sureties executed a bond to Goodrich (and his codefendant, who was only a nominal party) in form of the statute requiring such bond of the judgment creditor before sale of the attached land. This bond recited the death of John J. Michie, and that Amazon A. Dixon was his "sole heiress." This bond was filed November 9, 1868,

and a venditioni exponas issued April 3, 1869, under which the land was sold and bought by Amazon A. Dixon. The sheriff's ³¹⁶ deed was executed May 11, 1870. The record fails to show confirmation of the sale, but this deed has a certified copy of what purports to be its presentation in open court, and an order that its acknowledgment in court be indorsed on the deed and certified by the clerk, to the end that the deed may be entitled to record. Various attacks are made on the validity of these proceedings. The first is that there is no affidavit for attachment or warning order. The record does not negative in any way its existence, and the evidence to sustain this allegation is the absence from the papers, which otherwise seem complete, of the affidavit. This will be considered in another connection.

It is claimed that the deed is based on an attachment which was set aside, and is therefore void. As indicated, the first proceeding was not in conformity to a new statute; the second was in substantial compliance therewith, and, if irregular, the irregularities did not extend to more than errors rendering the judgment reversible, not void on collateral attack. In fact, a slight amendment to the sheriff's return would have obviated many of the questions now presented.

It is contended that the term of court at which the proceedings were begun anew was held at the wrong time. It is true that the act of March 13, 1867, changed the time, but that act provided that the change should not take effect until after the 1st of July, 1867, and hence the May term, 1867, when the order was made, was not affected thereby.

The next point is the lack of confirmation appearing of record, and the lack of proper authentication appearing upon the Louisiana judgment. The former matter will be referred to again, and, as to the latter, it was a matter of the sufficiency of the evidence before the court, reviewable upon appeal only.

Attack is made on the titles of the appellees. They are charged with not being bona fide purchasers; but that issue is immaterial, for the plaintiff in these actions to quiet title must have a "reasonably clear title," to invoke the jurisdiction of equity: *Lawrence v. Zimbleman*, 37 Ark. 643. They are not trespassers, and have a title which has been successfully maintained in another litigation against other parties claiming under ³¹⁷ Amazon A. Dixon, which will be referred to again. Whether they were bona fide purchasers, or speculating on the strength of the title they bought, makes no difference here,

for they are indisputably the owners of the Amazon Dixon title, and the question is whether that title is good, or whether the appellants have successfully assailed it.

Another reason is presented here why the Dixon title is not good, and that is that it appears from the bond given for the sale that Michie, the plaintiff, was dead, and authorities are cited on both sides to the effect of his death after judgment and before sale, and also as to the bond being made by some one other than the judgment plaintiff. In this case it was made by his sole heir. That question was not raised in the pleadings below, and should not be raised here for the first time.

It appears that in 1882 this land was sold under probate order by the executor of Amazon Dixon and guardian of her children, and purchased by Gibson, and Gibson conveyed to Newgass, and Newgass to Beer. Suit was brought by the appellant, Bennett, as grantee of the Dixon heirs, or some of them, against Newgass and Beer in the United States circuit court, and he prevailed, and in 1899, a decree was entered in his favor for the land, subject to a lien for taxes paid by Newgass and Beer, amounting to about three thousand five hundred dollars, which was satisfied some two years before this suit was brought by the appellants.

It appears that the appellants live in Kentucky, and had no information of their rights, supposed or real, to this land until a short time before the suit was brought. They learned of their supposed rights from a letter written by one Brown in Louisiana, and later through attorneys in Arkansas county, who were engaged to bring this suit. The transactions culminating in the deed of May 11, 1870, to Mrs. Dixon were had from 1867 to 1870, and this suit was filed February 28, 1902. The land has always been wild and unoccupied, and the record is silent as to its value at any time. This court recently held that, as to wild and unoccupied lands, the mere payment of taxes under a void tax title for thirteen years would not ripen the void tax title, and the land owners who failed for the period to pay taxes ³¹⁸ or assert their rights would not be barred by laches from so doing where there was no evidence of enhanced value, no evidence of the change of status of anyone toward the land, and no loss of evidence by lapse of time, or other equitable ground to invoke estoppel by laches: *Jackson v. Boyd*, 75 Ark. 194, 87 S. W. 126. There is no evidence here of the increase in the value,

and the same argument is made here as in *Jackson v. Boyd*, 75 Ark. 194, 87 S. W. 126, that it is to be inferred from the general increase in land values over the state, but, as therein decided, that is sufficient. Loss of evidence is one of the most frequent causes to defeat an asserted right by laches. This case aptly illustrates the necessity of that salutary rule of equity jurisprudence. Almost every defect relied upon is susceptible of correction by parol.

Much stress is laid upon the absence of the affidavit for warning order and attachment. The files in the case disclose all other important papers except this, and after thirty-five years it is impossible to prove that it was duly made and filed and has been lost; yet, if this suit had been brought in reasonable time, can anyone doubt that this would have been proved? The other papers show a painstaking effort to comply with the statute, and surely this primal requirement would not have been omitted. After the papers have been subject to public inspection and handling for thirty-five years, no presumption can be indulged that they are "all present or accounted for."

The record fails to show confirmation of the sale or approval of the deed, yet the deed contains what purports to be a copy of an order directing its acknowledgment to be noted thereon, to the end that it be recorded. This certified under the signature of the clerk and the seal of the court. Either this is a false official certificate, or else the record was omitted. Thirty-odd years ago it would have been easy to correct the record by nunc pro tunc, or punish the officer for making a false and forged certificate of an order.

If the question whether the abatement of the suit by the death of the plaintiff (Michie) precluded valid subsequent process could be considered and become material, then parol evidence of the date of death, the condition of his estate and the devolution ³¹⁹ of his property would be important. If the sheriff's return is so fatally defective as appellant contends, it could easily have been amended at that time. The matter in which it is defective, the failure to show that Goodrich was not to be found in the county, was a failure to show something evidently a fact. Conceding, without deciding, that every defect relied upon is fatal to the title, yet everyone was susceptible thirty-five years ago of having been met by parol evidence and the defect cured. There is not a single matter open to appellant on the face of the record of

that class which cannot be supplied by parol or else is susceptible to proper amendment. A stronger case for the application of the rule as to laches on account of loss of evidence cannot be found.

But it is shown that the appellants were ignorant of their rights until a short time before the suit was brought, and it is insisted that this excuses them. They utterly fail to show in their pleadings or evidence the cause of the long delay in ascertaining their rights. All matters now set up have been open to the world for thirty-five years, and to their ancestor for eight years and more before his death. When the opposing party misleads, or the facts are successfully concealed, or other reasons render ignorance permissible, it is an excuse for laches; but there must be a showing of some good reasons.

This question was before the supreme court of the United States in the case of *Wetzel v. Minn. Railway Transfer Co.*, 169 U. S. 237, 18 Sup. Ct. Rep. 307, 42 L. ed. 730. Remsen was a soldier in the Mexican war, and as such became entitled to a land warrant. The warrant was issued to his widow and children, and was sold by the widow and one adult child, acting for all, but they failed to procure proper consent of the orphan's court, rendering the sale void on account of such failure. The parties lived in Philadelphia, and the purchaser located the land warrant on lands near St. Paul, Minnesota, which in time became very valuable. Incidentally, the heirs learned of the defect from a lawyer who was examining into titles, and thirty years after the youngest became of age brought suit for the land. The court held that the exercise of diligence was incumbent on them; that they knew (or, if not, were culpably ignorant) that their father was a Mexican war veteran, and that fact would lead to information that he would be entitled to a ³²⁰ land warrant. In this case these heirs certainly knew, or else were culpably ignorant, that their father had owned this large tract of about eight thousand acres of land. The court said in the case mentioned that knowledge of the transfer came to them, not through any exertion of themselves, but from an accidental meeting with this lawyer. In this case the knowledge came to these parties through a third person, and not through their exertion. In that case the ground for applying laches was the great increase in the value of the property; in this equally well-established ground of loss of evidence. The court concluded: "While the fact that the com-

plainants were ignorant of the defect in the title and were without means to prosecute an investigation into the facts may properly be considered by the court, it does not mitigate the hardships to the defendants of unsettling these titles. If the complainant may put forward these excuses for delay after thirty years, there is no reason why they may not allege the same as an excuse after a lapse of sixty. The truth is, there must be some limit of time within which these excuses shall be available, or titles might forever be insecure. The interests of public order and tranquillity demand that parties shall acquaint themselves with their rights within a reasonable time, and although this time may be extended by their actual ignorance, or want of means, it is by no means illimitable." This reasoning, from this great tribunal, is so sound, and so in harmony with many decisions of this court, that it is decisive of this case.

In addition to the loss of evidence, the status of parties toward this property has changed. The appellees purchased, for a small sum, it is true, the interests of the Dixon heirs, but they conducted to successful conclusion a lawsuit to establish their rights, and then had to pay three thousand five hundred dollars tax liens, and this was done over two years before this suit was brought. They put in time and money to win the land, and the appellants waited till after they won the suit and expended this sum, and now seek to recover the lands of them. All of these matters were publicly done in the courts of the country, and these parties waited too long to ascertain and assert what are, at best, very doubtful rights.

The decree is affirmed.

Relief in equity, other than by appellate proceedings, against judgments, decrees, and other judicial determinations, is the subject of a monographic note to Little Rock etc. Ry. Co. v. Wells, 54 Am. St. Rep. 218-261. And negligence as a bar to relief in equity against judgments is the subject of a monographic note to Payton v. McQuown, 53 Am. St. Rep. 444-453. The vacation of judgments on motion, when not specially authorized by statute, is the subject of a monographic note to Furman v. Furman, 60 Am. St. Rep. 633-663.

CANNON v. MATTHEWS.

[75 Ark. 336, 87 S. W. 428.]

Growing Strawberry Plants attached to the soil are personal property, and the subject of replevin. (p. 67.)

S. R. Chew, H. L. Fitzhugh and J. W. Walker, for the appellant.

336 McCULLOCH, J. The question involved in this appeal is whether growing strawberry plants attached to the soil can be the subject of replevin. Appellant, who was plaintiff below, sued in replevin for the strawberry plants growing on the land of appellee, claiming the plants under an alleged parol contract for the purchase of same. Defendant answered, denying that he had agreed to sell the plants in controversy to appellant.

337 At the trial below there was testimony tending to show that appellee had verbally agreed to sell to appellant all the strawberry plants on a certain tract of land, and that, after appellant had removed a part of them, a controversy arose between them as to the number of plants appellee had agreed to sell, and this suit was brought in consequence of the disagreement.

The court held that the suit could not be maintained, and directed the jury to return a verdict in favor of the defendant, which was done.

Replevin is strictly a possessory action for the recovery of personal property, and, in order to recover, the plaintiff must be the legal owner, and entitled to the possession at the time of the commencement of the action: *Cobbey on Replevin*, secs. 27, 73. So the right of recovery in this case must turn upon the question whether the strawberry plants sued for are to be treated as chattels, or part of the land upon which they were growing.

Many distinctions abound in the books as to the rules in determining the character of property in fruits of the soil attached thereto, whether they are to be considered chattel interests or as a part of the realty; the distinction most frequently referred to being that between such as are natural products of the soil, *fructus naturales*, and *fructus indus-*

triales, though this distinction is rejected by many courts, and by others adopted.

The pioneer English decision on the subject seems to have been one by Chief Justice Treby at nisi prius, reported by Lord Raymond in 1 Ld. Raym. 182 (*Littlewood v. Smith*), in which it was said that timber growing upon land might be sold by parol "because it is a mere chattel"; the court rejecting all distinctions between natural and industrial products. This statement is by Mr. Baron Hullock in *Scovell v. Boxall*, 1 Young & J. 396, pronounced to be mere dictum, but the doctrine is later fully approved by English judges.

In the case of *Marshall v. Green*, 1 C. P. D. 35, the distinction between *fructus naturales* and *fructus industriales* as a test of the application of the statute of frauds, was rejected, and the rule announced by Treby, C. J., fully approved.

In *Browne on Statute of Frauds*, section 254b, the author, in discussing the above-cited case and the tests therein referred to, ³³⁸ says: "Those tests had, it is true, the sanction of previous decisions, but neither of them had proved satisfactory or been uniformly followed. The doctrine which laid down one rule for the sale of *fructus naturales*, and another for the sale of *fructus industriales*, is objectionable, because founded narrowly upon consideration of the ownership of the crop, not at all upon consideration of the conditions of sale." The same learned author says (section 257a): "Where such an agreement (for sale of growing products of the soil) makes part of the transaction, it seems clear that an interest in land is contracted for and agreed to be given. But where, as in *Marshall v. Green*, 1 C. P. D. 35, there is no agreement that the goods should remain on the vendor's land, the vendee's right to come in and take away what he has bought not depending upon any contract or agreement, but being a mere incident of his purchase arising by implication of law, and not subject to revocation by the owner of the land, the contract is for the sale, not of land, but of goods, and this independent of the nature of the growth sold."

Professor Greenleaf says: "Though all that grows on the soil, whether spontaneously or by culture, ordinarily passes with the land, yet trees, grass, crops and other things fixed to the soil, and so part of the realty, may be the subject of a separate sale in prospect of severance, and in that case will

be regarded as personal chattels, if so treated by the parties. The cases on this much vexed subject are extremely contradictory; but the principle now most generally recognized seems to be this, that in contracts for the sale of things annexed to and growing upon the freehold, if the vendee is to have a right to the soil for a time, for the purpose of further growth and profit of that which is the subject of sale, it is an interest in land within the meaning of the fourth section of the statute of frauds, and must be proved by writing; but where the thing is sold in prospect of separation from the soil immediately, or within reasonable and convenient time, without any stipulation for the beneficial use of the soil, but a mere license to enter and take it way, it is to be regarded as substantially a sale of goods only, and so not within that section of the statute. . . . The question thus turning upon the intention of the parties and the nature of the contract, it would seem to be of no importance whether the thing sold is to be severed ³⁸⁹ from the soil by the vendor or the vendee; whether it is to be paid for by particular admeasurement, or in the gross; or whether the subject of sale consists of trees and other spontaneous products, or of *fructus industriales*": 1 Greenleaf's Cruise, p. *55, note 1.

The doctrine announced has been declared by many of the courts of this country: *Cutler v. Pope*, 13 Me. 377; *Cain v. McGuire*, 13 B. Mon. 340; *Smith v. Bryan*, 5 Md. 151, 59 Am. Dec. 104; *Bostwick v. Leach*, 3 Day, 476; *McClintock's Appeal*, 71 Pa. St. 365; *Sterling v. Baldwin*, 42 Vt. 306.

Courts of other states adhere to the distinction between natural products and fruits of industry, and hold that an oral sale of the latter is sufficient, but of the former insufficient to pass title before severance: *Vulicevich v. Skinner*, 77 Cal. 239, 19 Pac. 424; *Armstrong v. Lawson*, 73 Ind. 498; *Smock v. Smock*, 37 Mo. App. 56; *Hirth v. Graham*, 50 Ohio St. 57, 40 Am. St. Rep. 641, 33 N. E. 90, 19 L. R. A. 721; *Slocum v. Seymour*, 36 N. J. L. 138, 13 Am. Rep. 432; *Carson v. Browder*, 2 Lea (Tenn.), 701; *Howe v. Batchelder*, 49 N. H. 204; 2 Schouler on Personal Property, sec. 452; 1 Warvellé on Vendors, sec. 163.

This court held in *Kendall v. J. I. Porter Lumber Co.*, 69 Ark. 442, 64 S. W. 220, that a deed conveying growing trees, authorizing the grantee to remove them from the soil within

a definite time, was a conveyance of an interest in the soil, within the purview of the registration laws.

Without undertaking to discriminate between the line of authorities herein cited, we hold that the property sued for in this case falls clearly within the classification of fruits of industry, and not natural products. According to either of the lines of authorities cited, it must be treated as personal property, and the subject of replevin: *Cobbey on Replevin*, sec. 73; *Shinn on Replevin*, secs. 226, 227; *Wells on Replevin*, secs. 74, 75; *Matlock v. Fry*, 15 Ind. 483; *Garth v. Caldwell*, 72 Mo. 622.

The court erred in directing a verdict for defendant.

Reversed and remanded for a new trial.

Growing Grass, Vegetables, and Fruit are usually regarded, if not severed from the land, as partaking of the nature of realty: *Matter of Chamberlain*, 140 N. Y. 390, 37 Am. St. Rep. 563; *Kirkeby v. Erickson*, 90 Minn. 299, 101 Am. St. Rep. 411; *Sparrow v. Pond*, 49 Minn. 412, 32 Am. St. Rep. 571; note to *People v. Miller*, 88 Am. St. Rep. 591.

The Question of When Replevin is sustainable is the subject of a monographic note to *Sinott v. Feiock*, 80 Am. St. Rep. 741-767.

DREYFUS v. ROBERTS.

[75 Ark. 354, 87 S. W. 641.]

ACCORD AND SATISFACTION—Acceptance of Less Sum Than is Due.—If an agreement is fully executed to discharge a debt by the payment of a smaller sum, and such discharge is evidenced by a written receipt for the lesser sum in full satisfaction of the greater sum, it is a valid and irrevocable act and discharges the debt. (p. 74.)

Scott & Head and Searcy & Parks, for the appellants.

C. B. and H. Moore and H. Moore, Jr., for the appellee.

357 HILL, C. J. In 1896 Dreyfus & Company obtained a judgment against Roberts for sixteen hundred and twenty-one dollars and interest. In 1900 Dreyfus turned the debt evidenced by this judgment to a collection agency for collection, with authority to compromise. The collection agency

proposed to Roberts to accept two hundred dollars in cash, if at once remitted, in full discharge of the whole debt. Roberts was living in Lafayette county, Arkansas. He was unable to raise the money, and applied to his mother to assist him. She did not have the money, but had credit, and borrowed two hundred dollars from a gentleman in Texarkana, who drew a check on a bank in Texarkana, Texas. This check, after proper indorsements, was accepted by the collecting agency in Chicago as a full acquittance of the debt, and it executed a receipt in full, and promised to have the judgment record satisfied, but instead of this being done, ³⁵⁸ Dreyfus caused execution to issue on the judgment. This action started in chancery, and was transferred to the circuit court as a proceeding to quash on the ground that the judgment had been paid.

The receipt in this case was as follows:

“Dear Sir: We have your communication with inclosure as stated [which was the \$200 check], and you may consider this a receipt and satisfaction in full of the account of S. G. Dreyfus & Company v. yourself for \$1,621. We will immediately have judgment satisfied, as per your request. Very truly yours,

“SPRAGUE COLLECTING AGENCY,
“Per FRANK M. UTT, General Attorney.”

In 1602, Lord Coke, speaking for the court of common pleas, said: “Pinnel brought an action of debt on a bond against Cole, of 16 pounds for the payment of 8 pounds, 10 shillings, the 11th day of November, 1600. The defendant pleaded that he at the instance of the plaintiff before the said day, scil. 1 October Anno 44, apud W. solvit querenti 5 pounds, 2 shillings, 2 pence, quas quidem 5 pounds, 2 shillings, 2 pence, the plaintiff accepted in full satisfaction of the 8 pounds, 10 shillings. And it was resolved by the whole court that the payment of a lesser sum of the day in satisfaction of a greater cannot be any satisfaction of the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum; but the gift of a horse, hawk, robe, etc., in satisfaction is good. For it shall be intended that a horse, hawk, or robe, etc., might be more beneficial to the plaintiff than the money, in respect of some circumstance, or otherwise the plaintiff would not have accepted of it in satisfaction. But when the whole

is due, by no intendment the acceptance of less can be a satisfaction to the plaintiff; but in the case at bar it was resolved that the payment and acceptance of parcel before the day in satisfaction of the whole would be a good satisfaction in regard of circumstance of time; for peradventure parcel of it before the day would be more beneficial to him than the whole at the day, and the value of the satisfaction is not material": *Pinnel's Case*, 3 Coke, pt. 5, p. 117a.

³⁵⁹ It will be noted that the doctrine that the acceptance of a lesser sum for the whole on or after due is not valid satisfaction of the whole was obiter dictum in this case; but this dictum of this great lawyer and jurist established the doctrine at common law that there must be some other consideration, however trivial, than cash to make a payment of a lesser sum binding as a satisfaction of the whole, notwithstanding the solemn agreement of the parties to that effect.

Sir Frederick Pollock thus states the case: "It is enough to say that the English common law stands committed to the absurd paradox that a debt of one hundred pounds may be perfectly well discharged by the creditor's acceptance of a peppercorn at the same time and place at which the one hundred pounds are payable, or of ten shillings at an earlier day or at another place, but that nothing less than a release under seal will make his acceptance of ninety-nine pounds in money at the same time and place a good discharge, although modern decisions have confined the absurdity within the narrowest limits": *Pollock's Principles of Contract*, 1st Am. from 2d Eng. ed., 165.

In 1884 the lord chancellor, the Earl of Selborne, delivering the opinion of the judges in the house of lords, said: "It might be (and indeed I think it would be) an improvement in our law if a release or an acquittance of the whole debt, on payment of any sum which the creditor might be content to receive by way of accord and satisfaction (though less than the whole), were held to be generally binding, though not under seal": *Foakes v. Beer*, L. R. 9 App. Cas. 605. Thus it is seen that after three hundred years' experience in England the highest court of the realm says the law would be improved by not following Lord Coke's dictum in the *Pinnel* case.

The *Pinnel* case came to the Colonies, and then the Union, as part and parcel of the common law, and has generally been adhered to, though with growing reluctance and generally with criticism. In view of the expressions of the courts on the

subject, it may be safely conjectured that, if presented as an original proposition to the American judiciary, it would find little, if any, support. The editors of a current encyclopedia of the law say of the rule in question: "This doctrine has been freely criticised in ³⁶⁰ most of the courts which have occasion to consider it": 1 Cyc. 321. Notwithstanding these criticisms, except when changed by statutes, the courts most generally adhere to it: 1 Cyc. 319, and cases in note; 1 Am. & Eng. Ency. of Law, 2d ed., p. 413, and notes.

While adhering to the rule, the court will not extend it "beyond its precise import," and will not inquire into the adequacy of the supporting consideration: *Hastings v. Lovejoy*, 140 Mass. 261, 54 Am. Rep. 462, 2 N. E. 776. The court of appeals of New York, in following the rule, said: "This rule has been criticised as unsound and unjust in cases where the lesser sum is accepted in full satisfaction of the greater" (citing cases): *McKenzie v. Harrison*, 120 N. Y. 260, 17 Am. St. Rep. 638, 24 N. E. 458, 8 L. R. A. 257.

That same distinguished court said later: "The steadfast adhesion to this doctrine by the courts, in spite of the current of condemnation by the individual judges of the courts, and in face of the demands and conveniences of a much greater business, and more extensive mercantile dealings and operations, demonstrates the force of stare decisis. But the doctrine of stare decisis is further illustrated by the course of judicial decisions on this subject; for, while the courts still hold to the doctrine of the Pinnel case, 3 Coke, pt. 5, p. 117a, and *Cumber-Wane* case, 1 Strange, 426, they have seemed to seize with avidity upon any consideration to support the agreement to accept the lesser sum in satisfaction of the larger, or, in other words, to extract, if possible, from the circumstances of each case a consideration for the new agreement, and to substitute the new agreement in place of the old, and thus to form a defense to the action brought upon the old agreement"; *Jaffray v. Davis*, 124 N. Y. 164, 26 N. E. 351, 11 L. R. A. 710.

The court in the above case reviews many decisions where the accord was supported on various grounds, and some are interesting and amusing. The payment at York of a lesser sum than was due at Westminster is good. The payment in a check for a less sum is good. The giving of a negotiable note for the lesser sum of either the debtor or some other party

is good. If the note or evidence of the debt be surrendered, it is good. If any security, however trivial, is taken, it is good. In short, "if there ³⁶¹ is any benefit, or even any legal possibility of benefit, to the creditor thrown in, that additional weight will turn the scale, and render the consideration sufficient to support the agreement": *Jaffray v. Davis*, 124 N. Y. 164, 26 N. E. 351, 11 L. R. A. 710. Numerous other instances may be found, accepting chattels, goods, lands or anything else of less value than the debt, if it be other than what the article represents—money—will be good: See note, 1 Am. & Eng. Ency. of Law, 2d ed., pp. 414-419.

In brief, the law is, following those decisions to their end, that an executed settlement of great or small amounts for lesser sums is good when lagnappe is given, but not on account of the payment of the money and the agreement of the parties, but because of the lagnappe being given.

It was universally held at common law that a release under seal, either with or without partial payment, was a good accord and satisfaction, and took the case out of the rule: *Jaffray v. Davis*, 124 N. Y. 164, 26 N. E. 351, 11 L. R. A. 710; 1 Am. & Eng. Ency. of Law, 2d ed., p. 415; 1 Cyc. 323.

The seal had magic to import a consideration. Hence a release to which a piece of sealing wax was attached was good, while the same release without the piece of wax was worthless. The distinction between sealed and unsealed instruments is almost universally abolished, and yet the conservatism of the courts has seemingly restrained them from giving now the same effect to a written release of the whole debt which such release would have had as a sealed instrument. Connecticut and Vermont have given that effect to a receipt. "The general principle laid down with regard to receipts in full has long been the settled law of this state, whatever it may be elsewhere. The receipt in this case, unless impeached for fraud or mistake, was valid, and discharged the whole debt, though given for a payment that was in itself but a part of the entire debt": *Aborn v. Rathbone*, 54 Conn. 444, 8 Atl. 677.

The rule in Vermont seems to be that a receipt for a lesser sum, purporting to discharge the whole sum, is *prima facie* a discharge of it, and is subject to attack only for fraud, mistake, and the like grounds: *Holbrook v. Blodget*, 5 Vt. 520; *Stephens v. Thompson*, 28 Vt. 77; *Ashley v. Hendee*, 56 Vt. 209; *Guyette v. Town of Bolton*, 46 Vt. 228.

362 In Mississippi the court has gone much further than this, and has completely cut away from the rule in Pinnel's case; and of it, in *Clayton v. Clark*, 74 Miss. 499, 60 Am. St. Rep. 521, 22 South. 189, 37 L. R. A. 771, Chief Justice Woods, speaking for the court, said: "The absurdity and unreasonableness of the rule seems to be generally conceded. but there also seems to remain a wavering, shadowy belief in the fact, falsely so called, that the agreement to accept, and the actual acceptance of, a lesser sum in the full satisfaction of a larger sum, is without any consideration to support it—that is, that the new agreement confers no benefit upon the creditor. However it may have seemed three hundred years ago in England, when trade and commerce had not yet burst their swaddling bands, at this day and in this country where almost every man is in some way or other engaged in trade or commerce, it is as ridiculous as it is untrue to say that the payment of a lesser part of an originally greater debt, cash in hand, without vexation, cost and delay, or the hazards of litigation in an effort to collect all, is not often, nay, generally, greatly to the benefit of the creditor. Why shall not money—the thing sought to be secured by new notes of third parties, notes whose payment in money is designed to be secured by mortgage, and even negotiable notes of the debtor himself—why shall not the actual payment of money, cash in hand, be held to be as good consideration for a new agreement, as beneficial to the creditor as any mere premises to pay the same amount, by whomsoever made and howsoever secured? And why may not men make and substitute a new contract and agreement for an old one, even if the old one calls for a money payment? And why may one accept a horse worth one hundred dollars in full satisfaction of a promissory note for one thousand dollars, and be bound thereby, and yet not be legally bound by his agreement to accept nine hundred and ninety-nine dollars, and his actual acceptance of it, in full satisfaction of the one thousand dollar note. No reason can be assigned, except that just adverted to, and this rests upon a mistake of fact. And a rule of law which declares that under no circumstances, however favorable and beneficial to the creditor, or however hard and full of sacrifice to the debtor, can the payment of a less sum of money at the time and place stipulated in the original obligation, or afterward, for a greater sum, though
363 accepted by the creditor in full satisfaction of the whole

debt, ever amount in law to satisfaction of the original debt, is absurd, irrational, unsupported by reason and not founded in authority, as has been declared by courts of the highest respectability, and of last resort, even when yielding reluctant assent to it. We decline to adopt or to follow it."

The first appearance of the rule in Pinnel's case in Arkansas was in *Pope v. Tunstall*, 2 Ark. 209. The court adhered to the doctrine, but pointed out numerous exceptions to it: if the accord was at a difference place; the payment in a chattel; payment of less sum by a third person; mutual promises entering into the agreement, etc. The court quoted this criticism: "That there was more nicety than good sense in some of the cases on this subject; that accords are favored in law, and therefore ought not to be rigorously expounded." In *Cavaness v. Ross*, 33 Ark. 572, the rule originating in Pinnel's case was quoted from text-writers, followed and applied.

In *Reynolds v. Reynolds*, 55 Ark. 369, 18 S. W. 377, a statement of the rule by Lord Ellenborough in *Fitch v. Sutton*, 5 East, 230, is quoted and followed. In *Gordon v. Moore*, 44 Ark. 349, 51 Am. Rep. 606, there was, while recognizing the old rule, a practical breaking away from it. Moore executed a release in consideration of four hundred and fifty dollars of a judgment for two thousand nine hundred and ninety-three dollars and twenty cents, and authorized the clerk to enter the satisfaction. The release recited: "Witness my hand and seal," but bore no seal, and was executed in 1882, after the distinction between sealed and unsealed instruments was abolished: Const. 1874, sch. 1. Judge Eakin said: "It would be hard and unreasonable if a creditor, pressed for money, might not say to an embarrassed or reluctant debtor, 'Pay me a part, and I will release the balance.' He is cut off from doing that, in many cases, by the rule as it now stands, but the rule is a hard one, based upon purely technical reasoning. It is hedged in with many exceptions." The result reached was thus stated: "We conclude, therefore, that an agreement by a creditor to accept a smaller sum in satisfaction of a debt, carried into execution by a receipt of the money, and the execution of a formal and positive instrument of release, with all other acts essential to an absolute relinquishment of his right, is a valid and irrevocable act." Thus it is seen *Gordon v. Moore*, 44 Ark. 349, 51 Am. Rep. 606, recognized and sustained a written ³⁶⁴ release not under seal, and practically placed this court in line with Connecticut and Vermont, which accord such effect to a receipt in full.

In *Hearlet v. Spratlin*, 54 Ark. 185, 15 S. W. 461, a parol release, sustained alone by the evidence of the party claiming it, was held not to be an accord and satisfaction, the court merely referring to *Gordon v. Moore*, 44 Ark. 349, 51 Am. Rep. 606. The question then becomes important to determine what constitutes a release.

Mr. Beach says: "The proper words of a release are *remise, release, quitclaim and acquit*. Any expressions, however, which denote the intention of the one party to discharge the other are sufficient": 1 Beach on Modern Contracts, sec. 460.

The receipt of a given sum in full satisfaction of a larger one certainly conveys the intention to discharge the party of the debt thus expressly stated to be discharged as well as the words "*remise, release, quitclaim and acquit*." The release in *Gordon v. Moore*, 44 Ark. 349, 51 Am. Rep. 606, did not use these technical terms, but "released said Childress from any and all liability" on the judgment, and authorized its satisfaction.

Mr. Daniel says: "A release is technically an instrument under seal, the seal importing the consideration. But the release of a party to a bill or note by an agreement, upon a valuable consideration, is as effectual as if made under seal": 2 Daniel on Negotiable Instruments, sec. 1290. The consideration fictitiously imported to the release by the wax affixed to the name no longer exists; but this court enforced a release without it, thereby recognizing that a written release was valid without the seal. When a receipt and release, in this respect, amount to exactly the same thing, evidencing a discharge by one party of the other, it is useless to preserve a distinction without a difference. Business and commercial affairs adjust themselves along practical and not technical lines. The court might well place its decision under the facts in this case on some of the numerous exceptions to the doctrine of the *Pinnel* case, but it prefers to call a halt in refining away a rule "which has been more honored in the breach than the observance." It is therefore held that when an agreement is fully executed to discharge a debt by the payment of a smaller sum, and such discharge is evidenced, as it usually is in practical business affairs, ³⁶⁵ by a written receipt for the lesser sum in full satisfaction of the greater sum, it is "a valid and irrevocable act."

This case does not present the question whether a parol release fully proved by clear and satisfactory evidence, carried into execution to receiving the payment, would be valid, and a discussion of it would be merely multiplying obiter dicta.

The judgment is affirmed.

Battle, J., and McCulloch, J., dissent.

The Acceptance from the maker by the payee of a note of a sum less than that actually due, with an agreement that such payment is in full satisfaction of the debt, accompanied by a surrender of the note, extinguishes the entire debt: *Clayton v. Clark*, 79 Miss. 499, 60 Am. St. Rep. 521. And if an offer is made to one as full payment of a claim, and the party to whom it is made takes the money, though without words of assent, or even with words of protest, it has been held that the acceptance is an assent de facto and binds him: *Anderson v. Standard Granite Co.*, 92 Me. 429, 69 Am. St. Rep. 522. Compare *Tanner v. Merrill*, 108 Mich. 58, 62 Am. St. Rep. 687; *Leeson v. Anderson*, 99 Mich. 247, 41 Am. St. Rep. 597; note to *Jones v. Perkins*, 64 Am. Dec. 139.

COX v. DAUGHERTY.

[75 Ark. 395, 36 S. W. 184.]

LANDLORD AND TENANT—Unauthorized Agreement by Tenant as to Boundary.—A landlord is not bound by an unauthorized agreement concerning the boundaries to his land signed by his tenant at will, and such agreement is not admissible in evidence to affect the landlord's interest in the land. (p. 78.)

LIMITATION OF ACTIONS—Adverse Possession.—If possession of land is adverse, the statute of limitations runs during the entire time of the land owner's possession, whether his occupation be by himself or by and through his tenant. (p. 78.)

BOUNDARIES by Agreement.—By agreement, land owners may establish a final and decisive boundary between their lands, without regard to the line of the government survey. (p. 78.)

G. Jones and Marshall & Coffman, for the appellant.

M. M. Stuckey and J. W. Phillips, for the appellee.

³⁹⁶ **BUNN, C. J.** This is a suit in ejectment by Carrie T. Daugherty, the alleged owner, against Junius R. Cox, tenant in possession of a strip of land extending north and south. one hundred and three feet wide at north, and one hundred feet wide at south end. Judgment for plaintiff, and defendant appeals to this court.

397 The facts are as follows, to wit: In October, 1881, Ed. McDonald was owner by inheritance from his father of the northwest fractional quarter of section 1, township 11 north, range 2 west, in Jackson county, Arkansas, and William Davis of the northwest quarter of said section 1; and Jerry Martin was the owner of the southwest quarter of the northeast quarter of said section 1. There is evidence that in March, 1881, R. E. McDonald, Davis and Martin had their said lands surveyed, in order to establish a division line between McDonald's land on the west and those of Davis and Martin on the east side. In pursuance of this agreement, a lane for a public highway was left between the tracts, and the center of the land was established as the boundary line between McDonald on the west and Davis and Martin on the east; and all their fences, houses and other improvements were changed to suit this adjustment of the line between them. By agreement of the parties Felix Simmons, the county surveyor, surveyed the lands, and established this line of division between them, and gave them a certificate of his survey, which is as follows, to wit:

"This survey begins at the southwest corner of section 1, township 11 north, range 3 west, where I found one of the old bearing trees, agreeing with the notes in distance and bearing, from which I ran north va. com. 6 degrees east, 42 chains and 42 links, to quarter section corner, and find the old bearing trees standing, agreeing with the notes; thence east va. com. 9 degrees, 45 minutes east, 38 chains and 67 links; set post for a quarter section corner, from which a white oak, 14 inches in diameter, bears west 29 links distant, and a black gum, 14 inches in diameter, bears S. 48 & $\frac{1}{2}$ E. 50 links distant; thence east 35 chains to quarter section corner on east side, where the old bearing trees are standing; then begin at northeast corner of section 1, township 11 north, range 3 west, which stands near the residence of J. R. Cox, and which is the established corner, I run west va. com. 6 degrees east, 36-50 links, and set post for quarter section corner on the north line of section 1, from which a sweet gum, 20 inches in diameter, bears N. 50 deg. W. 131 links distant, and a white oak, 50 inches in diameter, bears N. 32 & $\frac{1}{2}$ E. and 135 & $\frac{1}{2}$ ³⁹⁸ links distant. Which survey I certify to be correct, and conforming to the original lines and corners.

"March 4, 1881.

(Signed) "FELIX SIMMONS,
"County Surveyor."

In October, 1881, Davis sold his part of the land to Mrs. C. M. Cox, the mother of defendant and appellant, Junius R. Cox, and put her in possession. At this time the land had not been actually opened in accordance with the survey, but seems to have been soon afterward. It appears that before this line was established, one Eliza Alexander purchased of Martin one acre on the west side of his tract, and in making this survey this acre was found to be a part of McDonald's land on the west side of the line, and she subsequently paid him for it, and received his deed on the twenty-fourth day of January, 1882. In 1890, McDonald sold his fractional quarter section to Mrs. Carrie T. Daugherty, since Mrs. McDougal, the plaintiff; and on the 3d of December, 1890, the following agreement was executed in writing by and between McDonald, J. R. Cox and Martin, to wit:

"State of Arkansas, County of Jackson.

"This agreement, entered into this 3d day of December A. D. 1890, by the parties of R. E. McDonald, J. R. Cox and Jerry Martin, that we will let the lane to be the dividing line between our lands lying in township 11, section 1, range 3 west, until we get the State surveyor to run the lines. The said surveyor to commence at the southeast corner of the northeast quarter of section 1, township 11, range 3 west, run west, and give Martin and Cox the number of chains and links Cox's deed calls for; thence west on the said line to the south corner of the northwest quarter of section 1, township 11, range 3 west, count back giving R. E. McDonald the number of chains and links his deed calls for, leaving the overplus in the center; then beginning at the northeast corner of the northeast quarter of section 1, township 11, range 3 west, running west on the variation of the field notes, giving J. R. Cox the number of chains and links his deed calls for; then west on the same variation to the northwest corner of the northwest quarter of section 1, township 11, range 3 west; then coming back from said corner, giving McDonald the number of chains and links his deed calls for, leaving the overplus in the center, R. E. McDonald ³⁹⁹ receiving one-half of the overplus, J. R. Cox and Jerry Martin the other half; then the corner located by said surveyor shall be final.

(Signed) "R. E. McDONALD.
"J. R. COX.
"JERRY MARTIN."

“When we have the lines run, I will see that Ed McDonald’s part is paid.

(Signed) “J. R. COX.”

The testimony fails to show any authority in J. R. Cox to sign this agreement, his mother C. M. Cox still being the owner, and he only her tenant at will. The testimony shows that Mrs. C. M. Cox had been in continuous, uninterrupted possession of her tract since she purchased it from Davis, in 1881. Whether she held adversely to McDonald and his vendee during this time is one of the principal matters in controversy, as upon the settlement of this question depends the success or failure of the plea of the statute of limitation made by defendant J. R. Cox. The object and effect of the agreement made in 1890 between McDonald, J. R. Cox and Martin was to destroy the theory of defendant that the adjustment of 1881 was to be permanent and final, and that the possession of the parties, given and taken in accordance therewith, was adverse to the one to the other. J. R. Cox having no authority from his mother to bind her by this agreement, which so vitally affected her interest in her lands, the written agreement of 1890 signed by him was not admissible in evidence.

In the second instruction given by the court on its own motion over the objection of the defendant, the court, in effect, confined the period of the running of the statute of limitations to the time J. R. Cox held possession of the land, whereas he should have had the benefit of the whole time of his own and his mother’s possession.

Moreover, in this same instruction, the court, disregarding the claim of the defendant that the rights of the parties were fixed by the adjustment of March, 1881, made the line between the northwest and the northeast quarter of said section, as established by the government surveys, the true division line ⁴⁰⁰ between the parties, as the same was ascertained by one James A. Martin, a surveyor who last surveyed the lands. This was an error. If the first adjustment was in fact intended to be final and decisive, it matters not where the line of the government survey may be.

The whole question then turns upon whether or not the adjustment of 1881 was intended by the parties to be final, and not what was the true line between their lands according to the government surveys originally made, in case there

was no adverse holding for the statutory period. Other errors may be cured on a new trial by the parties if it is so desired.

For the errors named, the judgment is reversed, and the cause is remanded for rehearing.

A Boundary Line between coterminous owners may be established by a practical location or an agreement by them, even though the boundary so established does not agree with the government survey: See the monographic note to *Washington Rock Co. v. Young*, 110 Am. St. Rep. 677-689.

The Connected, Successive, and Continuous Possession of a landlord by his tenant, his heirs and their grantees, to land in dispute may be tacked together so as to form a continuous and uninterrupted possession adverse to the true owner for the period of time necessary to give title by adverse possession: *Ramsey v. Glenny*, 45 Minn. 401, 22 Am. St. Rep. 736.

PRICE v. ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

[75 Ark. 479, 88 S. W. 575.]

NEGLIGENCE—Question for Jury.—In an action to recover for personal injury alleged to have been caused by negligence, if there is substantial conflict in the evidence, it is proper for the court to submit the questions of negligence and contributory negligence to the jury upon proper declarations of law. (p. 80.)

CARRIERS—Passengers—Intoxicated Persons.—A railway company is not required to accept as a passenger one without an attendant, who, from intoxication, is mentally or physically incapable of taking care of himself. (p. 80.)

CARRIERS—Persons Entitled to Become Passengers.—A railway company cannot refuse to receive as a passenger one who is capable of taking care of himself, and whose presence is not dangerous or hurtful or annoying to his fellow-passengers. (pp. 80, 81.)

CARRIERS—Drunken Passengers—Agency of Conductor in Accepting.—If the conductor of a passenger train accepts one as a passenger, unattended, who, from drunkenness, is unable to look after himself, the conductor in so doing is acting within the scope of his authority. (p. 81.)

CARRIERS—Acceptance of Drunken Passenger—Duty to Care for.—It is the duty of the conductor of a railway passenger train to pass upon the eligibility of those presenting themselves for transportation, and if he accepts a person as a passenger whom he knows to be unattended and to be insensible from intoxication, and thereby unable to protect himself from injury, the company owes such passenger the duty to exercise such care as may be reasonably necessary for his safety. (p. 81.)

CARRIERS—Acceptance of Drunken Passenger—Duty to Care for.—While a railway company is not an insurer of the safety of the

person of one whom it receives as a passenger, unattended, knowing him to be at the time in an insensibly drunken condition, yet it is bound to exercise all the care that a reasonably prudent man would to protect one in such condition from the dangers incident to his surroundings and mode of travel, and it must, in such case, bestow upon him such care and attention, beyond that given to the ordinary passenger, which reasonable prudence and foresight demand for his safety. (p. 81.)

CARRIERS—Acceptance of Drunken Passenger—Contributory Negligence.—The question of contributory negligence cannot arise where the undisputed evidence shows an unattended passenger to have been mentally or physically incapable of self-protection arising from his intoxication, where the railway company had knowledge of such condition when it accepted him as a passenger. (p. 81.)

NEGLIGENCE—Res Ipsa Loquitur—Application of Doctrine of. The doctrine of *res ipsa loquitur* does not apply in cases where the accident or injury, unexplained by attendant circumstances, might as plausibly have resulted from the negligence on the part of the passenger as the carrier, nor to an injury to a passenger that comes by reason of conditions that are personal or peculiar to him, and not by reason of any management of or accident to, or condition in the train itself over which the carrier has conclusive control, but the doctrine does apply when the injury is of such nature that it could not well have happened without the carrier being negligent, or when it is caused by something connected with the equipment or operation of the road over which the company has entire control. (p. 82.)

O. S. Scott, C. S. Todd and B. D. Tarlton, for the appellants.

B. S. Johnson and J. E. Williams, for the appellee.

490 WOOD, J. There was evidence to support the verdict. It was a mixed question of law and fact as to whether appellee was liable in damages for the death of Price. There was such substantial conflict in the evidence as to make it entirely proper for the court to submit the questions of negligence and contributory negligence to the jury upon proper declarations of law to be applied by the jury to the facts: *Fisher v. West Virginia etc. Ry. Co.*, 39 W. Va. 366, 19 S. E. 578, 23 L. R. A. 758.

The court granted many separate requests for instructions on behalf of appellants as well as appellee. It would uselessly extend this opinion for us to discuss each instruction given at the instance of appellee to which appellants object. It will suffice to announce the law applicable to such cases, and then to determine whether the instructions, as a whole, conform to the principles announced.

A railway company is not required to accept as a passenger one without an attendant who, from intoxication, is mentally or physically incapable of taking care of himself. But it

cannot refuse to receive as a passenger one who is capable of taking care of himself, and whose presence is not dangerous or hurtful or annoying to fellow-passengers.

If a conductor of a passenger train accepts one as a passenger, unattended, who, from drunkenness, is unable to look after himself, he, the conductor, in so doing, is acting within the scope of his authority. It is one of the duties of the conductor to pass upon the eligibility, so to speak, of those presenting themselves for transportation.

If a conductor accepts a person as a passenger whom he knows to be unattended, and knows to be insensible from intoxication, and thereby unable to protect himself from danger and injury, the company owes him the duty to exercise such care as may be reasonably necessary for his safety. While the company ⁴⁹¹ is not an insurer of the person of one who has been received as a passenger in such condition, being cognizant thereof, it is bound to exercise all the care that a reasonably prudent man would to protect one in such insensible and helpless condition from the dangers incident to his surroundings and mode of travel.

The railroad company must bestow upon one in such condition any special care and attention, beyond that given to the ordinary passenger, which reasonable prudence and foresight demands for his safety, considering any manner of conduct or disposition of mind manifested by the passenger and known to the company, or any conduct or disposition that might have been reasonably anticipated from one in his mental and physical condition, which would tend to increase the danger to be apprehended and avoided. If its servants, knowing the facts, fail to give such care and attention, and injury results as the natural and probable consequence of such failure, the company will be guilty of negligence, and liable in damages for such injury.

The question of contributory negligence could not arise where the undisputed evidence showed the passenger to be mentally or physically incapable of self-protection, and where the railway company had knowledge of such condition when it accepted him as a passenger.

Where the evidence is conflicting, and men of fair judgment and reasonable information might reach different conclusions in considering it, then the questions of negligence and contributory negligence must be determined by the jury as matters of fact.

The doctrine of *res ipsa loquitur* does not apply in cases where the accident or injury, unexplained by attendant circumstances, might as plausibly have resulted from negligence on the part of the passenger as the carrier. Nor is it applicable to the death of a passenger that comes by reason of circumstances and conditions that are personal and peculiar to him, and not by reason of any management of, or accident in, the train itself, over which the carrier has exclusive control. "The true rule would seem to be that when the injury and circumstances attending it are so unusual and of such a nature that it could not well have happened without the company being negligent, or when it is caused by something connected with the equipment ⁴⁹² or operation of the road over which the company has entire control, a presumption of negligence on the part of the company usually arises from proof of such facts, in the absence of anything to the contrary, and the burden is then cast upon the company to show that its negligence did not cause the injury."

Authority for the various propositions of law announced above will be found in 4 Elliott on Railroads, secs. 302, 1330, 1577, 1644; Penn. R. Co. v. Riaordon, 119 Pa. St. 577, 4 Am. St. Rep. 670, 13 Atl. 324; Barnowsky v. Nelson, 89 Mich. 523, 50 N. W. 989, 15 L. R. A. 33, note; Hutchinson on Carriers, secs. 800, 801; Transportation Co. v. Downer, 11 Wall. 129, 20 L. ed. 160; 6 Cyc. 628-630; Thompson on Carriers and Passengers, 209, 214, 270, 271, 369; Washington v. Missouri etc. R. Co., 90 Tex. 314, 38 S. W. 764; Wood on Railroads, 1559, 1569; 3 Wood on Railroads, sec. 1207; Croom v. Chicago etc. Ry., 52 Minn. 296, 38 Am. St. Rep. 557, 53 N. W. 1128, 18 L. R. A. 602, note; Missouri Pac. Ry. Co. v. Evans, 71 Tex. 361, 9 S. W. 325, 1 L. R. A. 476; Milliman v. New York Cent. etc. R. R. Co., 66 N. Y. 642; 6 Cyc. 598, 599, note; Meyer v. St. Louis etc. Ry. Co., 54 Fed. 116, 4 C. C. A. 221; Cincinnati etc. R. Co. v. Cooper, 120 Ind. 469, 16 Am. St. Rep. 334, 22 N. E. 340, 6 L. R. A. 241; Kingston v. Ft. Wayne etc. Ry., 112 Mich. 40, 70 N. W. 315, 74 N. W. 230, 40 L. R. A. 131, notes; Fisher v. West Virginia etc. R. R. Co., 39 W. Va. 366, 19 S. E. 578, 23 L. R. A. 758; St. Louis etc. R. R. Co. v. Carr, 47 Ill. App. 353; Atchison etc. R. Co. v. Parry, 67 Kan. 515, 73 Pac. 105; Putnam v. Broadway etc. R. Co., 55 N. Y. 108, 14 Am. Rep. 190; St. Louis etc. Ry. v. Martin, 61 Ark. 549, 33 S. W. 1070; St. Louis etc. Ry. Co.

v. Sweet, 60 Ark. 550, 31 S. W. 571; St. Louis etc. Ry. Co. v. Rexroad, 59 Ark. 180, 26 S. W. 1037; Little Rock etc. R. R. Co. v. Duffey, 35 Ark. 602.

Instruction No. 8, given at the request of appellants, is not an accurate and complete statement of the doctrine of res ipsa loquitur, as applicable to the facts in this record. But the error presents no ground for reversal, because the instruction was favorable to appellants, and was asked by them, and the verdict was for appellee.

Without expressly approving as precedents all of the instructions in the form given, we think that upon the whole they conform to the law as herein announced, and fairly presented the issues.

Affirm.

A Common Carrier is not bound to accept a drunken person as passenger: See the monographic note to Illinois Cent. R. R. Co. v. Smith, 107 Am. St. Rep. 299, 300. As to what care a carrier must exercise toward an intoxicated person, however, in case he is accepted as a passenger, see Cincinnati etc. R. R. Co. v. Cooper, 120 Ind. 469, 16 Am. St. Rep. 334; Haug v. Great Northern Ry. Co., 8 N. Dak. 23, 73 Am. St. Rep. 727.

CASES
IN THE
SUPREME COURT
OF
CONNECTICUT.

MARSHALL v. CLARK.

[78 Conn. 9, 60 Atl. 741.]

SALES—Breach of Contract—Measure of Damages.—The ordinary measure of damages for failure by a seller of goods to deliver them as agreed is the difference, if any, between the contract price agreed upon and their highest market price at the place and time agreed upon for the delivery. (p. 85.)

SALES—Breach of Contract—Measure of Damages.—In assessing damages for breach of a contract to deliver goods sold by a wholesale to a retail dealer, if there is no wholesale market price at the place of delivery, the market value should be determined by the wholesale market price at the time at the nearest convenient wholesale market, together with the cost of transportation from there to the place of delivery. (p. 85.)

SALES—Breach of Contract—Damages.—Knowledge by a wholesaler that his customer buys goods from him to resell at retail does not make the wholesaler liable for profits which the retailer might have made had he been able to receive and sell such goods. (p. 86.)

SALES—Breach of Contract—Damages.—Loss of customers by a retail dealer, and shrinkage in the value of similar goods brought to replace those ordered from a wholesaler, but not delivered by him, cannot be considered in estimating damages for a breach of the contract of sale. (p. 86.)

PRACTICE.—Delay in Acting on Motions to set aside a verdict as against the evidence is immaterial when the undisputed facts show that the action taken by the trial court was well founded. (p. 87.)

C. S. Hamilton and J. F. Torrance, for the appellant.

G. C. Fox, Jr., for the appellees.

¹⁰ BALDWIN, J. The plaintiffs, wholesale coal dealers in New York City, sued the defendant, a coal dealer in Derby.

for a balance of five hundred dollars due for coal sold to him. His answer, admitting the indebtedness, set up by way of counterclaim that they owed him one thousand dollars as damages for breach of a contract made with him in New York City on February 6, 1903, to sell and deliver to him at Derby a cargo of coal then laden on the barge "President," in New York harbor. The damages which he alleged that he had suffered were the loss of profits that he would have made by retailing the coal to customers in Derby who needed and would have bought it, as the plaintiffs well knew; the loss of the trade of a large number of customers; the loss of freight paid, at a higher rate than that agreed on with the plaintiffs, on coal which he was obliged to purchase from others; and a depreciation in value of such coal before he could sell it.

It was admitted by the pleadings that the cargo in question, consisting of four hundred and ninety-nine tons, was so sold to him at five dollars and twenty-five cents a ton, free on board, at New York, and that the defendant was to pay ninety cents a ton for its transportation on the barge to Derby. The plaintiffs denied that they were to deliver it in Derby, claiming that it was to be taken there by the defendant, he arranging for the transportation with the master of the barge, and paying the freight to him; and as to this the evidence was sufficient to justify the jury in finding the issue for the defendant.

¹¹ They could therefore award him such damages as naturally followed from the plaintiffs' failure to deliver the coal at Derby as agreed—that is, within a reasonable time after February 6th. Their ordinary measure would be the excess, if any, of the market price of such coal at Derby, at the date when the cargo should have been delivered, and the price agreed on between the parties: *Jordan v. Patterson*, 67 Conn. 473, 35 Atl. 521. This market price would be the wholesale price. It was not claimed that there was any wholesale market price for coal at Derby. The value of coal at Derby would therefore be determined by its wholesale market price at the time at the nearest convenient wholesale market, and the cost of transportation from there to Derby: *Grand Tower etc. Co. v. Phillips*, 23 Wall. (U. S.) 471, 23 L. ed. 71. A near and convenient wholesale market was to be found in New York City.

The evidence showed beyond reasonable question that coal of the kind in question, which had previously been scarce there, on account of the great strike in Pennsylvania, became plenty early in February, and that the wholesale market price did not rise after February 6th during the remainder of that month and the month following.

It showed, also, that the Housatonic river was open and free from ice, up to Derby, until February 20th; that Bridgeport harbor remained open at all times after February 6th; and that the freight on coal by the earload from Bridgeport to Derby in February was eighty cents a ton.

The defendant could therefore have bought other and equally good coal, at and for a considerable time after the breach of contract by the plaintiffs, at the same price which he agreed to pay to them, except for such increase as there might be in the freight charges between New York and Derby. It appeared that he bought a cargo from them on February 13th, for transporting which to Derby by way of the Housatonic river he paid one dollar a ton. This did not reach Derby until March, but, had it been shipped to Bridgeport and thence to Derby by rail, the freight would not have exceeded one dollar and eighty cents a ton. If he could properly have taken the ¹² latter course, his damages from the breach of contract would be ninety cents a ton, or less than four hundred and fifty dollars. The verdict in effect gave him nine hundred and thirty-nine dollars and twenty cents.

That the plaintiffs knew when they sold him the cargo that he bought for the purpose of selling it at retail did not entail any obligation to answer for profits which he might have made, had he been able so to sell it. The coal could easily have been replaced by purchases from others, with the same opportunity for profit on resales.

No proof was offered of the alleged loss of customers, nor of a shrinkage in value of coal bought from others to replace that sold by the plaintiffs; and had there been, it would have been inadmissible. Such consequences were not of a kind to be reasonably anticipated from the breach of the plaintiffs' contract.

The motion to set the verdict aside was held under advisement from December 7th to February 2d. It is urged that in view of such a delay less weight should be given to

the opinion of the trial judge. The undisputed facts, however, are sufficient to show that it was well founded.

It is further contended that if the verdict was excessive, it should have been set aside only in case the plaintiff declined to remit a portion of the damages. There is nothing in the evidence that could justify the jury in finding damages in excess of the five hundred dollars which was conceded to be due to the plaintiffs. The verdict should have been in their favor.

There is no error.

In this opinion the other judges concurred.

In Case a Vendor Fails to Deliver Goods purchased, the general damages are usually limited to the difference between the market price and the contract price: Kelley v. La Crosse Carriage Co., 120 Wis. 84, 102 Am. St. Rep. 971. If the goods are not obtainable in the open market, the buyer may recover the profits lost through the default of the seller: Kavanaugh Mfg. Co. v. Rosen, 132 Mich. 44, 102 Am. St. Rep. 378. And, generally, if the contemplated breach of a contract is to deprive the innocent party of profits, the defaulting party ought to compensate him therefor. Only when the estimate of prospective profits involves such a degree of speculation and uncertainty that it is likely to work injustice, rather than justice, should the courts reject it, if loss of profits is the result of the breach of the contract: Kelley v. La Crosse Carriage Co., 120 Wis. 84, 102 Am. St. Rep. 971. The right of a buyer to recover for prospective profits, under certain circumstances, where the seller fails to deliver goods purchased for resale is also recognized in Guetzkow v. Andrews, 92 Wis. 214, 53 Am. St. Rep. 909.

SHAILER v. BULLOCK.

[78 Conn. 65, 61 Atl. 65.]

BASTARDY—Child as Evidence.—In bastardy proceedings the child whose paternity is disputed is admissible in evidence to show a resemblance between it and its alleged father. (p. 88.)

BASTARDY—Constancy of Declarations of Paternity.—In bastardy proceedings it is not essential to plaintiff's recovery that she should have been constant in her declarations that the defendant was the father of her child, nor that she should have made such declaration during her travail. (pp. 88, 89.)

TRIAL—Instructions.—An Incorrect Statement of Law contained in the last words of the court's charge to the jury is not cured by a correct statement of the law given in the first part of such charge. (p. 89.)

TRIAL—Conflicting Instructions.—If both parties submit written requests to charge, some of which are absolutely conflicting,

it is error for the court to read the whole of such requests to the jury as the law of the case, without adequate comment or reference to such conflict. (pp. 89, 90.)

BASTARDY—Cross-examination of Defendant—Misconduct.—In bastardy proceedings the cross-examination of the defendant for the purpose of attacking his credit should be confined to such acts of misconduct as affect his character for veracity. (p. 91.)

BASTARDY—Cross-examination of Defendant.—In bastardy proceedings, it is within the discretion of the trial court to fix a date anterior to which the cross-examination of the defendant as to his prior misconduct shall not extend. Such discretion is of necessity very wide, and its exercise will not be reviewed unless clearly abused. (p. 92.)

S. Judson and O. W. Platt, for the appellant.

J. P. Goodhart and J. A. Marr, for the appellee.

66 **TORRANCE, C. J.** On the trial of this case the plaintiff offered the child, whose paternity was in dispute, in evidence, to show a resemblance of feature between it and the defendant. The child was about ten months old. The court ruled that the child could not be exhibited to the jury for such purpose. This ruling was not based on the fact that no such resemblance existed, but apparently upon the sole ground that resemblance in such cases was not of probative value.

In so ruling the court erred. Although the decisions upon this subject in the state courts are not in entire harmony, it is certainly the prevailing general rule in such courts, based, we think, upon good grounds, that such evidence is of probative value, and is admissible for what it may be worth, in proof of paternity, in cases like the one at bar. See the cases upon this subject cited in notes under sections 166 and 1154 of Wigmore on Evidence, volumes 1, 2.

The plaintiff claimed to have proved that she had been constant in her declaration that the defendant was the father of her child, and had "declared to the attending physician during her travail that the defendant was the **67** father of said child." The evidence for the defendant tended to prove that she had made no such declaration during the time of her travail. Upon this subject the court in the fore part of its charge, told the jury that it was not necessary for them to find, in order to render a verdict in the plaintiff's favor, that she had been constant in her declarations that the defendant was the father of her child, nor that she had made such declaration during her travail; and this was correct: *Booth v. Hart*, 43 Conn. 480; *Robbins v. Smith*, 47 Conn.

182. At the very close of the charge, however, the court said this to the jury: "As already stated, gentlemen, the burden of proof in this case, as in all civil cases, is on the plaintiff. If she proves by a fair preponderance of evidence admitted at this trial all the material allegations of her complaint, that is, that she is a single unmarried woman, that she gave birth to a male child on the fifteenth day of September, 1903, that said child was begotten on her body at the house of the defendant by the defendant on the 13th of January, 1903, and that the plaintiff has been constant in her declarations, and made such declarations while in the pains of childbirth, then your verdict should be for the plaintiff. On the other hand, if you find from all the evidence admitted on the trial that the plaintiff has failed to prove any one of these allegations by a fair preponderance of evidence, your verdict should be for the defendant." The fact that the plaintiff had declared in her travail that the defendant was the father of her child, and that she had remained constant in her declarations as to its paternity, were thus in effect erroneously made material facts in the case, and the jury were emphatically told that unless they found them to be true, their verdict must be for the defendant. The defendant says this part of the charge cannot have misled the jury to the plaintiff's harm, because the court had previously charged correctly upon this point. We cannot take this view of the matter. This part of the charge came as the very last word of the court to the jury. It was a formal, ⁶⁸ and it must have appeared to the jury a carefully made and full, statement of the essential facts which they must find proven before they could render a verdict for the plaintiff. Upon the record in this case, we think that the incorrect statement of the law, in the last words of the charge, was not cured by the correct statement of it in the fore part of the charge: *Smith v. King*, 62 Conn. 515, 26 Atl. 1059.

We also think that the charge as a whole, for the reasons hereinafter stated, was so inadequate that it furnished no real guidance to the jury in its deliberations. Both sides filed numerous written requests to charge, many of which on each side related to mere matters of fact, and most of which on one side were in conflict with those of the other, in their statements both of fact and of law. As a part of its charge, and by much the larger part of it, the court read impartially to the jury, first the written requests of the plain-

tiff, and then those of the defendant; and with few exceptions it read them just as they were written, and it apparently charged these conflicting requests, without any adequate comment or reference to the conflict between them, as the law of the case by which the jury were to be guided.

The result of such a reprehensible practice was a charge needlessly long and utterly inadequate for the guidance of the jury in their deliberations. For the two errors hereinbefore considered, and for the character of the charge as a whole, we are of opinion that a new trial in this case must be ordered.

In view of the result thus reached we deem it unnecessary to consider any of the other errors assigned, save one relating to the cross-examination of the defendant as to credit. Upon his direct examination the defendant testified in substance that he was a clergyman and had been in charge of a church in Stratford in this state for the past four years; and that before coming to Stratford he had been engaged in ministerial and educational work at divers places outside of this state. Upon his cross-examination he was asked the following questions in substance, among others: Were you dismissed from ⁶⁹ Unity Church, Detroit, "by reason of charges"? Were you dismissed from the Y. M. C. A. at Fremont, Ohio? While engaged in evangelistic work in Chicago were you tried before two members of the Bible Institute "relative to charges of immoral relations" with a church member? Were your services in the Y. M. C. A. at Evanston discontinued by the trustees? Under what circumstances did you discontinue your services at Elkhart, Indiana? Did you leave ministerial work in Berea, Kentucky, "under unusual circumstances"? A few other questions of like nature with the foregoing were also asked. As we understand the record, the court ruled that the cross-examination of the defendant as to credit should be confined strictly to the four year period of his residence in this state, and that his character and conduct outside of that period could not be inquired into. The court said: "I shall exclude all matters remote in their character; and I mean by 'remote in their character' anything prior to his residence in the state of Connecticut." The court, against the objection of the defendant, allowed the questions to be put and permitted the defendant to answer them, and then, under the above ruling and against the objection of the plaintiff, ordered the questions and an-

swers to be stricken out; thus, in effect, though in a round-about way, enforcing its ruling that the cross-examination of the defendant as to credit should be confined strictly to a comparatively short period of his life; and of this action of the court the plaintiff complains.

The credit of a witness may be attacked in at least three ways: 1. By evidence of his reputation for untruthfulness; 2. Under the statute (section 667) by record evidence of his conviction of certain crimes; and 3. By cross-examination of the witness: *Dore v. Babcock*, 74 Conn. 425, 50 Atl. 1016. Under this last mode of attack, in this state and in most jurisdictions, particular acts of misconduct on the part of the witness may be shown by his cross-examination, although extrinsic evidence of such acts will not be received: *Dore v. Babcock*, 74 Conn. 425, 50 Atl. 1016; *Spiro v. Nitkin*, 72 Conn. 202, 44 Atl. 13; 2 Wigmore on Evidence, secs. 979, 981. Whether the acts of misconduct ⁷⁰ shown by the cross-examination of the witness may be such as indicate bad moral character in general, or whether they must be such as indicate a lack of veracity in the witness, is a question upon which the courts are not agreed: 2 Wigmore on Evidence, sec. 982; but in this state, in the case of witnesses, the rule is that the particular acts shown on the cross-examination must be such as indicate a lack of veracity: *State v. Randolph*, 24 Conn. 363; *Spiro v. Nitkin*, 72 Conn. 202, 44 Atl. 13; *Dore v. Babcock*, 74 Conn. 425, 50 Atl. 1016; *Smith v. Brockett*, 69 Conn. 492, 38 Atl. 57. Whether this mode of attack upon the credit of a witness should be allowed at all, and if allowed whether it should be at the discretion of the trial court, or merely at the unlimited discretion of the cross-examiner, are questions of policy, upon which the courts are not agreed. Some few courts, perhaps wisely, prohibit it altogether; others allow it to be used substantially at the discretion of the cross-examiner; while the rule in most jurisdictions is that it may be used, subject to the discretion of the trial court: 2 Wigmore on Evidence, sec. 983; and this last is the rule in this state: *Spiro v. Nitkin*, 72 Conn. 202, 44 Atl. 13; *State v. Ferguson*, 71 Conn. 227, 41 Atl. 769. Furthermore, in this mode of impeaching the credit of a witness, it is well settled that if the witness denies the particular acts of misconduct affecting his character for veracity, about which he is asked, that is the end of the matter and such acts cannot be proved by extrinsic evidence: 2 Wigmore on

Evidence, sec. 981; 3 Taylor on Evidence, Chamberlayne's notes, sec. 1438.

In this case the plaintiff had the right to cross-examine the defendant as to credit, and, subject to the discretion of the court, was at liberty to show thereby any acts of misconduct on the part of the defendant which affected his character for truthfulness; but most of the foregoing questions put in the exercise of such right might have been, and should have been, properly excluded, because, if proved or admitted, they had no legitimate tendency to affect his character for truthfulness: *Dore v. Babcock*, 74 Conn. 425, 50 Atl. 1016; 2 Wigmore on Evidence, sec. 982.

It was within the discretion of the trial court to limit the time beyond which the cross-examination of the defendant as to credit should not go; but whether, under the circumstances of this case, the limitation as to time which the court imposed upon the plaintiff was a reasonable one may well admit of doubt; we incline to think it was not. The discretion vested in the trial court as to the limits of cross-examination as to credit is of necessity a very wide one, and should be interfered with only in cases where it has been clearly abused. Should there be a retrial of this case, we think we have here said enough to guide the trial court in the exercise of its discretionary power over the right to cross-examine witnesses as to credit.

There is error and a new trial is granted.

In this opinion the other judges concurred.

In Bastardy and Rape Prosecutions it is competent to make profert of the child to the court or jury, if not of too immature age, to show its resemblance to the defendant: *State v. Danforth*, 73 N. H. 215, 111 Am. St. Rep. 600; *Kelly v. State*, 133 Ala. 195, 91 Am. St. Rep. 25; *State v. Saidell*, 70 N. H. 174, 85 Am. St. Rep. 627, and cases cited in the cross-reference note thereto. The admissibility of the declarations of the mother as to the putative father of the child, when they are lacking in constancy, is considered in the note to *Johnson v. Walker*, 109 Am. St. Rep. 741.

GRAHAM v. WALKER.

[78 Conn. 130, 61 Atl. 98.]

EASEMENTS.—Personal Rights of Way, not appurtenant to land, cease with the life of the grantee. (p. 94.)

EASEMENTS.—Personal Rights of Way not appurtenant to land cannot be granted to the inhabitants of a certain territory or particular locality. (p. 94.)

EASEMENTS May be Appurtenant to Land although the servient tenement is separated by other lands from the dominant tenement. (p. 96.)

EASEMENTS.—Right of Way by Prescription may be appurtenant to particular land, although the servient and dominant tenements are separate and apart, and the way is accessible only by means of a highway upon which the respective tenements abut. (p. 97.)

EASEMENTS by Prescription.—The use of an easement, which can be claimed as an appurtenance by prescription, must be so related to the use of the dominant tenement that its particular connection with the beneficial enjoyment of that tenement is not merely conjectural but direct and apparent. (p. 97.)

EASEMENTS—Right of Way by Prescription.—A claim to a way by prescription appurtenant to a particular close cannot be maintained unless the prescriptive use is such as to make it reasonable to presume that the owner of the land over which the way is used knows that such use is in connection with and furtherance of the enjoyment of such close, and not under a claim of personal right or privilege. (pp. 97, 98.)

W. H. Shields and A. A. Browning, for the appellants.

C. W. Comstock and E. W. Higgins, for the appellee.

131 BALDWIN, J. The answer contained three separate defenses: A general denial; an entry in the exercise of a prescriptive right of way to and from Taftville appurtenant to a close of the defendants situated in a quarter of the town of Lisbon known as Blissville; and an entry in the exercise of a right of way to and from Taftville, belonging by immemorial local custom to all the inhabitants of Blissville.

It was admitted that the land over which the way was alleged to exist was bounded by a highway, on the opposite side of which, at a distance of about half a mile, the defendants owned a house and farm, which was the close to which they claimed the way to be appurtenant.

The defendants introduced evidence which, as they claimed, proved the existence of each of the rights of way set up in their answer: the former by a continuous, uninterrupted and

adverse user for more than fifteen years by them and their predecessors in title in connection with the occupation, use and enjoyment of their close; and the latter by a like user for more than fifteen years by all the land owners and inhabitants of Blissville generally and their tenants and employés.

With respect to the third defense, the jury were instructed that if a substantial portion of the inhabitants of Blissville for an entire period of at least fifteen years had uninterruptedly, continuously, adversely, and under a claim of right in behalf of all the inhabitants passed over the land in question, to and from Taftville, with the knowledge of the owner of the land, a right of way in favor of all the inhabitants ¹³² was thereby acquired, founded on custom, which attached to everyone who for the time being was such an inhabitant, while he continued to be such; that if such a user was open, notorious and visible, the owner of the land was charged with notice of it; that a user would be continuous and uninterrupted, if it was substantially such, although it were more or less frequent according to the nature of the way and the occurrence of occasions for traveling over it; and that certain testimony which had been introduced by the plaintiff as to the existence of other paths and their use by the inhabitants in going to and from Taftville tended in a measure to show that their use of the way claimed was not continuous, uninterrupted and customary. These instructions are made a ground of appeal by the defendants.

They were too favorable to the defense. A right of way by custom in favor of the inhabitants of a particular locality might be set up by the common law of England. It could be proved by immemorial usage. From such proof a presumption was deemed to arise that the usage was founded on a legal right. This right was not assumed to arise from a grant by an owner of land of an easement in it. No grant of that nature can subject the tenement of the grantor to an easement which will outlast the life of the grantee, unless it be made in such a way as to become appurtenant to some other tenement. A right of way by custom appertains to a certain district of territory, but not to any particular tenement forming-part of that territory. Nor is it confined to owners of land within that territory. It belongs to the inhabitants of that territory, whether land owners or not. To a fluctuating body of that kind no estate in lands can be granted. If, therefore, an easement be claimed to ex-

ist in their favor, a title cannot be made out by prescription, on the theory of a lost grant. It must have come, if at all, from some public act of a governmental nature.

The theory of English law was that, if there had been a usage from time immemorial (that is, so far as could be ascertained, from the coronation of Richard I), affecting the use of real estate by those not able to show any paper title ¹³³ to warrant it, it might fairly be presumed that it arose under an act of parliament or other public act of governing power, the best evidence of which had perished. A charter from some feudal lord or ecclesiastical corporation might be such an act. Of such charters there were no public records. That the accidental destruction of the parchment on which one was written should annul the privileges which it gave would be plainly unjust.

The political and legal institutions of Connecticut have, from the first, differed in essential particulars from those of England. Feudalism never existed here. There were no manors or manorial rights. A recording system was early set up and has been consistently maintained, calculated to put on paper, for perpetual preservation and public knowledge, the sources of all titles to or encumbrances affecting real estate. Nor have we all the political subdivisions of lands which are found in England. An easement by custom may exist there in favor of the inhabitants of a city, county, town, hamlet, burgh, vill, manor, honour, or hundred: 1 Coke's Littleton, 110b, 113b, 115b. Most of these terms denote forms of communities that are unknown in this state. Under our statute of limitations, also, rights of way may be established by a shorter user than that required by the English law: *Coe v. Walcottville Mfg. Co.*, 35 Conn. 175; Gen. Stats., sec. 1073.

During the greater part of the colonial era the common law of England was not deemed to form a part of the jurisprudence of Connecticut, except so far as any part of it might have been accepted and introduced by her own authority: Stats., ed. 1769, 1; 1 Swift's System, 44. Later the doctrine received the sanction of this court that it was brought here by the first settlers, and became the common law of Connecticut so far as it was not unadapted to the local circumstances of this country: *Card v. Grinman*, 5 Conn. 164. This court has never affirmed the recognition by our law of personal rights of way or other easements resting on local

custom. In view of all the considerations named, we are of opinion that such rules of the ¹³⁴ English common law as gave them sanction were unadapted to the conditions of political society existing here, and have never been in force in Connecticut. It follows that the trial court erred in directing the jury to disregard the second defense.

They were told in the first place to disregard it, because the evidence of user introduced in its support was equally relevant to support the third defense, and if the defendants as inhabitants of Blissville had a personal right of way by local custom, their user, being consistent with that, could not be claimed to indicate the assertion and enjoyment of a way by prescription appurtenant to their particular close: See *Blewett v. Tregonning*, 3 Ad. & E. 554. There being no such thing in Connecticut as a personal right of way established by custom, the evidence in question could only be pertinent to the second defense, and if sufficient to support that, the defendants would have been entitled to a verdict.

The defendants had themselves used the way in question only since they purchased their close, seven years before. To make out a prescriptive right, it was therefore necessary to tack the user by their predecessors in title.

The trial court further instructed the jury, particularly with regard to the second defense, that there had been no evidence that the use of the way by the defendants or their predecessors in title had any connection with the defendants' land, nor any direct relation to its use and enjoyment, since it differed in no respect from the use of the way by their neighbors, and therefore that no way appurtenant to their close had been made out.

In this there was error. An easement may be appurtenant to land although the servient tenement is separated by other lands from the dominant tenement. A right to the enjoyment of a pew in the parish church could at common law be claimed by prescription as appurtenant to a messuage in any part of the parish: *Stocks v. Booth*, 1 Term Rep. 432. A right to convey water from a distant source of supply may be appurtenant to a tenement separated from that on which such source of supply is situated by several intervening ¹³⁵ parcels of land, each belonging to a different proprietor: *Cady v. Springfield Water Works Co.*, 134 N. Y. 118, 31 N. E. 245. In like manner, a way from one close to and through another is none the less appurtenant to the former

if it run over the intervening lands of numerous proprietors: *Guthrie v. Canadian Pacific R. W. Co.*, 27 Ont. App. 64; *Horner v. Keene*, 177 Ill. 390, 52 N. E. 492. See *Fisk v. Ley*, 76 Conn. 295, 56 Atl. 559. No reason is apparent why the same principles should not govern when a way is prescribed for as an appurtenance, which commences at a highway. In an early English case, the plaintiff declared on a way to his close in D. "in, by, and through a certain way" the court held that—assuming a motion in arrest of judgment the court held that assuming the term "way," as thus used, to mean highway—while the plaintiff was in the exercise of a public right when on the highway, he might prescribe for a way over adjoining ground reached from and by means of the highway: *Banning's Case*, Noy, 9. This is cited by Comyn as authority for the position that a private way may exist to the close of another, through or across the highway: 3 Comyn's Digest, 57, *Chimin, D.* So it has been held that a way may be appurtenant to a close, though separated from it by a navigable river: *Case of Private Road*, 1 Ashm. 417.

That a way cannot be appurtenant to a close at which it neither begins nor ends has been often asserted by text-writers, and is not without countenance from judicial decision: Washburn on Easements, 3d ed., *161; 23 Am. & Eng. Ency. of Law, 2d ed., 6, "Private Ways"; *Whaley v. Stevens*, 21 S. C. 221, 27 S. C. 549, 4 S. E. 145. The better reason seems to us to lead to a contrary conclusion and to be supported by the rules of common law. An appurtenant way ordinarily does touch the close to and from which it leads, and that it should is commonly essential to its enjoyment; but it is not always thus essential, and when not, the dominant may be separated even at a long distance from the servient tenement.

The use, however, of any easement, which can be claimed ¹³⁶ as an appurtenance by prescription must be so related to the use of the dominant tenement that its particular connection with the beneficial enjoyment of that tenement is not merely conjectural, but direct and apparent. A claim to a way by prescription appurtenant to a particular close being founded on the presumption of a lost grant, none can be so gained unless the prescriptive use was such as to make it reasonable to presume that the owner of the land over which the way was used knew that such use was in

connection with and furtherance of the enjoyment of such close. He might be willing to concede a claim to a personal right of way which would cease with the life of the claimant, when he would dispute a claim to a right of way appurtenant to another's close, which would endure forever.

The fact that the respective closes of the parties were half a mile apart, and that the way was only accessible by the highway on which each of these closes abutted, did not conclusively bar a claim that the way was an appurtenance to that of the defendants. The testimony which they had introduced tended to show a long, adverse, and continuous user by the successive owners of their close, in connection with their use, occupation and enjoyment of it, in going thence to Taftville and back. Such a user, if proved to the satisfaction of the jury, might sufficiently establish a direct connection between the use of the close and the use of the way to bring it within the definition of a way appurtenant. That some or all of their neighbors might have a similar way, appurtenant to their closes, was immaterial: *Kent v. Waite*, 10 Pick. 138.

Other reasons of appeal require no discussion, as the questions presented are not likely to recur on another trial.

There is error, and a new trial is ordered.

In this opinion the other judges concurred.

The Use of Ways is discussed in the note to *Bakeman v. Talbot*, 88 Am. Dec. 279-282. And the rights and obligations of parties to ways are discussed in the notes to *Dudgeon v. Bronson*, 95 Am. St. Rep. 318-330; *Welch v. Wilcox*, 100 Am. Dec. 115-119.

FARRELL v. HAWLEY.

[78 Conn. 150, 61 Atl. 502.]

EXTRADITION—Proceedings on.—Under section 5278 of the Revised Statutes of the United States, relating to extradition, no hearing before the governor of the state to whom the requisition is addressed, and no notice to the person charged with crime is required as preliminary to the issue of a warrant for his arrest and surrender, but the governor, before issuing the warrant, should be satisfied that there is probable cause to believe that at the time it is charged that the crime was committed such person was within the state from which the requisition proceeds. (p. 99.)

EXTRADITION—Proceedings on—Evidence.—If extradition of a person is requested of the governor of a state, the latter, be-

fore issuing his warrant for the arrest of such person, need not take oral testimony, but may act on any proof satisfactory to him and having a reasonable tendency to show that the person required is a fugitive from justice from the demanding state. (p. 101.)

EXTRADITION—Proceedings on—Reply.—An averment in a reply of a prisoner in custody under a warrant in extradition that no legal hearing or other judicial proceeding has been had to ascertain whether he is a fugitive from justice is insufficient on demurrer, without a statement of the facts which render the hearing illegal, and an averment that the prisoner was not present in the demanding state when the crime is alleged to have been committed is of no avail if it is admitted that the governor issuing the warrant had probable cause for believing that he was present. (p. 101.)

EXTRADITION—Proceedings on—Conclusiveness of Governor's Finding.—The finding of a governor in extradition cases is not always and necessarily final, but it can be pronounced insufficient to support an arrest under the warrant only upon conclusive proof that the prisoner was not in the state demanding him at the time when it is charged that the crime was committed, and that there was no evidence to the contrary before the governor worthy of consideration. (p. 102.)

EXTRADITION Proceedings—Presumption.—In extradition proceedings it is presumed that the governor, who is asked to deliver up the fugitive, in issuing his warrant acted on sufficient evidence. (p. 102.)

EXTRADITION—Habeas Corpus—Bail.—In habeas corpus proceedings to secure the release of one in custody under a warrant of extradition, it is within the discretion of the court, after remanding the prisoner, to refuse to admit him to bail. (p. 102.)

J. D. Toomey, Jr., and F. A. Bartlett, for the appellant.

W. B. Boardman, for the appellee.

151 BALDWIN, J. By the Revised Statutes of the United States, section 5278, whenever the executive authority of any state demands any person, as a fugitive from justice, of the **152** executive authority of any other state to which such person has fled, and produces a copy of an indictment found, or an affidavit made before a magistrate, charging the person demanded with having committed a crime, which copy is certified as authentic by the governor of the state from whence the person so charged has fled, it shall be the duty of the executive authority of the state to which such person has fled to cause him to be arrested and delivered to the agent who may be appointed to receive him by the authorities of the demanding state.

Under this statute no hearing before the governor to whom the requisition is addressed, had on notice to the person charged with crime, is required as a preliminary to the issue of a warrant for his arrest and surrender: *Munsey v.*

Clough, 196 U. S. 364, 25 Sup. Ct. Rep. 282, 49 L. ed. 515. The governor, however, should, before issuing it, be satisfied that there is probable cause to believe that, at the time when it is charged that the crime was committed, such person was within the state from which the requisition proceeds: *Hyatt v. People*, 188 U. S. 691, 23 Sup. Ct. Rep. 456, 47 L. ed. 657.

The warrant issued by the governor of this state, after stating that the governor of New York has represented to him that the plaintiff, having been charged with rape committed in that state, has fled from justice into this state, contains these recitals: "And whereas, the said representation and demand is accompanied by properly attested copies of the proceedings in said state of New York, against the said James Farrell, and with the proper affidavits of witnesses, whereby the said James Farrell is charged with the said crime and with having fled from said state, and taken refuge in the state of Connecticut, which said proceedings are certified by the said governor of New York, to be duly authenticated; and, whereas, I find that said demand is conformable to law and ought to be complied with."

General Statutes, section 1566, provides that when a demand of this nature is made upon the governor, he may request any prosecuting officer to investigate the ground for it "and report to him the situation and circumstances of the person ¹⁵³ so demanded and whether he ought to be surrendered; and if the governor shall find that such demand is conformable to law, and ought to be complied with, he shall issue his warrant" for the arrest and surrender. By section 1567 no person arrested on such a warrant is to be surrendered until he has been informed of the demand made for it and of the crime charged, and has had an opportunity to apply for a writ of habeas corpus.

Upon such a writ he will be entitled to a discharge if the governor had no jurisdiction to direct his arrest or surrender. There would be no jurisdiction if the person whose surrender was asked were not a fugitive from justice; and he could not be such a fugitive unless he was in the state from which the demand comes when it is charged that the crime was committed. Although absent at that time he might be prosecuted there, under certain circumstances, if he were afterward found within its territory: *State v. Grady*, 34 Conn. 118. But he could not lawfully be surrendered for trial there on an executive requisition.

The recitals in the governor's warrant, which is set up in the return in the present action, state that the governor of New York had represented to him that the plaintiff had fled from New York to Connecticut to escape arrest on a criminal prosecution; that affidavits were presented in support of this representation; and that upon this showing he came to the conclusion that the requisition made upon him was conformable to law and ought to be complied with. It was not necessary that he should require the production of oral testimony. He was not exercising a judicial, but an executive, function. He was not conducting a contested, but an *ex parte*, proceeding. Any mode of proof which to him might be satisfactory in kind and convincing in effect, and that had a reasonable tendency to establish the fact of a fleeing from justice, fulfilled all the requirements of law: *Roberts v. Reilly*, 116 U. S. 80, 6 Sup. Ct. Rep. 291, 29 L. ed. 544.

On the face of the pleadings it would appear that the ordinary procedure upon executive requisitions was followed. The averment that there was no legal hearing before the governor implied that there was some kind of hearing before him, and was of no avail on demurrer without a statement of the facts which rendered it not legal. That it was not a judicial one was immaterial. The governor was a competent person, and the only competent person, to hear and determine the matter (either with or without the aid of a prosecuting officer), prior to the issue of the warrant of arrest.

The averment that the plaintiff was neither physically nor constructively present in the state of New York at the time when it was charged that the rape was committed, sets up what might be a good defense if offered on his trial to the jury for the crime of which he stands accused, but is without force in this proceeding, in view of the admission that the governor has found probable cause for believing it to be untrue. Such an admission necessarily results from the undisputed fact that there was some kind of a hearing before the governor which satisfied him that a warrant should be issued. Neither by the governor nor by the court of common pleas could it be finally adjudicated, for the purposes of determining his guilt or innocence, whether the plaintiff was in New York at the time in question. If any fair ground on which reasonable men could conclude that

he was had been shown, it was the duty of the governor to order his surrender, and of the courts, on a writ of habeas corpus, to remand him to the custody of the officer having him in charge.

That such a ground was shown before the governor is to be presumed, in the absence of an averment to the contrary. The demurrer admitted nothing which was not well pleaded and material in the reply. The allegation that the plaintiff was not in New York when the rape was committed was immaterial, because pleaded in connection with what amounted to an admission that the governor, after a hearing, had found that he was there then.

If the plaintiff had desired to show that in fact no competent evidence that he was a fugitive from justice was before the governor, he should have set this up in his reply. ¹⁵⁵ The finding of the governor in extradition cases is not always and necessarily final. That now in question could have been pronounced insufficient to support an arrest under the warrant, upon conclusive proof before the courts in this proceeding, first, that the plaintiff was not within the state of New York at the date when it was charged that the crime was committed, and, second, that there was no evidence to the contrary, or none worth serious consideration, before the governor: *Munsey v. Clough*, 196 U. S. 364, 25 Sup. Ct. Rep. 282, 46 L. ed. 515. In the reply to the return it was averred that the plaintiff was neither actually nor constructively within the state of New York at the time in question, but there was no allegation that the governor acted without evidence worthy of serious consideration to establish the contrary. The presumption is that he acted on such evidence, and this presumption not having been met by anything in the plaintiff's pleading, the demurrer was properly sustained: *Munsey v. Clough*, 196 U. S. 364, 25 Sup. Ct. Rep. 282, 49 L. ed. 515.

It is assigned for error that the court of common pleas, after remanding the plaintiff to the custody of the sheriff by the judgment appealed from, refused to admit him to bail. As to this, the trial court ruled that it had power, at common law, to accept bail pending the appeal to this court, but in the exercise of its discretion refused to accept it. Assuming, without deciding, that it was right in the first ruling, of which the plaintiff does not complain, it was clearly right in holding that whether the power should be exercised was

a matter of judicial discretion. We see nothing in the record to indicate that this discretion was not well exercised.

No question has been made as to our power to entertain this reason of appeal. We therefore do not think it necessary to inquire whether for such a cause of complaint, arising after judgment, the remedy pursued was in form the proper one, inasmuch as, had the plaintiff suffered an injustice, the only mode of relief was to ask it from us, or one of us: *State v. Hunter*, 73 Conn. 435, 47 Atl. 665.

There is no error.

In this opinion the other judges concurred.

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I. Scope of Note.

This note is intended to supplement and bring down to date the note on the same general subject attached to Matter of Fetter, 57 Am. Dec. 389. We shall exclude from our consideration questions particularly relating to the substantive law on the general subject and also questions relating to the trial of the accused after his extraditions. Several phases of the general subject have been treated in the series: See the monographic note on the arrest and detention of fugitives from justice before the formal demand for them on extradition, attached to *Simmons v. Vandyke*, 46 Am. St. Rep. 414; the monographic note on the grounds on which one state may refuse to surrender a person demanded by the authorities of another, attached to *Barrainger v. Baum*, 68 Am. St. Rep. 129; the monographic

note on the right to try extradited persons for offenses other than that for which they have been extradited, attached to *State v. Hall*, 10 Am. St. Rep. 207; the monographic note treating of the extent of the inquiry on habeas corpus of persons held on extradition process, attached to *State v. Smith*, 100 Am. St. Rep. 36.

II. General Nature of the Right of Extradition.

a. **Nature and Source of the Right.**—"Extradition may be sufficiently defined to be the surrender by one nation to another of an individual accused or convicted of an offense committed outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands the surrender": *Terlinden v. Ames*, 184 U. S. 270, 22 Sup. Ct. Rep. 484, 46 L. ed. 534. And as was observed in *People v. Cross*, 135 N. Y. 536, 31 Am. St. Rep. 850, 32 N. E. 426, in speaking of the nature of extradition: "The obligation of independent nations to surrender fugitives from justice to each other, when demanded, rests either upon international comity or the stipulations of express treaty. When upon the former, there is and can be no general rule as to the duty of the government upon which the demand is made, save its own sense of justice and regard for what is due its neighbors. When upon the latter, the obligation is discharged by the surrender of persons properly charged with the specific offenses provided for in the treaty."

But the extradition of a fugitive from justice from one state to another is a matter which arises under the United States constitution and not upon comity or contract: *Hyatt v. People*, 188 U. S. 691, 23 Sup. Ct. Rep. 456, 47 L. ed. 657. The fugitive in extradition proceedings is not, however, sought for any crime committed against the United States: *In re Fergus*, 30 Fed. 607. And the governor of a state in issuing a warrant in extradition acts under the authority of the constitution and laws of the United States, even though the state has legislated upon the same subject: *In re Baker*, 21 Wash. 259, 57 Pac. 827; *Ex parte Smith*, 3 McLean, 121, Fed. Cas. No. 12,968. Whenever the executive of a state causes by his warrant the arrest and delivery of a person charged as a fugitive from justice from another state, such prisoner is held in custody under color of authority derived from the constitution and laws of the United States and is entitled to invoke the judgment of the judicial tribunals, whether of the state or United States, by the writ of habeas corpus upon the lawfulness of his arrest and imprisonment: *Roberts v. Reilly*, 116 U. S. 80, 6 Sup. Ct. Rep. 91, 29 L. ed. 544. Congress has the power to vest the federal courts with the power to appoint United States commissioners to act in extradition cases: *Rice v. Ames*, 180 U. S. 371, 21 Sup. Ct. Rep. 406, 45 L. ed. 577. But the United States is not regarded as a party to extradition proceedings. It simply furnishes the process for the proceeding: *In re Ezeta*, 62 Fed. 972. In *Kentucky v. Dennison*, 24

How. 66, 16 L. ed. 717, though the court held that the duty of the executive of a state was ministerial with respect to delivering the person demanded, still it was also stated that the federal courts had no means to compel the governor to perform the moral obligation of the state under the compact in the constitution, and consequently the court refused to grant the motion for a mandatory order to compel the governor of Ohio to issue his warrant of extradition at the instance of the commonwealth of Kentucky.

Though there is some apparent confusion in the authorities, yet the rule may be said to be that when a case comes within the terms of the constitution, the duty of the governor upon whom the demand is made is merely ministerial, and he has no right to exercise any discretionary power as to the nature or character of the crime charged, but he may properly exercise a discretion in determining whether a case contemplated by the constitution and laws of the United States has been presented for his action: Monographic note to *Barranger v. Baum*, 68 Am. St. Rep. 131.

b. Rule Governing International Extradition.

1. Necessity for Existence of Treaty or Convention Stipulations.

"The surrender of fugitives from justice is a matter of conventional arrangement between states, as no such obligation is imposed by the law of nations": *In re Metzger*, 5 How. 176, 12 L. ed. 104. The right of one independent government to demand and receive from another the custody of an offender who has sought an asylum upon its soil depends upon the existence of treaty stipulations between them, and is measured and restricted by the express provisions of the treaty and those silent provisions which are necessarily implied: *Knox v. State*, 164 Ind. 226, 108 Am. St. Rep. 290, 73 N. E. 255. Hence, the rule is that the right of extradition by a foreign country exists only by virtue of a treaty stipulation to that effect: *State v. Burchinal*, 4 Harr. (Del.) 572; *Matter of Fetter*, 23 N. J. L. 311, 57 Am. Dec. 382; *Adriance v. Lagrave*, 59 N. Y. 110, 17 Am. Rep. 317; *Commonwealth v. Deacon*, 10 Serg. & R. 125; *United States v. Davis*, 2 Sum. 482, Fed. Cas. No. 14,932; *Ex parte Dos Santos*, 2 Brock. 493, Fed. Cas. No. 4016; *Ex parte McCabe*, 46 Fed. 363, 12 L. R. A. 589. And in the more recent case of *Terlinden v. Ames*, 184 U. S. 270, 22 Sup. Ct. Rep. 484, 46 L. ed. 534, the court observed: "In the United States, the general opinion and practice have been that extradition should be declined in the absence of a conventional or legislative provision: 1 *Moore on Extradition*, 21; *United States v. Ranscher*, 119 U. S. 407, 7 Sup. Ct. Rep. 234, 30 L. ed. 425.

"The power to surrender is clearly included within the treaty-making power and the corresponding power of appointing and receiving ambassadors and other public ministers: *Holmes v. Jennison*, 14 Pet. 509, 10 L. ed. 593. Its exercise pertains to public policy and governmental administration is devolved on the executive authority,

and the warrant of surrender is issued by the Secretary of State as the representative of the President in foreign affairs.”

It is optional with the executive to surrender a fugitive from justice where there is no treaty or act of Congress requiring it to be done: *In re Sheazle*, 1 Wood. & M. 66, Fed. Cas. No. 12,734. But Congress may provide for extradition to a foreign country without any reciprocal treaty and merely as a matter of international comity: *Neely v. Henkel*, 180 U. S. 126, 21 Sup. Ct. Rep. 308, 45 L. ed. 457.

2. Effect of Treaty as Limiting Extradition to the Crimes Embraced Therein.—The mere fact that a treaty exists setting forth the crimes for which it is agreed that a person may be extradited does not entitle the prisoner to be discharged because the crime for which he is surrendered is not included in that list, since the existence of the treaty did not deprive the foreign nation of power to surrender fugitives from justice accused of crimes not named therein, nor the United States of the right to receive such fugitive into its custody: *Ex parte Foss*, 102 Cal. 347, 41 Am. St. Rep. 182, 36 Pac. 669, 25 L. R. A. 593. Though Congress may prescribe less formalities than are required by a treaty for the extradition of an accused person from the United States, it is doubtful whether they may prescribe requirements additional to those acquired in the treaty: *Grin v. Shine*, 187 U. S. 181, 23 Sup. Ct. Rep. 98, 47 L. ed. 130.

3. Effect of Treaty Stipulations Upon State Courts.—Treaties between the United States and foreign countries are obligatory upon the tribunals of the several states as well as those of the federal government, and the state courts are bound to give them effect: *Blandford v. State*, 10 Tex. App. 627. And it was observed in *Terlinden v. Ames*, 184 U. S. 270, 22 Sup. Ct. Rep. 484, 46 L. ed. 534, as follows: “Treaties of extradition are executory in their character, and fall within the rule laid down by Chief Justice Marshall in *Foster v. Neilson*, 2 Pet. 314, 7 L. ed. 435, thus: ‘Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial, department.’

“In *Doe ex dem. Clark v. Braden*, 16 How. 635, 14 L. ed. 1090, where it was contended that so much of the treaty of February 22, 1819, ceding Florida to the United States, as annulled a certain land grant, was void for want of power in the king of Spain to ratify such a provision, it was held that whether or not the king of Spain had power, according to the constitution of Spain, to annul the grant, was a political, and not a judicial, question, and was decided when the treaty was made and ratified.

“Mr. Chief Justice Taney said: ‘The treaty is therefore a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the constitution of the United States. It is their duty to interpret it and administer it according to its terms. And it would be impossible for the executive department of the government to conduct our foreign relations with any advantage to the country, and fulfill the duties which the constitution has imposed upon it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power by its constitution and laws to make the engagements into which he entered.’ ”

4. Rule of Construction Applicable to Extradition Treaties. Extradition treaties should be faithfully observed and interpreted with a view to fulfill our first obligation to other powers, without sacrificing the legal or constitutional rights of the accused. The supreme court of the United States observing in this respect that: “In the construction and carrying out of such treaties the ordinary technicalities of criminal proceedings are applicable only to a limited extent”: *Grin v. Shine*, 187 U. S. 181, 23 Sup. Ct. Rep. 98, 47 L. ed. 130; *Wright v. Henkel*, 190 U. S. 40, 23 Sup. Ct. Rep. 781, 47 L. ed. 948. And where doubts exist as to the true construction of a treaty, a construction consistently applied by the executive department, as, for instance, by the department of the Secretary of State, is of great weight: *Ex parte McCabe*, 46 Fed. 363, 12 L. R. A. 589.

c. Rule Governing Interstate Extradition.—Extradition between the states is not governed by international law, but depends solely on the federal constitution and the acts of Congress under it. No person can be extradited from one state to another unless the case falls within the constitutional provisions: *People v. Hyatt*, 172 N. Y. 176, 92 Am. St. Rep. 706, 64 N. E. 825, 60 L. R. A. 774, affirmed in *Hyatt v. New York*, 188 U. S. 691, 23 Sup. Ct. Rep. 456, 47 L. ed. 657. The power to grant extradition cannot be exercised on the ground of comity: *Ex parte Morgan*, 20 Fed. 298. In a general way it is said that the principles governing international extradition have no application to extradition cases arising between the states: *Knox v. State*, 164 Ind. 226, 108 Am. St. Rep. 290, 73 N. E. 255. In some cases the courts distinguish between foreign and interstate extradition by referring to the former as international extradition cases, and the latter as interstate rendition cases: *In re Ezeta*, 62 Fed. 972.

It is the constitutional duty of a state in every case to extradite a fugitive from justice upon a legal requisition from another state, and it can ask no questions upon the subject nor impose any terms: *State v. Hall*, 40 Kan. 338, 10 Am. St. Rep. 200, 19 Pac. 918. But “where a demand is properly made by the governor of one state upon the governor of another, the duty to surrender is not absolute and

unqualified. It depends upon the circumstances of the case. If the laws of the latter state have been put in force against a fugitive and he is imprisoned there, the demands of these laws may first be satisfied. The duty of obedience then arises and not before": *Taylor v. Taintor*, 16 Wall. 366, 21 L. ed. 287. The governor of the state upon whom the demand is made may also demand as a condition precedent that it be shown by competent proof that the accused is, in fact, a fugitive from the justice of the demanding state: *Ex parte Reggel*, 114 U. S. 642, 5 Sup. Ct. Rep. 1148, 29 L. ed. 250. In order to give the executive jurisdiction to issue his warrant for the surrender of a fugitive from justice under the act of Congress, there must be a demand by the executive of the state from which the accused fled, a copy of an indictment found, or an affidavit made before a magistrate, charging him with having committed a specified crime, and such copy must be authenticated by the executive of such state: *State v. Richardson*, 34 Minn. 115, 24 N. W. 354. But while there must be a proper charge of crime, it is settled that the guilt or innocence of the prisoner will not be investigated on the extradition proceeding: *Monographic note to Matter of Fetter*, 57 Am. Dec. 395; *Bruce v. Rayner*, 124 Fed. 481. The action of the governor in honoring the requisition for extradition is said to be "at least quasi judicial": *Ex parte Moyer* (Idaho), 85 Pac. 897. The duty of passing upon the validity of the requisition papers cannot be delegated by the governor. Thus in *Re Tod*, 12 S. Dak. 386, 76 Am. St. Rep. 616, 81 N. W. 637, 47 L. R. A. 566, the court observed: "It was also shown on the hearing that the warrant purporting to be signed by the executive of this state was never in fact issued by him, but was issued by some person other than the governor. The duty of examining requisition papers, passing upon their validity and issuing his warrant, devolves upon the governor personally. It is a power that cannot be delegated to any other person. The liberty of the citizen is involved, and he can only be restrained of that liberty by the personal act of the governor, upon whom the power has been conferred by the constitution and laws of the United States and the constitution and laws of this state. The execution of the power requires careful examination of the requisition papers, and involves the exercise of a sound judgment, aided, in case of necessity, by the advice of the attorney general of the state. The liberty of the citizen would be in great danger if any person could be allowed to issue such extradition warrants in the absence of the governor."

Although the United States constitution makes it the duty of a state to surrender fugitives from justice to the demanding state (*Kentucky v. Dennison*, 24 How. 66, 16 L. ed. 717), still the governor of one of the United States has no power to deliver up to the authorities of a foreign country a person charged with a crime committed in such foreign country: *In re Vogt*, 44 How. Pr. 171; *Holmes v. Jennison*, 14 Pet. 540, 10 L. ed. 579.

The arrest and detention of a person accused of crime in another state is frequently made before actual demand pursuant to requisition papers has been made. In some of the states such arrest is made under statutes of the state providing for such cases, while in others it is made to rest upon the authority of the federal constitution providing for extradition between the states: Monographic note to *Simmons v. Vandyke*, 46 Am. St. Rep. 414. The case to which the note just cited is attached, however, maintains a contrary doctrine, and held that the arrest and detention of a person in one state upon the authority of telegrams received from the authorities of another state, reciting that they have a warrant for his arrest, a copy of which is given, together with the statement that they have started after him with proper papers, is unauthorized; *Simmons v. Vandyke*, 138 Ind. 380, 46 Am. St. Rep. 411, 37 N. E. 973, 26 L. R. A. 33. But, on the other hand, it has also been held that the mere fact that the prisoner, being a fugitive from justice, was kidnaped in another state and brought into the state from which he had fled, is alone no reason why he should be released, unless the demand for his release is made by the governor or other executive authority of such foreign state: *Ex parte Barker*, 87 Ala. 4, 13 Am. St. Rep. 17, 6 South. 7. In the state of Nevada it has been held that in order to hold a fugitive from justice to await the requisition of the governor of another state, it must affirmatively appear from the complaint filed before the committing magistrate in Nevada that a crime has been committed in the other state, that the accused has been charged in that state with its commission, and that he has fled from justice and is within the state of Nevada: *Ex parte Lorraine*, 16 Nev. 63.

III. Right of a State to Legislate Upon the Subject of Extradition.

The validity of state legislation ancillary to and in aid of the act of Congress in regard to extradition is now well established: *Dennison v. Christian*, 196 U. S. 637, 25 Sup. Ct. Rep. 795, affirming (*Neb.*), 101 N. W. 1045. The decisions in *Ex parte White*, 49 Cal. 433, *Ex parte Ammons*, 34 Ohio St. 518, *Ex parte Romanes*, 1 Utah, 23, were also to the same effect. "While legislation by a state against the constitution and the laws of Congress, impairing the full operation of their provisions, would be nugatory, yet it is competent for a state legislature to enact laws on the subject at a stage prior to that which the constitution and federal laws have designated as the time at which they take cognizance of it, provided that such enactments are not inconsistent with the end named in the constitution": *Kurtz v. State*, 22 Fla. 36, 1 Am. St. Rep. 173.

Under a state statute providing that if the governor finds that the demand for the arrest of a fugitive from justice is conformable to law and ought to be complied with, he shall issue his warrant, the governor exercises executive, and not judicial, functions, and any mode of proof which to him is satisfactory in kind and

convincing in effect, and has a reasonable tendency to establish the flight from justice, fulfills all the requirements of the law: *Farrell v. Hawley*, 78 Conn. 150, 61 Atl. 502. And a state may also, in the exercise of its reserved sovereign powers, and as an act of comity to a sister state, provide by statute for the surrender, upon requisition, of persons who are indictable for a crime committed through their constructive presence in such sister state, though they have never been corporally within such state and have never fled therefrom to escape arrest and punishment: *State v. Hall*, 115 N. C. 811, 44 Am. St. Rep. 501, 20 S. E. 729, 28 L. R. A. 289. But it was observed by the supreme court of the United States that: "The exercise of jurisdiction by a state to make an act committed outside its borders a crime against the state is one thing, but to assert that the party committing such act comes under the federal statute, and is to be delivered up as a fugitive from the justice of that state, is quite a different proposition": *Hyatt v. People*, 188 U. S. 691, 23 Sup. Ct. Rep. 456, 47 L. ed. 657.

IV. Between What Political Entities or Subdivisions the Right of Extradition Exists.

a. **Extradition to and from the Territories or Other Possessions of the United States or Places Under Its Protection.**—The constitution of the United States in the clause relating to extradition merely authorizes the extradition of "a person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state": U. S. Const., art. 4, sec. 2. In *Ex parte Morgan*, 20 Fed. 298, the court, in discussing the question whether a person could be extradited from or to a territory of the United States said: "The question has been raised in argument that the act of Congress, as far as it provided that the demand for extradition could be made upon the governor of a state by the chief executive of a territory, was void as being against or beyond the constitution. Of course, Congress cannot legislate beyond the power given it by the constitution. The exercise of its legislative authority must be because of a power expressly given, or of one which is necessary to carry out and make effective one expressly given by the constitution. The constitution uses the word 'state' alone, and the act of Congress uses the words 'state' and 'territory.' It is a question that will admit of serious discussion. But it must be remembered that, under article 4, section 3 of the constitution, Congress has power to make all needful rules and regulations respecting the territory or other property belonging to the United States. Is not this part of the constitution a part of the fundamental law of the land? It is a part of the supreme law of the land, and is therefore a part of the law of each state. Are not all laws deemed necessary to be passed by Congress, and within their power under the constitution to pass, binding on the states and to be observed by them? If Congress deems it a needful rule or regulation, relating

to the territories of the Union, to extradite their fugitive criminals, it has the power to pass such a rule, not, perhaps under the extradition clause of that instrument, but under the clause relating to the territories, and this rule is binding on the states, and to be observed and obeyed by them. I believe, therefore, that this part of the act of Congress is valid, and the obligation to obey it, on the part of the governors of the respective states is as binding as when the demand for extradition is made by the governor of a state. But in my view of this case, this question need not be decided."

Although we do not doubt the soundness of the dicta just quoted, still we have not observed any case passing directly upon the question of the right of Congress to include the territories in laws giving effect to the constitutional provision relative to extradition proceedings. In the Matter of Romaine, 23 Cal. 585, though the extradition to the then territory of Idaho was allowed under a state statute relative to extradition, the court expressed an opinion that the federal constitution was inadequate to reach the case.

The power of Congress to legislate with respect to extradition from the Indian Territory to a state was upheld in *Ex parte Dickson*, 4 Ind. Ter. 481, 69 S. W. 943. Likewise the power of Congress to make special provisions with respect to the extradition of persons committing crimes in Alaska was recognized by the supreme court of Washington: *In re Baker*, 21 Wash. 259, 57 Pac. 827.

Cuba, though under a military governor appointed by and representing the President of the United States after the war with Spain, was recognized as foreign territory within the meaning of the act of Congress relative to extradition: *Neely v. Henkel*, 180 U. S. 109, 21 Sup. Ct. Rep. 302, 45 L. ed. 448. And the fact that the accused, who was being extradited by Great Britain, was arrested while on a British ship when it came into American waters does not affect the question of the jurisdiction of our government over the extradition proceedings: *In re Newman*, 79 Fed. 622.

b. Effect of Consolidation or Merger of Political Powers Upon the Force of Old Treaties.—The question whether power remains in a foreign state to carry out its treaty obligations is in its nature political and not judicial. Hence the courts ought not to interfere with the conclusion of the political department in that regard. Following this rule the court held that the extradition treaty of the United States with the kingdom of Prussia in 1852 was not terminated by the formation of the German Empire: *Terlinden v. Ames*, 184 U. S. 270, 22 Sup. Ct. Rep. 484, 46 L. ed. 534. But under a treaty provision for the extradition for crimes "committed within the jurisdiction" of either party, the place where the crime was committed must have been a part of the political possessions of the demanding government and not to include acts committed in a place, such as the South African Republic, which has been annexed to Great Britain since the act was committed: *In re Taylor*, 118 Fed. 196.

c. Who Determines the Political Status of Foreign Governments Requesting Extradition.—As indicated in the preceding subdivision, the political status of governments is a political and not a judicial question, and is determined by the department of state: *Terlinden v. Ames*, 184 U. S. 270, 22 Sup. Ct. Rep. 484, 46 L. ed. 534. Consequently the status of the South African Republic before Lord Roberts' Proclamation in the late war between that republic and Great Britain, is a matter for the department of state: *In re Taylor*, 118 Fed. 196. But the court may take judicial notice that the Dominion of Canada is a British possession: *Ex parte Lane*, 6 Fed. 34.

V. Who may be Extradited.

a. General Right to Extradite Fugitives from Justice.—The persons against whom extradition proceedings are directed are, of course, fugitives from justice. There is no want of harmony in the decisions on that question though there has been in the question whether the courts would recognize "constructive" flight from justice. The supreme court of the United States in the recent case of *Hyatt v. People*, 188 U. S. 691, 23 Sup. Ct. Rep. 456, 47 L. ed. 657, with respect to this question, observed: "The language of section 5278 of the Revised Statutes (U. S. Comp. Stats. 1901, p. 3592), provides, as we think, that the act shall have been committed by an individual who was at the time of its commission personally present within the state which demands his surrender. It speaks of a demand by the executive authority of a state for the surrender of a person as a fugitive from justice, by the executive authority of a state to which such person has fled, and it provides that a copy of the indictment found or affidavit made before a magistrate of any state, charging the person demanded with having committed treason, etc., certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled shall be produced, and it makes it the duty of the executive authority of the state to which such person has fled to cause him to be arrested and secured. Thus the person who is sought **must be one who has fled** from the demanding state, and he must have fled (not necessarily directly) to the state where he is found. It is difficult to see how a person can be said to have fled from the state in which he is charged to have committed some act amounting to a crime against that state, when in fact he was not within the state at the time the act is said to have been committed. How can a person flee from a place that he was not in? He could avoid a place that he had not been in; he could omit to go to it, but how can it be said with accuracy that he has fled from a place in which he had not been present? This is neither a narrow, nor, as we think, an incorrect interpretation of the statute. It has been in existence since 1793, and we have found no case decided by the court wherein it has been held that the statute covered a case where the party was not in the state at the time when the act is alleged to have been committed. We think the plain mean-

ing of the act requires such presence, and that it was intended to include, as a fugitive from the justice of a state, one who had not been in the state at the time when, if ever, the offense was committed and who had not, therefore, in fact, fled therefrom."

b. Right to Refuse Extradition Where Fugitive is Already in Custody in Asylum State.—The asylum state has the right to punish the accused fugitive for crimes committed within its jurisdiction before it becomes obligated to honor the requisition for extradition by a sister state: *Taylor v. Taintor*, 16 Wall. 366, 21 L. ed. 287. And where an extradited fugitive escapes and returns to the asylum state, and is placed under arrest there for an offense committed there subsequently to his return and before his rearrest on the extradition charge, he may be held until final disposition of such charges before being delivered to the extradited agent of the demanding state under the second warrant for his arrest issued by the governor of the asylum state: *Ex parte Hobbs*, 32 Tex. Cr. Rep. 312, 40 Am. St. Rep. 782, 22 S. W. 1035. But the accused fugitive cannot avail himself of the fact that he has been convicted of a crime in the asylum state and is out on bail pending his appeal, since that is a matter which the asylum state only can take advantage of: *People v. Hogan*, 34 Misc. Rep. 85, 69 N. Y. Supp. 475, citing *Roberts v. Reilly*, 116 U. S. 80, 6 Sup. Ct. Rep. 291, 29 L. ed. 514.

Neither does the fact that the prisoner is in jail under arrest in civil process prevent his extradition: *In re Mineau*, 45 Fed. 188; *Ex parte Rosenblat*, 51 Cal. 285. But the contrary has also been held: *Matter of Troutman*, 24 N. J. L. 634; *Matter of Briscoe*, 51 How. Pr. 422. The decision in the case of *In re Harriott*, 18 R. I. 12, 25 Atl. 349, also leans toward the idea that a person held in custody under civil process need not be surrendered, though the decision of the question was avoided by the fact that the accused was arrested on the civil process before his sentence under a criminal conviction had expired.

c. Right of Government to Refuse to Allow Extradition of Its Own Citizens to Foreign Countries.—In *Ex parte McCabe*, 45 Fed. 363, 12 L. R. A. 589, it was held, after an exhaustive discussion of the authorities and clauses from various treaties, that under our treaty with Mexico no authority was conferred upon the executive either to demand of the Mexican authorities the extradition of their subjects committing crimes in the United States or to surrender American citizens upon a demand made by the Republic of Mexico.

VI. By Whom the Demand for Extradition Should be Made or the Proceedings Commenced.

a. In Interstate Extradition Proceedings.—Under the terms of the constitution of the United States the demand for the extradition of a fugitive from justice shall be made by "the executive authority of the state from which he fled": U. S. Const., art. 4, sec. 2. Of course

the governor of the state is generally regarded as the chief executive authority of a state or territory. But where the state constitution of the demanding state provides that in case of disability of the governor the lieutenant-governor, or in case of his disability, the president pro tem. of the Senate, shall act as governor, it is not improper to designate either of them as the "acting governor," and the Secretary of State may attest the requisition as made "by the governor": *State v. Justus*, 84 Minn. 237, 87 N. W. 770, 55 L. R. A. 325. The chief justice of the supreme court of the District of Columbia is the person charged with the same duties in extradition proceedings as are imposed on the governors of the several states: *Hayes v. Palmer*, 21 App. D. C. 450. But the chief of the Cherokee nation is not the executive authority of any state or territory in the sense in which they are used in the constitution and laws of the United States. The Cherokee nation is a part of what is called "Indian country": *Ex parte Morgan*, 20 Fed. 298.

b. In International Extradition Proceedings.—The initiation of international extradition proceedings does not necessarily rest on a demand or requisition by the foreign government upon our government, but may be commenced by the arrest of the alleged fugitive under a warrant issued by a United States commissioner on complaint of a foreign consul: *In re Adutt*, 55 Fed. 376. Any person whom the executive department of the foreign government delegates may institute the extradition proceedings, at least under the treaty with Great Britain: *In re Kelly*, 26 Fed. 852. "The commissioner or other officer has jurisdiction to proceed 'upon complaint made under oath.' That means upon a 'complaint under oath' in behalf of the foreign government that is authorized by the existing treaty to have the surrender made. In other words, the government that has the treaty right must be the promoter of the proceeding": *In re Ferrelle*, 28 Fed. 875. A requisition from a foreign government and mandate from this government are not necessary under the United States Revised Statutes to institute extradition proceedings before a committing magistrate, and it is sufficient if it appears that the complaining witness is acting for the foreign government: *In re Orpen*, 86 Fed. 760; *In re Herres*, 33 Fed. 165. And where the complaint shows that it is made by the consul of the foreign government, it is not necessary that the jurat show his official character: *In re Adutt*, 55 Fed. 376. In foreign extradition under section 5270 of the United States Revised Statutes no evidence is required that a Russian consul, who made the complaint, had authority to do so. The court saying: "All that is required by section 5270 [U. S. Comp. Stats. 1901, p. 3591] is that a complaint shall be made under oath. It may be made by any person acting under the authority of the foreign government having knowledge of the facts, or, in the absence of such person, by the official representative of the foreign government, based upon depositions in his possession, although under the first article of the treaty the accused can only be surrendered upon a 'requisition' of the

foreign government, and by article 6 such requisition must be made by the 'diplomatic agent of the demanding government,' and in case of his absence from the seat of government, by the 'superior consular officer.' It is true that article 7 of the treaty provides that it 'shall be lawful for any competent judicial authority of the United States, upon production of a certificate issued by the Secretary of State stating that request has been made by the Imperial Government of Russia for the provisional arrest of a person convicted or accused of the commission therein of a crime or offense extraditable under this convention, and upon complaint, duly made, that such crime or offense has been so committed, to issue his warrant for the apprehension of such person'; and in this case it appears by the certificate of the acting Secretary of State that application was made in due form by the chargé d'affaires of Russia accredited to this government, for the arrest of Grin, alleged to be a fugitive from the justice of Russia. This, however, was entirely independent of the proceedings before the magistrate which might have been instituted by any person making a complaint under oath and acting by the permission or authority of the Russian government. While article 7 undoubtedly contemplates a prior certificate of the Secretary of State, the language of the article is merely permissive, and does not compel the production of such certificate before the warrant can be issued': *Grin v. Shine*, 187 U. S. 181, 23 Sup. Ct. Rep. 98, 47 L. ed. 130. The fact that the action of the person instituting the extradition proceeding was in behalf of the foreign government, and that his action was sanctioned, ratified and adopted by the executive department of the foreign government, may be shown at any time while the proceeding is pending before the commissioner: *In re Ferrelle*, 28 Fed. 878.

VII. Necessity for the Requisition Papers to be Authenticated and What Constitutes a Sufficient Authentication.

a. **What Constitutes a Sufficient Authentication in Either Interstate or International Extradition.**—Mere recitals in the demanding governor's requisition are not sufficient, of themselves, to authorize the arrest and surrender of the alleged fugitive: *Hartman v. Aveline*, 63 Ind. 344, 30 Am. Rep. 217. Under the act of Congress relating to extradition proceedings, the affidavit or indictment upon which a requisition is based must be certified by the governor or chief executive as authentic: *Ex parte Morgan*, 20 Fed. 298. But the state seal need not be affixed to the requisition papers: *In re Baker*, 21 Wash. 259, 57 Pac. 827.

The certificate of a consul which merely states that the papers are annexed is not defective because it does not designate the papers: *In re Dugan*, 2 Low, 367, Fed. Cas. No. 4120. And where the statute regarding the requirements of the certificate is ambiguous, a certificate which exactly conforms to the statute is not defective, since it must be held to mean whatever the statute means: *In re Behrendt*, 23 Blatchf. 40, 22 Fed. 699. A requisition is properly certified if the

governor certifies that the papers are duly authenticated without certifying that they are genuine: *Hackney v. Welsh*, 107 Ind. 253, 57 Am. Rep. 101, 8 N. E. 141. And a certificate that the affidavit upon which the requisition is founded "is duly authenticated according to the laws of said state" is sufficient: *Kurtz v. State*, 22 Fla. 36, 1 Am. St. Rep. 173. In *Ex parte Dawson*, 28 C. C. A. 354, 83 Fed. 306, the court, in construing the effect of section 5278 of the United States Revised Statutes with respect to the manner in which the indictment or affidavit charging the fugitive with crime in the demanding state should be certified, said: "The question presented for our determination is whether the recital, certified to be 'in due form,' is equivalent to a recital that the copy of the indictment accompanying the requisition was 'certified as authentic,' and therefore a substantial compliance with the requirements of the statute. The rules by which this question must be determined are the rules applicable to the construction of statutes by which the intention of the lawmaker is to be arrived at. As between the states of the Union, the whole subject of extradition is regulated and governed by positive law. The law of Congress was passed in conformity to the provisions of the federal constitution upon the subject, and we must suppose that the object of the law was to furnish the means by which the constitutional provision could be fairly and impartially carried into effect between the states. It is a copy of the indictment found or affidavit made charging the person demanded with having committed a crime that is required to be certified as authentic by the statute. The statute makes this requirement because otherwise the executive of a state upon whom the demand is made might be imposed upon by what purported to be a true copy of such an indictment, but which in fact might be a spurious copy. The genuineness of the copy, however, is not to be ascertained by a resort to any technical rule for ascertaining the fact, nor need the fact be made to appear in any set form of words, or even in the words of the statute requiring the authentication. All that can be required is that the language employed by the demanding governor in the requisition, understood in its ordinary meaning, shall show that the copy of the indictment upon which the requisition is made is genuine. The language of the recital in this warrant is certified to be 'in due form'; and it is now insisted by the petitioner that this is not the equivalent of the statutory words 'certified as authentic,' and means only that the indictment, according to the established method of expression or practice in Georgia, regularly and legally charges a crime. We cannot adopt this construction of the recital. The language of the recital, fairly construed, we think, is the equivalent of the statutory words, and is a substantial compliance with the act of Congress which requires the copy to be 'certified as authentic,' for the reason that it negatives the idea that the copy is spurious or fictitious, and shows that it is genuine, which is the only purpose of this provision of the statute."

But it has been also held that the act of Congress of 1882 which provides that in cases where depositions, warrants, or other papers are offered in evidence in any extradition they shall be admitted as evidence and received for all the purposes of the hearing if authenticated in a certain manner, applies only to papers offered in evidence by the prosecution to establish the criminality of the person apprehended and not to the documents or depositions offered on the part of the accused: *Oteiza v. Jacobus*, 136 U. S. 330, 10 Sup. Ct. Rep. 1031, 34 L. ed. 464. A certificate of an ambassador that certain depositions and other documents "are properly and legally authenticated so as to entitle them to be received and admitted for similar purposes by the tribunals of Russia," is a sufficient authentication: *Grin v. Shine*, 187 U. S. 181, 23 Sup. Ct. Rep. 98, 47 L. ed. 130. Likewise the certificate of the American ambassador that the papers authenticated are receivable in evidence in the foreign country as proof of the criminality of the accused is deemed sufficient proof of authentication: *In re McPhun*, 30 Fed. 57. Likewise in a case arising under the treaty with Great Britain, the certificate of the American ambassador that the papers "are properly and legally authenticated, so as to entitle them to be received in evidence for similar purposes by the tribunals of Great Britain," is in proper form: *In re Breen*, 73 Fed. 458. But a certificate of the American ambassador that the documents "are authenticated in the manner required by the statute of the United States" is defective: *In re Fowler*, 18 Blatchf. 430, 4 Fed. 303.

b. **Who are the Proper Officers to Authenticate the Papers.**—In interstate extradition documents are properly authenticated if they are certified to by the governor or chief magistrate of the demanding state: *In re Manchester*, 5 Cal. 237; *Hackney v. Welch*, 107 Ind. 253, 57 Am. Rep. 101, 8 N. E. 141; *Ex parte Reggel*, 114 U. S. 642, 5 Sup. Ct. Rep. 1148, 29 L. ed. 250. In international extradition authentication of depositions or other papers by the certificate of the diplomatic or consular office of the United States is sufficient: *Rice v. Ames*, 180 U. S. 371, 21 Sup. Ct. Rep. 406, 45 L. ed. 577. Hence the certificate of the principal diplomatic officer of the United States, in the language of the statute, certifying to the signatures to the documentary evidence taken for the purpose of extradition, is regarded as sufficient: *In re Behrendt*, 23 Blatchf. 40, 22 Fed. 699. Though communications from the Secretary of State as to who was the principal diplomatic officer of the United States at any place at a certain time is not necessary in order to enable the court to acquire information as to that fact, still the court may receive such communications as proof of the fact: *In re Orpen*, 86 Fed. 760. A vice-consul is not a deputy, but an acting consul, and hence he may authenticate depositions taken for use in international extradition: *In re Herres*, 33 Fed. 165. Requisition papers certified by the "chargé d'affaires ad interim of the United States to Great Britain" are not insufficient on the ground of not being the certificate of the

principal diplomatic or consular officer of the United States, resident in such foreign country: *In re Orpen*, 86 Fed. 760. Depositions in international extradition are properly authenticated where they are certified by the judge of investigation attached to the German court, as being copies, and as such, valid "pieces of evidence" under the laws of Prussia, and his signature is certified by the president of the court and the latter's signature by the minister of justice, all of which is followed by the certificate of the foreign office and a certificate by the American envoy extraordinary and minister plenipotentiary: *In re Krojanker*, 44 Fed. 482. And likewise a certificate by a royal judge of Prussia that the affidavits upon which the requisition are based are "valid evidence according to the laws existing in Prussia" is held to mean that the affidavits are valid evidence of criminality in the proceedings specified in the court where the proceeding purports to be had and is sufficient: *In re Behrendt*, 23 Blatchf. 40, 22 Fed. 699.

c. Right to Prove by Oral or Other Evidence that the Foreign Papers are Properly Authenticated.—"The words 'properly and legally authenticated, so as to entitle them to be received as evidence,' etc., are properly to be construed as if the expression were 'so properly and legally authenticated as to entitle them,' etc.; that is, 'so properly and legally authenticated that they would be entitled to be,' etc. This authentication, in regard to original papers, may be made by oral proof given here. A witness may swear here to the verity and identity of the original; and, also, from his knowledge and experience, that they would be received in the tribunals of the foreign country as evidence of the criminality of the person in respect to the offense charged against him as committed there, if the inquiry as to such criminality were being had in such foreign tribunals. This will be sufficient, under the statute, when originals are offered. When copies are offered they must be authenticated according to the law of the foreign country. The provision that 'the certificate of the principal diplomatic or consular officer of the United States, resident in such foreign country, shall be proof that any such deposition, warrant or other paper, or copy thereof, is authenticated in the manner required by this section' provides for a mode of proof in regard to both originals and copies, and in regard to both of the authentications mentioned in the section. Such certificate, if in proper form, is absolute proof, whatever may be the tenor of the certificate of foreign officials to the same documents.

"Practically there may, ordinarily, be no adequate attainable means, other than such certificate, of proving that the authentication of the copies is according to the law of the foreign country. But there is nothing in the statute which necessarily excludes oral proof authenticating the copies, or oral proof as to what the law of the foreign country is as to such authentication, or oral proof that such oral authentication is according to the

law of the foreign country. There is nothing in the statute which makes such certificate of the United States diplomatic or consular officers the only competent proof that either the originals or the copies are authenticated in the manner required by the statute. Whether the originals are offered, or copies are offered, it must appear that the originals would be received in the tribunals of the foreign country as evidence of the criminality of the person, in respect of the offense charged against him as committed there, if the inquiry as to such criminality were being had in such foreign tribunals": *In re Fowler*, 18 Blatchf. 430, 4 Fed. 303. The decisions in *Re McPhun*, 30 Fed. 57; *In re Charleston*, 34 Fed. 531; *In re Benson*, 34 Fed. 649.

d. **Who Determines the Sufficiency of the Authentication.**—"The governor of the state issuing the requisition is the only proper judge of the authenticity of the affidavit, and when the requisition certifies that the affidavit 'is duly authenticated according to the laws of said state,' it is sufficient: *In re Manchester*, 5 Cal. 237; *Church on Habeas Corpus*, sec. 479.

"The certification does not make the charge of crime, but simply authenticates the copy of that which does make it, and for this purpose it is conclusive": *Kurtz v. State*, 22 Fla. 36, 1 Am. St. Rep. 173.

VIII. Necessity for a Showing on Part of the Demanding State that Accused is a Fugitive from Justice.

In order to give the governor of the asylum state jurisdiction to issue his warrant of extradition, it must be shown that the accused is a fugitive from the justice of the demanding state: *In re Mohr*, 73 Ala. 503, 49 Am. Rep. 63; *Farrell v. Hawley*, 78 Conn. 150, ante, p. 98, 61 Atl. 502; *Hartman v. Aveline*, 63 Ind. 314, 30 Am. Rep. 217; *Dennison v. Christian* (Neb.), 101 N. W. 1045, affirmed in 196 U. S. 637, 25 Sup. Ct. Rep. 795; *Ex parte Lorraine*, 16 Nev. 63; *In re Tod*, 12 S. Dak. 386, 76 Am. St. Rep. 616, 81 N. W. 637, 47 L. R. A. 566; *In re Reggel*, 114 U. S. 642, 5 Sup. Ct. Rep. 1148, 29 L. ed. 250; *Hyatt v. New York*, 188 U. S. 691, 23 Sup. Ct. Rep. 456, 47 L. ed. 657.

IX. What Constitutes a Sufficient Showing that Accused is a Fugitive from Justice.

a. **Nature of the Question and Who Decides It.**—Whether the person demanded is a fugitive from justice of the state making a demand for his extradition is a question of fact which the governor of the state upon whom the demand is made must decide upon such evidence as he may deem satisfactory: *Katyuga v. Cosgrove*, 67 N. J. L. 213, 50 Atl. 679; *In re Tod*, 12 S. Dak. 386, 76 Am. St. Rep. 616, 81 N. W. 637, 47 L. R. A. 566; *In re Cook*, 49 Fed. 833; *Bruce v. Reyner*, 124 Fed. 481; *Roberts v. Reilly*, 116 U. S. 80, 6 Sup. Ct. Rep. 291, 29 L. ed. 544; *Munsey v. Clough*, 196 U. S. 364, 25 Sup. Ct. Rep. 282, 49 L. ed. 575. "Upon the executive of the state in which the

accused is found rests the responsibility of determining in some legal mode whether he is a fugitive from the justice of the demanding state. He does not fail in duty if he makes it a condition precedent to the surrender of the accused that it be shown to him by competent proof that the accused is in fact a fugitive from the justice of the demanding state": *Ex parte Reggel*, 114 U. S. 642, 5 Sup. Ct. Rep. 1148, 29 L. ed. 250.

b. **Degree of Proof that is Deemed Sufficient.**—The statute does not provide what particular kind of evidence should be produced to show that the accused is a fugitive from justice. Though common-law evidence is not necessary, still it must at least be evidence which is satisfactory to the mind of the governor: *Munsey v. Clough*, 196 U. S. 364, 25 Sup. Ct. Rep. 282, 49 L. ed. 575; *State v. Clough*, 72 N. H. 178, 55 Atl. 554. Or as was said in the principal case, any mode of proof which is satisfactory and convincing in effect to the governor and has a reasonable tendency to establish the fact of the accused fleeing from justice is sufficient for that purpose: *Farrell v. Hawley*, 78 Conn. 150, ante, p. 98, 61 Atl. 502.

c. **Right of Accused to be Heard on the Question.**—The accused is not entitled, as of right, to be heard on the question, whether he is a fugitive from justice: *State v. Clough*, 72 N. H. 178, 55 Atl. 554, 67 L. R. A. 946.

d. **What is Sufficient Proof.**

1. **In General.**—The charge that the accused committed a crime in one state, together with the fact that he is found in the state where his extradition is demanded, is *prima facie* evidence that he is a fugitive from justice: *Drinkall v. Spiegel*, 68 Conn. 441, 36 Atl. 830, 36 L. R. A. 486; *In re Kingsbury*, 106 Mass. 223; *People v. Pinkerton*, 17 Hun, 199; *Ex parte Swearingen*, 13 S. C. 74; *Hughes v. Pflanz*, 138 Fed. 980. The copy of the affidavit certified by the governor of the demanding state, setting forth that the accused had fled from the state and was in the state at the time of the commission of the offense, is sufficient to warrant a finding by the governor that the accused is a fugitive from justice: *State v. Clough*, 72 N. H. 178, 55 Atl. 554, 67 L. R. A. 946.

2. **Effect Where Flight is Merely of Constructive Character.**—The rule is now well established that, under section 5278 of the United States Revised Statutes, the governor should, before issuing his warrant of extradition, be satisfied that there is probable cause to believe that at the time when it is charged that the crime was committed, the alleged fugitive from justice was in the state which demands his extradition: *Farrell v. Hawley*, 78 Conn. 150, ante, p. 98, 61 Atl. 502; *Hyatt v. New York*, 188 U. S. 691, 23 Sup. Ct. Rep. 456, 47 L. ed. 651. See, also, subdivision V, a, supra.

3. **Effect Where Accused was in the Demanding State During the Period Limiting the Commencement of a Prosecution.**—Evidence that

the accused, who did not depart from the state, did not conceal himself within the state during the period in which he was amenable to process, under a provision requiring that an indictment be found within two years from the commission of the crime, is evidence tending to establish the fact that he was not a fugitive from justice; the court observing: "This testimony would not go to the sufficiency of the indictment, or to any manner of defense; it would be directed solely to the question whether he was a fugitive from justice—a question of fact. The court, as has been seen, can inquire whether the accused was within the state at the date of the alleged crime, and pursuing its inquiry it can ascertain if, being within the state at that time, he remained within reach of the criminal process during the whole period for which such process could run. If this be established, then it could reasonably be concluded that he is not a fugitive from justice and so not within the provisions of the constitution or of the act of Congress. It is not a question of pleading presented to the court on the trial of the accused, as in *United States v. Cook*, 17 Wall. 168, 21 L. ed. 538, but a question of fact to be disposed of before remanding the accused to the demanding state. He cannot be remanded unless he be a fugitive from justice": *Bruce v. Rayner*, 124 Fed. 481.

4. **Effect Where the Accused Conclusively Proves that He was not in the Demanding State.**—"When it is conceded, or when it is so conclusively proved that no question can be made, that the person was not within the demanding state when the crime is said to have been committed, and his arrest is sought on the ground only of a constructive presence at that time in the demanding state, then the court will discharge the defendant: *Hyatt v. New York*, 188 U. S. 691, 23 Sup. Ct. Rep. 456, 47 L. ed. 657; affirming the judgment of the New York court of appeals in *People v. Hyatt*, 172 N. Y. 176, 92 Am. St. Rep. 706, 64 N. E. 825, 60 L. R. A. 774. But the court will not discharge a defendant arrested under the governor's warrant where there is merely contradictory evidence on the subject of presence in or absence from the state, as habeas corpus is not the proper proceeding to try the question of alibi, or any question as to the guilt or innocence of the accused": *Munsey v. Clough*, 196 U. S. 364, 25 Sup. Ct. Rep. 282, 49 L. ed. 5, 75. But it has also been held that where there is sufficient evidence to make it appear *prima facie* that the accused was a fugitive from justice, the decision of the governor to the effect that he is such a fugitive is not reviewable on habeas corpus, unless it appears from the record itself that he was not or it so appears by such clear and invincible proof that it can be said from the whole evidence that there was no dispute before the governor in regard to that fact: *Dennison v. Christian* (Neb.), 101 N. W. 1045, affirmed in 196 U. S. 637, 25 Sup. Ct. Rep. 795, in a memorandum decision.

X. Necessity for a Showing that the Accused is Charged with the Commission of a Crime in the Demanding State or Country.

a. **Necessity for Charge in Prosecution Against the Accused to be Pending in the Demanding State.**—In order for the person to be extradited there must be some charge in the demanding state against the accused in the form of an indictment, information, affidavit or other form of accusation known to the laws of the demanding state: *In re Mohr*, 73 Ala. 503, 49 Am. Rep. 63; *Ex parte White*, 49 Cal. 433; *Ex parte Spears*, 88 Cal. 640, 22 Am. St. Rep. 341, 26 Pac. 608; *State v. Hufford*, 28 Iowa, 391; *In re Davis*, 122 Mass. 324; *State v. O'Connor*, 38 Minn. 243, 36 N. W. 462; *Smith v. State*, 21 Neb. 552, 32 N. W. 594; *Ex parte Lorraine*, 16 Nev. 63; *Matter of Clark*, 9 Wend. 212; *People v. Brady*, 56 N. Y. 182; *People v. Warden of City Prison*, 83 App. Div. 456, 82 N. Y. Supp. 439; *Ex parte Sheldon*, 34 Ohio St. 319; *Commonwealth v. Deacon*, 10 Serg. & R. 125; *Ex parte Morgan*, 20 Fed. 298. In other words, whether or not the accused is charged with the commission of a crime against the law of the demanding state is a jurisdictional question which is always open on the face of the papers to judicial inquiry: *Barranger v. Baum*, 103 Ga. 465, 88 Am. St. Rep. 113, 30 S. E. 524. But the act charged must be one of a strictly criminal character. Hence a charge of bastardy being of a mixed character and not strictly a criminal prosecution does not justify extradition: *In re Cannon*, 47 Mich. 481, 11 N. W. 280.

b. **Necessity for Proof of Identity of the Accused with the Person Charged with the Crime.**—The person arrested can demand proof of his identity with the person indicted: *People v. Byrnes*, 33 Hun, 98. His identity may be proved by oral evidence: *In re McPhun*, 30 Fed. 57. Or it may be established by his own admission when brought before the commissioner that he was the person named in the complaint and that he executed the note alleged to have been forged: *In re Charleston*, 34 Fed. 531. The rendition warrant is prima facie evidence that the person in custody is the person charged with the crime in the demanding state: *In re Baker*, 21 Wash. 259, 57 Pac. 827. Hence the identity of the prisoner with the person named in the warrant of extradition is always open in habeas corpus, and unless such identity is in some way established he is entitled to be discharged: Monographic note to *State v. Smith*, 100 Am. St. Rep. 38. The Christian name of the fugitive from justice is not, however, material where his identity with the person intended is shown: *People v. Pinkerton*, 17 Hun, 199. And the use of the name "Scrofford" instead of "Serafford" was held immaterial: *In re Serafford*, 59 Hun, 320, 12 N. Y. Supp. 943. On the general subject of *idem sonans*, see the note to *Thornily v. Prentice*, 100 Am. St. Rep. 322.

XI. What Constitutes a Sufficient Showing that the Accused is Charged with the Commission of a Crime.

a. In General.

1. Effect of Indictment or Affidavit as Evidence of Act Being a Crime.—A copy of an indictment accompanying a requisition for the extradition of a fugitive from justice is *prima facie* evidence that the act charged therein is a crime against the laws of the demanding state, and a copy of an information, after a preliminary examination and a holding to answer, has a like effect upon habeas corpus: *In re Van Sciever*, 42 Neb. 772, 47 Am. St. Rep. 730, 60 N. W. 1037. A verified complaint or affidavit charging the fugitive with an infamous crime is also sufficient: *In re Strauss*, 126 Fed. 327. The description of the crime contained in the indictment and the bench-warrant issued thereon, when made a part of the requisition papers, may be used to aid the brief description of the crime: *Hayes v. Palmer*, 21 App. D. C. 450. But a mere recital in the requisition papers that an indictment, duly authenticated, is annexed is not sufficient where no indictment is in fact attached: *Ex parte Hart*, 63 Fed. 249, 11 C. C. A. 165, 28 L. R. A. 801. Where the facts constituting the criminality make a showing of competent legal evidence for either forgery or embezzlement, it is not incumbent upon the foreign country to elect upon which charge they will try him if allowed to be extradited, so long as he is tried upon the facts which appeared in evidence before the commissioners in the extradition proceedings: *Ex parte Bryant*, 167 U. S. 104, 17 Sup. Ct. Rep. 744, 42 L. ed. 94.

2. Nature of the Question Whether the Act is a Crime in the Demanding State or Country.—Whether the accused is substantially charged with a crime against the laws of the state from whose justice he is charged with fleeing, by an indictment or affidavit, is a question of law which is always open upon the face of the papers to judicial inquiry upon an application for discharge under a writ of habeas corpus: *Ex parte Spears*, 88 Cal. 640, 22 Am. St. Rep. 341, 26 Pac. 608; *Roberts v. Reilly*, 116 U. S. 80, 6 Sup. Ct. Rep. 291, 29 L. ed. 544; *Munsey v. Clough*, 196 U. S. 364, 25 Sup. Ct. Rep. 282, 49 L. ed. 575.

3. How Question Whether the Act Charged is a Crime in Demanding State or Country may be Determined.—In determining whether or not a crime is charged in the demanding state, the court must have regard to the laws of that state alone: *Barranger v. Baum*, 103 Ga. 465, 88 Am. St. Rep. 113, 30 S. E. 524.

The general principles of international law require that in international extradition the act on account of which the extradition is demanded be regarded as of a criminal character by both the demanding and asylum nation, but it is not requisite that the act be regarded as an identical crime. It is sufficient if the essential character of the transaction is the same and is made a crime by the laws

of both nations: *Wright v. Henkel*, 190 U. S. 40, 23 Sup. Ct. Rep. 781, 47 L. ed. 948; *In re Reiner*, 122 Fed. 109. Hence a charge of an assault with intent to kill and murder is regarded as practically the same as an assault with intent to commit murder, described in the treaty with Great Britain, and extradition will be allowed for it: *United States v. Piazza*, 133 Fed. 998. Under the treaty with Mexico, printing is writing in the legal sense, so as to make the crime of forgery under the common law: *In re Benson*, 34 Fed. 649.

Inasmuch as there are no common-law crimes of the United States, and under our system of government the laws of the states of the Union provide for the punishment of nearly all crimes and misdemeanors, it is held that the better construction of a treaty provision (treaty of 1842 with Great Britain), which allowed extradition for such crimes "as according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offense had there been committed," taken in connection with a subsequent treaty (that of 1889), which provided for the extradition of persons charged with such crimes as are "punishable by the laws of both countries," is that the required evidence as to the criminality of the charge against the accused must be such as would authorize his apprehension and commitment for trial in that state of the Union in which he is found: *Pettit v. Walshe*, 194 U. S. 205, 24 Sup. Ct. Rep. 657, 48 L. ed. 938; *Wright v. Henkel*, 190 U. S. 40, 22 Sup. Ct. Rep. 781, 47 L. ed. 948; *In re Wright*, 123 Fed. 463; *In re Ezeta*, 62 Fed. 972.

4. **How Laws of the Demanding State or Country are Proved.**—The laws of a foreign country, when necessary to be known, must be proved as a fact: *In re McPhun*, 30 Fed. 57. The printed statutes of the demanding state, purporting to have been published by its authority, are admissible to prove that the act charged against the fugitive from justice is a crime by the law of that state: *Ex parte Sheldon*, 34 Ohio St. 319. "It is immaterial that it does not appear that a certified copy of such laws was furnished to the governor of Georgia. The statute does not require it, and the governor could have insisted, and it is to be presumed did insist, upon the production of whatever he deemed necessary or important properly to inform him on the subject. And the courts of the United States, to whose process the relator has appealed, take judicial notice of the laws of all the states." Thus spoke the supreme court with respect to the question whether the indictment charged a crime against the laws of New York: *Roberts v. Reilly*, 116 U. S. 80, 6 Sup. Ct. Rep. 291, 29 L. ed. 544.

5. **What are Political Crimes Within the Meaning of Treaties.**—The law with respect to the right to extradite for political crimes was very exhaustively discussed by Judge Morrow in *re Ezeta*, 62 Fed. 972. The alleged fugitives from justice were participants in a San Salvador revolution. The court, after announcing its jurisdiction to

determine whether the charges are of a political character, observed: "The testimony shows that they were all committed during the progress of actual hostilities between the contending forces, wherein General Ezeta and his companions were seeking to maintain the authority of the then existing government against the active operations of a revolutionary uprising. With the merits of this strife I have nothing to do. My duty will have been performed when I shall have determined the character of the crimes or offenses charged against these defendants, with respect to that conflict. During its progress, crimes may have been committed by the contending forces of the most atrocious and inhuman character, and still the perpetrators of such crimes escape punishment as fugitives beyond the reach of extradition. I have no authority in this examination to determine what acts are within the rules of civilized warfare and what are not. War, at best, is barbarous, and hence it is said that 'the law is silent during war.'

"What constitutes an offense of a political character has not yet been determined by judicial authority. Sir James Stephens, in his work, *History of the Criminal Law of England* (volume 2, page 71), thinks that it should be 'interpreted to mean that fugitive criminals are not to be surrendered for extradition crimes if those crimes were incidental to and formed a part of political disturbances.' Mr. John Stuart Mill, in the house of commons, in 1866, while discussing an amendment to the act of extradition, on which the treaty between England and France was founded, gave this definition: 'Any offense committed in the course of or furthering of civil war, insurrection, or political commotion': *Hansard's Debates*, vol. 184, p. 2115. In the *Castioni* case, ([1891] 1 Q. B. 149), decided in 1891, the question was discussed by the most eminent counsel at the English bar, and considered by distinguished judges, without a definition being framed that would draw a fixed and certain line between a municipal or common crime, and one of a political character. 'I do not think,' said Denman, J., 'it is necessary or desirable that we should attempt to put into language, in the shape of an exhaustive definition, exactly the whole state of things, or every state of things, which might bring a particular case within the description of an offense of a political character.' In that case, *Castioni* was charged with the murder of one Rossi, by shooting him with a revolver, in the town of Bellinzona, in the canton of Ticino, in Switzerland. The deceased, Rossi, was a member of the state council of the canton of Ticino. *Castioni* was a citizen of the same canton. For some time previous to the murder much dissatisfaction had been felt and expressed by a large number of inhabitants of Ticino at the mode in which the political party then in power were conducting the government of the canton. A request was presented to the government for a revision of the constitution of the canton, and the government having declined to take a popular vote on that question, a number of the citizens of Bellinzona, among whom was *Castioni*, seized the arsenal of the town, from which they

took rifles and ammunition, disarmed the gendarmes, arrested and bound or handcuffed several persons connected with the government, and forced them to march in front of the armed crowd to the municipal palace. Admission to the palace was demanded in the name of the people, and was refused by Rossi and another member of the government, who were in the palace. The crowd then broke open the outer gate of the palace, and rushed in, pushing before them the government officials whom they had arrested and bound. Castioni, who was armed with a revolver, was among the first to enter. A second door, which was locked, was broken open, and at this time, or immediately after, Rossi, who was in the passage, was shot through the body with a revolver, and died very soon afterward. Some other shots were fired but no one else was injured. Castioni fled to England. His extradition was requested by the federal council of Switzerland. He was arrested and taken before a police magistrate, as provided by the statute, who held him for extradition. Application was made by the accused to the high court of justice of England for a writ of habeas corpus. He was represented by Sir Charles Russell, now lord chief justice. The attorney general, Sir Richard Webster, appeared for the crown, and the solicitor general, Sir Edward Clarke, and Robert Woodfall, for the federal council of Switzerland. This array of distinguished counsel, and the high character of the court, commends the case as one of the highest authority. It appeared from an admission by one of the parties engaged in the disturbances 'that the death of Rossi was a misfortune, and not necessary for the rising.' The opinions of the judges as to the political character of the crime charged against Castioni, upon the facts stated, is exceedingly interesting, but I need only refer to the following passages. Judge Denman says: 'The question really is whether upon the facts it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character with a political object, and as part of the political movement and rising in which he was taking part.' Judge Hawkins, in commenting upon the character of political offenses, said: 'I cannot help thinking that everybody knows there are many acts of a political character done without reason, done against all reason; but at the same time one cannot look too hardly, and weigh in golden scales, the acts of men hot in their political excitement. We know that in heat and in heated blood men often do things which are against and contrary to reason; but none the less an act of this description may be done for the purpose of furthering and in furtherance of a political rising, even though it is an act which may be deplored and lamented, as even cruel and against all reason, by those who can calmly reflect upon it after the battle is over.' Sir James Stephens, whose definition as an author has already been cited, was one of the judges, and joined in the views taken as to the political character of the crime charged against Castioni. The prisoner was discharged. Applying, by analogy, the action of the English court in that case to the four cases now before me, under consideration, the

conclusion follows that the crimes charged here, associated as they are with the actual conflict of armed forces, are of a political character."

b. What Acts or Offenses are Embraced Under the Federal Constitutional Provision Respecting Extradition for "Treason, Felony or Other Crime."—The federal constitution provides: "A person charged in any state with treason, felony or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime": U. S. Const., art. 4, sec. 2.

In construing the effect of the words "treason, felony or other crime" as used in the provision just set forth, the United States supreme court in *Ex parte Reggel*, 114 U. S. 642, 5 Sup. Ct. Rep. 1148, 29 L. ed. 250, observed: "It is within the power of each state, except as her authority may be limited by the constitution of the United States, to declare what shall be offenses against her laws; and citizens of other states, when within her jurisdiction, are subject to those laws. In recognition of this right, so reserved by the states, the words of the clause in reference to fugitives from justice were made sufficiently comprehensive to include every offense against the laws of the demanding state, without exception as to the nature of the crime."

The words "treason, felony or other crime" contained in the constitutional provisions referred to embrace every act forbidden and made punishable as a crime by the law of the state or territory making the demand, whether made so by common law or by the statute: Monographic note to *Matter of Fetter*, 57 Am. Dec. 396. The court, in *Re Hooper*, 52 Wis. 699, 58 N. W. 741, on this subject, observed: "The weight of judicial opinion is that these words embrace any act forbidden and made punishable by the laws of the state making the demand: *Kentucky v. Dennison*, 24 How. 66, 16 L. ed. 717; *Taylor v. Tainter*, 16 Wall. 366, 21 L. ed. 287; *Cooley's Constitutional Limitations*, p. 16, note 1; *Brown's Case*, 112 Mass. 409, 17 Am. Rep. 114; *Clark's Case*, 9 Wend. 212; *People v. Brady*, 56 N. Y. 182; *People v. Pinkerton*, 17 Hun, 199; *Hurd on Habeas Corpus*, 597. 'Felonies and misdemeanors, offenses by statute and at common law, are alike within the constitutional provision; and the obligation to surrender the fugitive for an act which is made criminal by the law of the demanding state, but which is not criminal in the state upon which the demand is made, is the same as if the alleged act were a crime by the law of both': *People v. Brady*, 56 N. Y. 182. *Prima facie*, the warrant shows that the act charged was a crime by the laws of Kansas. Besides, in the absence of proof to the contrary, the presumption is that the laws of the state are the same as our own."

Chief Justice Taney, in *Kentucky v. Dennison*, 24 How. 66, 16 L. ed. 717, in which the court was equally divided, observed: "The word 'crime' of itself includes every offense from the highest to the lowest

in the grade of offenses, and includes what are called 'misdemeanors' as well as treason and felony." The decisions in *Morton v. Skinner*, 48 Ind. 123, and *State v. Stewart*, 60 Wis. 587, 50 Am. Rep. 388, 19 N. W. 429, were to the same effect. In *Matter of Vorhees*, 32 N. J. L. 141, it was argued that the constitutional provision did not embrace within its operation "all persons who might be guilty of the minor offenses, such as assaults, libels and the entire train of similar misdemeanors." The court, however, observed: "It is not probable that a state will ever require the surrender of offenders of this grade, but if the demand should be made, and the offense charged be indictable, it is not understood how such demand can be refused. The offense in such case would be a public one, as much so as the commission of the highest crime, and it is embraced in the words of the constitution. It is the right of the sovereignty whose laws have been violated to decide what offenders it will pursue, and the state upon which the demand is made cannot rightfully call in question that decision. In practice, there will be little danger of an abuse of this constitutional prerogative, and the possibility of such abuse is of but slight consideration, in comparison with the eminently great advantage which will result from the limits of such prerogative being so clearly defined as to be in every respect unquestionable. Nor should it pass without remark that if the definition of offenses given in this clause should be restricted to such as existed by law, at the date of the adoption of the constitution, very many crimes of great atrocity would become dispunishable by the flight of the perpetrators of them. Public policy, the security of society, and the regular and perfect dispensation of justice, as well as the established maxims of statutory construction, alike require that the term 'crime' as thus used, should be held to comprehend every violation of law which is of an indictable nature."

c. Who are "Magistrates" Within the Federal Law Relating to Extradition.—A magistrate is a judicial officer having summary jurisdiction in matters of criminal or quasi criminal nature, such as justices of the peace, police judges and American consuls in foreign ports. An assistant police magistrate of a city is a "magistrate" within the meaning of the federal law relating to the extradition of fugitives from justice: *Kurtz v. State*, 22 Fla. 36, 1 Am. St. Rep. 173.

d. Necessity for Charge in Demanding State Against the Accused to be of a Bona Fide Character.

1. Effect of Ulterior Motive or Malice on Part of the Persons Connected with the Extradition Proceedings.—It is within the discretion of the governor to issue or refuse to issue a warrant of extradition where it is sought for ulterior purposes: Monographic note to *Barranger v. Baum*, 68 Am. St. Rep. 133. It is, however, proper for the court to consider the fact that the prosecution is not carried on in the furtherance of public justice, but with a view to vent personal spite or malice: *In re Kelly*, 26 Fed. 852; *Ex parte Slausen*,

73 Fed. 666. In *Grin v. Shine*, 187 U. S. 181, 23 Sup. Ct. Rep. 98, 47 L. ed. 130, it was observed that: "Care should doubtless be taken that the treaty be not made a pretext for collecting private debts, wreaking individual malice, or forcing the surrender of political offenders; but where the proceeding is manifestly taken in good faith, a technical noncompliance with some formality of criminal procedure should not be allowed to stand in the way of a faithful discharge of our obligations."

Though it is within the discretion of the governor to refuse to issue a warrant of extradition where in his opinion it is sought for the purpose of collecting a debt, still where he has issued his warrant, the courts will not inquire into the motive or purpose of the proceeding: In *re Sultan*, 115 N. C. 57, 44 Am. St. Rep. 433, 20 S. E. 375, 28 L. R. A. 294. In other words, evidence of malice or ulterior motives on the part of the prosecuting witness in the foreign country does not invalidate the extradition commitment: In *re Herskovitz*, 136 Fed. 713. So, also, it was said in *Re Herres*, 33 Fed. 165, that: "While the courts should review the proceedings to see that no extradition is consummated upon a mere pretext or to subserve private malice, yet if it appears that a crime has been committed and probable that the accused has fled to this country for refuge, then a spirit of fairness, expecting that the foreign country will treat extradition proceedings from this country in the same spirit, requires that we act reasonably and justly, having reference more to the substance than to the form of the proceedings."

In a very late case in Idaho it was held that the motives which prompted a governor to issue his warrant of extradition are not proper subjects of judicial inquiry, since such an inquiry would be opposed both to the plainest principles of public policy and freedom of action by the executive within his constitutional authority: *Ex parte Moyer* (Idaho), 85 Pac. 897.

2. Effect of Long Delay in Finding Indictment or Instituting Extradition Proceedings.—The fact that it appears from the indictment that the crime was committed more than six years before the finding of the indictment does not preclude a finding that the accused is a fugitive from justice: *State v. Clough*, 71 N. H. 594, 53 Atl. 1086, 67 L. R. A. 946. In this connection, see, also, subdivision IX, d, 3.

In *Ex parte Dennison* (Neb.), 101 N. W. 1045, the extradition proceedings, which were based on an indictment for the crime of receiving and aiding in the concealment of stolen property, knowing it to have been stolen, was commenced twelve years after the alleged flight of the accused, though his whereabouts seemed to have been well known. In habeas corpus proceedings, the delay was argued as a ground for dismissal, but the appellate court merely observed that it was a matter which had been duly considered by the governor and remanded the prisoner.

e. Effect of Conviction of Accused on Constitutional Requirement that He be "Charged" with a Crime.—"The term 'charged with

crime,' as used in the constitution and statute, seems to us to have been used in its broad sense, and to include all persons accused of crime. It would be a very narrow and technical construction to hold that after the accusation, and before conviction, a person could be extradited, while after conviction, which establishes the charge conclusively, he could escape extradition. The object of the provisions of the constitution and statute is to prevent the escape of persons charged with crime, whether convicted or unconvicted, and to secure their return and punishment if guilty. Taking the broad definition of 'charged with crime' as including the responsibility for crime, the charge would not cease or be merged in the conviction, but would stand until the judgment is satisfied. It would include every person accused until he should be acquitted or until the judgment inflicted should be satisfied. Any other construction would prevent the return of escaped convicts upon the charge under which they had been sentenced, and defeat in many instances the ends of justice': *Hughes v. Pflanz*, 138 Fed. 980.

f. What Forms of Pleadings or Process are Necessary in the Demanding State to Constitute a Charge or Criminal Prosecution Against the Accused.

1. Right of Each State to Prescribe the Forms of Pleading in Its Own Jurisdiction.—Each state may prescribe the forms of pleading and process to be used in extradition proceedings, subject to the guaranties of life, liberty and property provided for in the United States constitution: *Ex parte Reggel*, 114 U. S. 642, 5 Sup. Ct. Rep. 1148, 29 L. ed. 250.

2. Immateriality of Technical Defects Where the Papers Substantially Charge a Crime.—The fact that an indictment has been found against the accused is regarded as *prima facie* evidence of a charge of crime against him in the demanding state: *State v. Schlemm*, 4 Harr. (Del.) 577; *In re Van Sciever*, 42 Neb. 772, 47 Am. St. Rep. 730, 60 N. W. 1037; *Matter of Fetter*, 23 N. J. L. 311, 57 Am. Dec. 382; *Ex parte Swearingen*, 13 S. C. 74; *In re Greenough*, 31 Vt. 279; *In re Hooper*, 52 Wis. 699, 58 N. W. 741. But the indictment or other form of accusation filed against the accused in the demanding state must substantially charge him with an extraditable offense, although it need not conform to the technical rules of pleading of the demanding state: *State v. O'Connor*, 38 Minn. 243, 36 N. W. 462; *State v. Goss*, 66 Minn. 291, 68 N. W. 1089; *State v. Clough*, 71 N. H. 594, 53 Atl. 1086, 67 L. R. A. 946; *Matter of Vorhees*, 32 N. J. L. 141; *People v. Byrnes*, 33 Hun, 98; *In re Baker*, 21 Wash. 259, 57 Pac. 827; *In re Roth*, 15 Fed. 506; *Webb v. York*, 79 Fed. 616, 25 C. C. A. 133; *In re Balensi*, 120 Fed. 864; *In re Strauss*, 126 Fed. 327; *Kentucky v. Dennison*, 24 How. 66, 16 L. ed. 717; *Ex parte Reggel*, 114 U. S. 642, 5 Sup. Ct. Rep. 1148, 29 L. ed. 250; *Munsey v. Clough*, 196 U. S. 364, 25 Sup. Ct. Rep. 282, 49 L. ed. 515

The technical sufficiency of the indictment against an alleged fugitive from justice is a matter for the courts of the demanding state: *Hayes v. Palmer*, 21 App. D. C. 450. And the requisition should not be denied because the affidavit or indictment, though sufficient in the demanding state, would not be held good in the asylum state: *Webb v. York*, 79 Fed. 616, 25 C. C. C. 133. The question whether the accused is substantially charged with a crime is one of law: *In re Tod*, 12 S. Dak. 386, 76 Am. St. Rep. 616, 81 N. W. 637, 47 L. R. A. 566; *Bruce v. Rayner*, 124 Fed. 481.

The United States supreme court in a case where the indictment, upon which the extradition was based, had several counts, one of which was insufficient, said: "If it be true, as stated by writers upon criminal procedure (*Bishop's Criminal Procedure*, sec. 429), that each count must be sufficient in itself, and averments in one cannot aid defects in another, it would seem to follow by parity of reasoning that defects in one ought not to impair the sufficiency of another": *Rice v. Ames*, 180 U. S. 371, 21 Sup. Ct. Rep. 406, 45 L. ed. 577.

Where the accused alleges in habeas corpus proceedings that the extradition proceedings are based on an indictment which fails to state facts sufficient to constitute a public offense, the burden is on him to establish such allegation by producing the controlling statute or other proof: *In re Renshaw*, 18 S. Dak. 32, 99 N. W. 83. Where an extradition treaty employed general names, such as murder, arson and the like, in defining the classes of crimes for which persons may be extradited, the question whether a given offense comes within the treaty must be determined by the law as it exists in the two countries at the time the extradition is applied for: *Cohn v. Jones*, 100 Fed. 639. Under the extradition treaty of 1842 with Great Britain, a complaint for the arrest and examination of the accused need not set out the offense with the particularity of an indictment, it being sufficient if it conforms to the requirements of a preliminary complaint under the local law where the accused is found: *In re Herskovitz*, 136 Fed. 713. In *Ex parte Slauson*, 73 Fed. 666, the petitioner was discharged on habeas corpus, the court saying: "Merely to refer to a class of criminal acts is not to charge a specific crime. This is all that has been done in this affidavit. Nor does the affidavit set out important elements of this statutory offense. The warrant is vague and does not inform the prisoner of the character of the crime, nor the time, place or circumstances of its commission, of which every prisoner is entitled to be advised." Where the indictment forming the basis of the extradition fails to state an offense, the accused is entitled to be discharged: *People v. Brady*, 56 N. Y. 182. But before the court in the asylum state is justified in holding the indictment to be so defective as to state no offense, it ought to have presented to it such an extreme case that no other rational conclusion could be reached: *People v. Police Commissioner*, 100 App. Div. 483, 91 N. Y. Supp. 760. Hence, where the indictment accompanying the requisition shows the commission of an offense against the laws of the demanding

state, the court will not, where the offense is larceny, consider whether it described the stolen property with sufficient particularity: *State v. O'Conner*, 38 Minn. 243, 36 N. W. 462. Likewise, it is immaterial that the accompanying affidavit fails to set out a specific date when the embezzlement charged was committed: *In re Keller*, 36 Fed. 681. And a complaint in international extradition charging embezzlement is not fatally defective because it does not use the word "fraudulently" in describing the embezzlement: *Grin v. Shine*, 187 U. S. 181, 23 Sup. Ct. Rep. 98, 47 L. ed. 130. Neither is it material that the indictment does not show an indorsement as a true bill over the signature of the foreman of the grand jury: *Hayes v. Palmer*, 21 App. D. C. 450. A clerical error in the affidavit of the clerk of the court reciting that the indictment was returned "on the second Monday of Feb., A. D. 1892," does not preclude a finding by the governor that the true date was in 1902, where the correct date is apparent from the caption of the indictment and the affidavit of the district attorney: *State v. Clough*, 71 N. H. 594, 53 Atl. 1086, 67 L. R. A. 946. And the mere fact that the affidavit accompanying the requisition papers fails to set forth the facts upon which the statement that the accused is a fugitive from justice is made does not make the affidavit insufficient as evidence upon which the governor may find that he was such a fugitive, even though the evidence might be considered meager or such as to admit of a different conclusion: *Ex parte Reggel*, 114 U. S. 642, 5 Sup. Ct. Rep. 1148, 29 L. ed. 250. Where an affidavit is used as the basis of the proceeding, it must be one that was made in the course of a criminal prosecution: *Ex parte Powell*, 20 Fla. 806. A statement in the affidavit that the accused was "a fugitive from justice," though in some sense a conclusion of law, has been deemed sufficient evidence upon which the governor may find that he was such a fugitive: *State v. Clough*, 71 N. H. 594, 53 Atl. 1086, 67 L. R. A. 946. Where the proceeding is instituted under a statute providing for the arrest of persons charged with the commission of any criminal offense against the laws of another state, which, if committed in the local state, would be a crime, the affidavit must set forth all that is essential to constitute the offense: *Smith v. State*, 21 Neb. 552, 32 N. W. 594.

3. Right to Use Equivalent Expressions in Describing the Crime Charged Against the Accused.—From what has been stated in the preceding subdivision it is apparent that expressions which are equivalent to those required in another state or country in describing the crime may be used, provided, of course, that they substantially describe the crime: *Grin v. Shine*, 187 U. S. 181, 23 Sup. Ct. Rep. 98, 47 L. ed. 130. Hence, an information charging the accused with an assault with intent to kill and murder is sufficient under a treaty provision authorizing the extradition of persons charged with "assault with intent to commit murder": *United States v. Piazza*, 133 Fed. 998.

4. Interchangeable Character of Complaints, Affidavits, Informations and Indictments.—A complaint is not necessarily an affidavit,

but if a jurat be attached and it be properly certified it becomes essentially an affidavit: *State v. Richardson*, 34 Minn. 115, 24 N. W. 354; *Ex parte White*, 39 Tex. Cr. 497, 46 S. W. 639. The United States supreme court has defined an indictment as "the presentation to the proper court under oath, by a grand jury, duly impaneled, of a charge describing an offense against the laws for which the party charged may be punished": *Ex parte Bain*, 121 U. S. 1, 7 Sup. Ct. Rep. 781, 30 L. ed. 489.

A charge of crime by an "information" has been held to be a compliance with the United States statutes regarding the necessity for "indictments found or an affidavit made before a magistrate" in extradition proceedings: *In re Hooper*, 52 Wis. 699, 58 N. W. 741. It was likewise in *People v. Stockwell*, 135 Mich. 341, 97 N. W. 765, said to be a sufficient basis for extradition. And also in *State v. Rowe*, 104 Iowa, 323, 73 N. W. 833. But in *Ex parte Hart*, 63 Fed. 249, 11 C. C. A. 165, 28 L. R. A. 801, it was held that an information is not the equivalent of an indictment, and that where it is merely verified by the prosecuting attorney, who states that he believes its contents to be true and not that they are true, it is not a substitute for an affidavit.

5. Effect Where the Complaint, Affidavit or the Like is Merely Made Upon Information and Belief, though Under Oath.—A crime must be distinctly charged in the criminal proceedings: *People v. Brady*, 56 N. Y. 182. And the charge of crime must be made by persons who are acting under oath: *Grin v. Shine*, 187 U. S. 181, 23 Sup. Ct. Rep. 98, 47 L. ed. 130; *Ex parte Grin*, 112 Fed. 790. A complaint sworn to by a person who does not pretend to have any personal knowledge of the facts or charge contained in the complaint, and who merely states the charge on his information and belief, is insufficient: *Ex parte Rowland*, 35 Tex. Cr. Rep. 108, 31 S. W. 651; *Ex parte Spears*, 88 Cal. 640, 22 Am. St. Rep. 341, 26 Pac. 608. "To authorize the removal of a citizen of Maryland to the state of Washington for trial on a charge of crime," said the court in *Ex parte Hart*, 63 Fed. 249, 11 C. C. A. 165, 28 L. R. A. 801, "something more than the oath of a party unfamiliar with the facts that he believes the allegations of the information to be true should be required, and is demanded by the law. To hold otherwise would enable irresponsible and designing parties to make false charges with impunity against those who may be the subjects of their enmity, and permit them, after they have caused public officials to believe their representations, to secure the arrest, imprisonment and removal of innocent persons on papers regular in character, but without merit and fraudulent in fact."

But an affidavit charging the commission of a crime directly and positively is not vitiated by the conclusion, "as said deponent verily believes": *In re Keller*, 36 Fed. 681. Some of the decisions, however, support the rule that the charge of crime may be made upon information and belief if the affiant or complainant sets forth the sources and

details of his information, so that it may appear that his reasons for believing the accused to be guilty of the offense charged are based upon something more than mere rumor or suspicion: *Ex parte Smith*, 3 McLean, 121, Fed. Cas. No. 12,968; *Ex parte Lane*, 6 Fed. 34. The supreme court of the United States in *Rice v. Ames*, 180 U. S. 371, 21 Sup. Ct. Rep. 406, 45 L. ed. 577, in passing upon the sufficiency of the complaint made on information and belief by the foreign officer before the United States commissioner in a case of international extradition, said: "A citizen ought not be deprived of his personal liberty upon an allegation which, upon being sifted, may amount to nothing more than a suspicion. While authorities upon this subject are singularly few, it is clear that a person ought not to be arrested upon a criminal charge, upon less direct allegations than are necessary to authorize the arrest of a fraudulent or absconding debtor: *Smith v. Luce*, 14 Wend. 237; *In re Bliss*, 7 Hill, 187; *Proctor v. Prout*, 17 Mich. 473. So, too, in applications for injunctions, the rule is that the material facts must be directly averred under oath by a person having knowledge of such facts: *Waddell v. Bruler*, 4 Edw. Ch. 671; *Armstrong v. Sanford*, 7 Minn. 49 (Gil. 34). We do not wish, however, to be understood as holding that, in extradition proceedings, the complaint must be sworn to by persons having actual knowledge of the offense charged. This would defeat the whole object of the treaty, as we are bound to assume that no foreign government possesses greater power than our own to order its citizens to go to another country to institute legal proceedings. This is obviously impossible." Then, after adverting to the statutory provisions respecting the admissibility of the properly authenticated proceedings had in the foreign country, the court further observed: "If the officer of the foreign government has no personal knowledge of the facts, he may with entire propriety make the complaint on information and belief, stating the sources of his information and the grounds of his belief, and annexing to the complaint a properly certified copy of any indictment or equivalent proceeding which may have been found in the foreign country, or a copy of the depositions of witnesses having actual knowledge of the facts, taken under the treaty and act of Congress. This will afford ample authority to the commissioner for issuing the warrant."

6. Right to Amend Papers After Hearing of the Extradition Proceedings.—The United States commissioner, before whom the proceedings for extradition have been heard, cannot amend the complaint or warrant, or supply defects by his certificate after the case is closed and a writ of certiorari is served upon him to produce the record of the proceedings had before him: *Ex parte Lane*, 6 Fed. 34.

XII. Manner of Conducting Extradition Proceedings and Right of Accused to be Heard Therein.

a. Degree of Technicality with Which the Proceedings are Conducted.—International extradition proceedings are conducted under the auspices of the federal government: *Ex parte Royall*, 117 U. S.

241, 6 Sup. Ct. Rep. 734, 29 L. ed. 868; *United States v. Rauscher*, 119 U. S. 407, 7 Sup. Ct. Rep. 234, 30 L. ed. 425. The complaint in international extradition may be based upon telegraphic information: *Ex parte Van Hoven*, 4 Dill. 415, Fed. Cas. No. 16,859; *In re Roth*, 15 Fed. 506; *In re Thomas*, 12 Blatchf. 570, Fed. Cas. No. 13, 887. The substance and not the mere form of the proceeding should be considered: *In re Herres*, 33 Fed. 165. "The old doctrine that proceedings for the extradition of an alien are to be conducted with extreme technicality has long since been abandoned. The investigation before the commissioner is not to be treated as if it were a trial before a petit jury": *In re Breen*, 73 Fed. 458; *In re Balensi*, 120 Fed. 864. No preliminary requisition from the demanding foreign government is now required in order to give jurisdiction to a United States commissioner to conduct an international extradition proceeding. And it is not improper for a United States judge to make a warrant of arrest in such a proceeding returnable before another officer, such as a United States commissioner, having the same power and jurisdiction to act: *Grin v. Shine*, 187 U. S. 181, 23 Sup. Ct. Rep. 98, 47 L. ed. 130.

b. Right of Accused to be Heard in His Own Defense.—Under section 5278 of the United States Revised Statutes, providing for extradition, no hearing before the governor to whom the requisition is addressed and no notice to the person charged with the crime is required as a preliminary to the issuance of a warrant of extradition: *Farrell v. Hawley*, 78 Conn. 150, ante, p. 98, 61 Atl. 502. In interstate extradition proceedings the accused has no constitutional right to be heard before the governor on the question whether he has been substantially charged with a crime and whether he is a fugitive from justice: *Munsey v. Clough*, 196 U. S. 364, 25 Sup. Ct. Rep. 282, 49 L. ed. 515. He is not entitled to submit evidence in his own behalf as a strict matter of right: *People v. Hyatt*, 172 N. Y. 176, 92 Am. St. Rep. 706, 64 N. E. 825, 60 L. R. A. 774. As was said by Mr. Justice Brewer in *Matter of Strauss*, 197 U. S. 324, 25 Sup. Ct. Rep. 535, 49 L. ed. 774: "An extradition defendant is not put on trial upon any writ which is issued for the purposes of extradition, any more than he is upon the warrant which is issued by the justice of the peace directing his arrest."

It has, however, been held that under the terms of the treaty with Great Britain of 1842 that a fugitive is entitled to introduce such evidence as would be appropriate to a hearing, having reference to a commitment for a future trial: *In re Wadge*, 15 Fed. 864; *In re Kelley*, 25 Fed. 268. "Persons charged with crime in foreign countries, who have taken refuge here, are entitled to the same defenses as others accused of crime within our own jurisdiction": *Grin v. Shine*, 187 U. S. 181, 23 Sup. Ct. Rep. 98, 47 L. ed. 130. It is not, however, the practice to receive depositions of foreign witnesses taken abroad on the part of the defense in international extradition: *In re*

Wadge, 15 Fed. 864; *Oteiza v. Jacobus*, 136 U. S. 330, 10 Sup. Ct. Rep. 1031, 34 L. ed. 464.

Technical objections to documents offered on the part of the prosecution in international extradition cases are not given favorable consideration: *Neely v. Henkel*, 180 U. S. 126, 21 Sup. Ct. Rep. 308, 45 L. ed. 457. Documents or copies thereof should be properly authenticated in order to be received in evidence: *Roberts v. Reilly*, 116 U. S. 80, 6 Sup. Ct. Rep. 291, 29 L. ed. 544. The competency of depositions as evidence of criminality in international extradition is determined by the act of Congress: *In re Charleston*, 34 Fed. 531.

c. Effect of Waiving Right to Produce Evidence on Hearing of Habeas Corpus.—Where the accused, after the issuance of the warrant of extradition sues out a writ of habeas corpus but waives his right to produce evidence showing that he was not a fugitive from justice, he is concluded by the *prima facie* case made out of the requisition papers: *Munsey v. Clough*, 196 U. S. 364, 25 Sup. Ct. Rep. 282, 49 L. ed. 515.

d. Necessity for Documents in Foreign Language to be Translated. In order to render documents in foreign languages admissible in international extradition proceedings, they should be accompanied by an accurate translation which is verified by the translator by his oath taken before a proper officer: *In re Henrich*, 5 Blackf. 414, Fed. Cas. No. 6369.

e. Right to Adjourn the Proceedings.—In international extradition cases the commissioner may, in his discretion, grant reasonable adjournments to enable testimony to be produced: *In re MacDonnell*, 11 Blatchf. 79, Fed. Cas. No. 8771. And the United States commissioner is not prohibited by a state statute limiting continuances in proceedings before justices of the peace and examining magistrates to ten days, from continuing the proceedings for a period over ten days: *Rice v. Ames*, 180 U. S. 371, 21 Sup. Ct. Rep. 406, 45 L. ed. 577. But the commissioner is under no obligation to adjourn the proceedings for the purpose of enabling the accused to obtain testimony upon commissions or depositions from foreign countries: *In re Wadge*, 15 Fed. 864.

f. Quantum and Degree of Proof Necessary to be Adduced in International Extradition Proceedings.—In order to warrant the extradition of a fugitive from a foreign country, the evidence need not be conclusive nor absolutely convincing of the guilt of the accused, it being sufficient if there is competent legal evidence and probable cause for believing the accused to be guilty of the offense charged against him: *In re MacDonnell*, 11 Blatchf. 79, Fed. Cas. No. 8771; *In re Risch*, 36 Fed. 546; *In re Charleston*, 34 Fed. 531; *United States v. Piazza*, 133 Fed. 998; *Benson v. McMahon*, 127 U. S. 457, 8 Sup. Ct. Rep. 1240, 32 L. ed. 234; *Ornelas v. Ruiz*, 161 U. S. 502, 16 Sup. Ct. Rep. 689, 40 L. ed. 787. The guilt or innocence of the accused is not to be determined in the extradition proceeding: *Hyatt v. People*,

188 U. S. 691, 23 Sup. Ct. Rep. 456, 47 L. ed. 657. Under the statutes of the United States providing for the extradition of persons from foreign countries occupied by or under the control of the United States, it is the sole function of the judge to determine the question of probable cause on evidence which is competent under our laws: *Neely v. Henkel*, 180 U. S. 109, 21 Sup. Ct. Rep. 102, 45 L. ed. 448. But the legal requirements of testimony are not always demanded. Thus, in *Re Orpen*, 86 Fed. 760, a dying declaration of a woman upon whom a criminal abortion had been performed was admitted in evidence in foreign extradition for murder, although the declaration did not in terms set forth that it was made by the deceased under a sense of impending death, it being considered sufficient to show probable cause for believing that the prisoner, a doctor, had committed the crime.

XIII. Right of Accused to Obtain Bail Pending the Extradition Proceedings.

With respect to the question whether the alleged fugitive from justice is entitled to bail pending the final determination of the extradition proceedings, the United States supreme court in the recent case of *Wright v. Henkel*, 190 U. S. 40, 23 Sup. Ct. Rep. 781, 47 L. ed. 948, after a review of the various statutes which were urged to have a bearing on the subject, said: "The demanding government, when it has done all that the treaty and law require it to do, is entitled to the delivery of the accused on the issue of the proper warrant, and the other government is under obligation to make the surrender an obligation which it might be impossible to fulfill if release on bail were permitted. The enforcement of the bond, if forfeited, would hardly meet the international demand; and the regaining of the custody of the accused obviously would be surrounded with serious embarrassment. And the same reasons which induced the language used in the statute would seem generally applicable to release pending examination. The subject was considered by the district court of Colorado in the *Case of Carrier*, 57 Fed. 578, and *Hallett, J.*, held that the matter of admitting to bail was not a question of practice; that it was dependent on statute; that although the statute of the United States in respect of procedure in extradition did not forbid bail in such cases, that was not enough, as the authority must be expressed; and that as there was no provision for bail in the act, bail could not be allowed.

"And Judge Lacombe, in the present case, stated that the application to bail in such cases had, on several occasions, been made to the circuit court, and that they had been uniformly denied.

"In *Queen v. Spilsbury*, [1898] 2 Q. B. 615, it was held that the queen's bench had, 'independently of statute, by the common law, jurisdiction to admit to bail,' but that was a case arising under the fugitive offender's act [44 & 45 Vict., c. 69], and the distinction existing ordinarily between rendition between different parts of her

majesty's dominions and cases arising under the extradition acts was pointed out. The court, while ruling that the power to admit to bail existed, held that, as matter of judicial discretion, it ought not to be exercised in that case.

"We are unwilling to hold that the circuit courts possess no power in respect of admitting to bail other than as specifically vested by statute, or that, while bail should not ordinarily be granted in cases of foreign extradition, those courts may not in any case, and whatever the special circumstances, extend that relief. Nor are we called upon to do so, as we are clearly of opinion, on this record, that no error was committed in refusing to admit to bail, and that, although the refusal was put on the ground of want of power, the final order ought not to be disturbed."

Bail was refused in *Re Wright*, 123 Fed. 463, which was a phase of the case quoted from above. The question arose but was not decided in *Re Farez*, 7 Blatchf. 345, Fed. Cas. No. 4644.

With respect to interstate extradition, bail was allowed pending an appeal from the denial of a writ of habeas corpus in *Ex parte Hart*, 63 Fed. 249, 11 C. C. A. 165, 28 L. R. A. 801, though there appears to have been no contest about the matter. But bail was refused in *Ex parte Erwin*, 7 Tex. App. 288.

In *Ex parte Wall*, 84 Miss. 783, 38 South. 628, the court in refusing bail observed: "There is an obvious distinction between cases of arrest and examination for commitment to await extradition demand and warrant, and cases arising on habeas corpus after arrest on executive warrant for extradition." In the case just cited the accused was held under an executive warrant for extradition.

Some of the states have statutes providing for the arrest of persons charged with the commission of offenses in other states, and provide for the allowance of bail in such cases.

XIV. What the Warrant of Extradition Should Show.

The warrant of extradition must bear on its face the evidence that it was duly issued, and should set forth or recite the indictment or affidavit upon which it is founded: In *re Doo Woon*, 9 Saw. 417, 18 Fed. 898. It is not necessary that copies of the indictment, affidavit or other records be annexed to it. It is sufficient if the jurisdictional facts are recited on its face: *State v. Richardson*, 34 Minn. 115, 24 N. W. 354. It is not necessary that the warrant contain an express recital that the governor found that the accused was a fugitive from justice. The issuance of the warrant upon the demand made upon that ground is sufficient to justify the presumption that the governor so found, until that presumption is overthrown by proof to the contrary: *Ex parte Dennison* (Neb.), 101 N. W. 1045. The warrant need not contain a formal statement of all the facts upon which it issues: *State v. Clough*, 71 N. H. 594, 53 Atl. 1086, 67 L. R. A. 946.

In *Ex parte Dawson*, 83 Fed. 306, 28 C. C. A. 354, the circuit court of appeals said: "While it is not necessary to the sufficiency of an

extradition warrant, when attacked on habeas corpus, that it shall set out in full a copy of the indictment or affidavit upon which it is based, or that it be accompanied by such affidavit or indictment, yet a warrant for the arrest and return of the fugitive criminal must recite or set forth, in substance, the evidence necessary to authorize the state executive to issue it; and where the requisition, and the copy of the indictment accompanying it, are made a part of the return, and the warrant alone, as in this case, is before the court, it must show (1) that a demand by requisition has been made for the party in custody, as a fugitive from justice; (2) that the requisition was accompanied by a copy of an indictment or affidavit charging the commission of an offense; (3) that the copy of such indictment or affidavit was certified by the governor of the state making the demand as authentic: *Roberts v. Reilly*, 116 U. S. 80, 6 Sup. Ct. Rep. 291, 29 L. ed. 544; *Ex parte Reggel*, 114 U. S. 642, 5 Sup. Ct. Rep. 1148, 29 L. ed. 250; *In re Doo Woon*, 18 Fed. 898, 9 Saw. 417; *Ex parte Smith*, 3 McLean, 121, Fed. Cas. No. 12,968; *People v. Donohue*, 84 N. Y. 438." The decision in *Re Sylvester*, 21 Wash. 263, 57 Pac. 829, was to the same effect.

The extradition warrant is valid if it recites without setting forth in full the affidavit upon which it is issued. The correct rule being that where the executive issuing the warrant withholds the papers on which its issuance was based, then the warrant itself must be relied on for the necessary evidence to show that the essential conditions requisite to a valid issuance exist, but it is sufficient if the recitals therein are what the law requires: *Ex parte Stanley*, 25 Tex. App. 372, 8 Am. St. Rep. 440, 8 S. W. 645. The warrant need not, however, recite that the governor of the demanding state produced, or caused to be produced, a copy of an indictment or affidavit before a magistrate, showing that the accused had been charged with having committed a crime: *Ex parte Moscato*, 44 S. C. 335, 22 S. E. 308.

XV. Effect of the Various Recitals in the Executive Warrant.

The warrant of the governor in extradition proceedings is presumptive, but not conclusive, evidence that the person is a fugitive from justice: *People v. Hyatt*, 172 N. Y. 176, 92 Am. St. Rep. 706, 64 N. E. 825, 60 L. R. A. 774. In other words, the issuance of the warrant is prima facie evidence that the accused is a fugitive from justice: *Ex parte Moyer* (Idaho), 85 Pac. 897; *State v. Justus*, 84 Minn. 237, 87 N. W. 770, 55 L. R. A. 325; *Ex parte Dennison* (Neb.), 101 N. W. 1045; *Katynga v. Cosgrove*, 67 N. J. L. 213, 50 Atl. 679; *In re Cook*, 49 Fed. 833; *Bruce v. Rayner*, 124 Fed. 481. The recitals in the warrant setting forth that the accused stands charged with a specified crime are sufficient on habeas corpus: *Ex parte Lewis*, 79 Cal. 95, 21 Pac. 553. Indeed, it has been held that the issuance of the warrant amounts to a determination that the accused was substantially charged with the commission of a crime: *Ex parte Moyer* (Idaho), 85 Pac. 897. It may be said, in a general way, that the warrant is prima

facie evidence of the existence of every fact which the executive was obliged to determine before issuing it: *In re Kingsbury*, 106 Mass. 223; *People v. Police Commissioner*, 100 App. Div. 483, 91 N. Y. Supp. 760; *Gillis v. Leekly*, 38 Wash. 156, 80 Pac. 300.

XVI. Right of Executive to Revoke His Extradition Warrant.

The governor of a state may revoke his warrant for the surrender of the alleged fugitive from justice at any time before he is taken out of the state: *Barranger v. Baum*, 103 Ga. 465, 68 Am. St. Rep. 113, 30 S. E. 524; *State v. Toole*, 69 Minn. 104, 65 Am. St. Rep. 553, 72 N. W. 53, 38 L. R. A. 224; *In re Sultan*, 115 N. C. 57, 44 Am. St. Rep. 433, 20 S. E. 375, 28 L. R. A. 294; *Work v. Corrington*, 34 Ohio St. 64, 32 Am. Rep. 345.

XVII. Status and Rights of the Agent Appointed to Receive the Fugitive on Behalf of the Demanding State.

The agent appointed by the state to demand and receive the alleged fugitive from justice is not a United States officer: *Robb v. Connolly*, 111 U. S. 624, 4 Sup. Ct. Rep. 544, 28 L. ed. 542. When a legally extradited fugitive from justice is delivered to the agent of the demanding state and is carried out of the limits of the asylum state, and there escapes and returns to the asylum state, he may be rearrested upon an alias warrant issued by the governor without a new requisition from the governor of the demanding state, but the extradition agent has no right to gather an armed force and rearrest him by violence, but he may use all precautions to prevent his escape and may follow in hot pursuit of recapture: *Ex parte Hobbs*, 32 Tex. Cr. Rep. 312, 40 Am. St. Rep. 782, 22 S. W. 1035.

XVIII. Effect of Delay in Removing the Prisoner After Allowance of Extradition.

In *Re Dawson*, 101 Fed. 253, the prisoner who waived examination in the extradition proceedings instituted by Great Britain to return him to South Africa was imprisoned for over two months, whereupon he applied for release because of the delay of the British authorities in sending an officer for him. He was released, although it was said that officer was on the way.

XIX. Right to Make a Second Application for Extradition After the Refusal of the First One.

Res adjudicata does not apply to judgments on habeas corpus in cases of extradition: *Kurtz v. State*, 22 Fla. 36, 1 Am. St. Rep. 173. Where the first application for extradition is refused on the ground that the evidence presented is insufficient, it leaves the proceeding in the same condition as in other cases of preliminary examination, and there may be a second inquiry: *In re Kelly*, 26 Fed. 852; *Muller's Case*, Fed. Cas. No. 9913. But in *Re White*, 45 Fed. 237, where

the prisoner had been discharged on habeas corpus on one occasion by a state judge and also by the federal judge, and he urged the several discharges as a bar to a subsequent application for his extradition, the court said: "The main ground on which the release of the prisoner is sought is that, by the proceedings had before Judge Kerr, and the order therein made, the matter at bar has been fully and finally adjudicated, and stands *res judicata*. It will be noticed that none of the proceedings wherein White was discharged upon habeas corpus related to the complaint and warrant of arrest issued by the judge of the municipal court of Eau Claire City, under date of January 17th. The contention is that the several proceedings were in fact based upon the one offense, and that the orders heretofore made, releasing him from the arrests made upon the prior proceedings must be deemed to be adjudications upon the question whether White can be extradited for trial for that offense. Counsel have very fully and ably presented their views on these questions, and have cited many authorities thereon. I shall not attempt to quote therefrom or to point out wherein differences exist in the facts of the different cases. It is entirely possible that the plea of *res adjudicata* might, under some circumstances, be available in a case wherein extradition was sought upon a second or third warrant issued for that purpose. Thus, if upon an arrest made upon a warrant granted by the governor, the question of identity of the person arrested with the one charged with an offense had been properly presented, heard and determined upon a return to a writ of habeas corpus, the decision being in favor of the one arrested, it might be that the same could be successfully pleaded to a second arrest. Thus, if in this case it appeared that upon the hearing before Judge Kerr, or upon that before Judge Nelson, the question of identity had been presented and determined in favor of the relator, it would seem that such decision would be final, and that the relator should not again be called upon to meet that issue. If, however, the person arrested is released upon habeas corpus upon the ground of informality or mistakes in the proceedings, or upon some ground which does not decide the question whether upon the real facts the one arrested should be extradited for trial, such release, not being upon the merits, should not be a bar to an arrest upon perfected papers or proceedings."

XX. Right to Question the Regularity of the Extradition After Removal to the Demanding State.

The regularity of the extradition proceedings can only be attacked in the asylum state, and cannot be questioned on habeas corpus after the alleged fugitive has been delivered into the jurisdiction of the demanding state: *Ex parte Moyer* (Idaho), 85 Pac. 897; *Ex parte Baker*, 43 Tex. Cr. Rep. 281, 96 Am. St. Rep. 871, 65 S. W. 91; *In re Cook*, 49 Fed. 833; *Cook v. Hart*, 146 U. S. 183, 13 Sup. Ct. Rep. 40, 36 L. ed. 934. Hence after the trial and conviction of the petitioner upon the charge set forth in the extradition proceedings neither the

state nor federal courts will consider on habeas corpus the question whether the state court illegally obtained control of his person by reason of the agent of the state refusing to allow the petitioner to there procure a writ of habeas corpus: *Eaton v. West Virginia*, 91 Fed. 760, 34 C. C. A. 68. Likewise a prisoner who voluntarily accompanies an officer into the state without use of extradition papers issued in his case cannot afterward object to the regularity of such papers: *State v. Cutshall*, 109 N. C. 764, 26 Am. St. Rep. 599, 14 S. E. 107.

XXI. Right of Courts to Review the Action of the Executive in Extradition Proceedings.

The writ of habeas corpus is the method by which the validity of extradition proceedings is usually tested. The extent of the inquiry on habeas corpus with respect to extradition proceedings was treated in the very recent monographic note on that subject attached to *State v. Smith*, 100 Am. St. Rep. 36.

HAZARD POWDER COMPANY v. SOMERVILLE MANUFACTURING COMPANY.

[78 Conn. 171, 61 Atl. 519.]

RIPARIAN RIGHTS—Use of Water for Power.—As against a lower an upper proprietor having riparian rights has clearly the right to use the water for power, and this involves the right to detain it long enough, and to discharge it in such manner as will make it useful, but such detention and discharge must be reasonable under all the circumstances of the particular cases. (p. 149.)

RIPARIAN RIGHTS—Reasonable Use of Water.—The question in a given case whether the use of water by an upper riparian owner is reasonable is essentially one of fact, but the conclusion of the trial court upon the question of reasonable use may be reviewed by the appellate court. (p. 150.)

RIPARIAN RIGHTS—Reasonable Use of Water—Evidence.—Upon the question of reasonable use of water by an upper riparian owner, evidence of the custom and usage of other persons carrying on the same business on the same or a like stream in reference to the length of the time of working runs is admissible. (p. 150.)

RIPARIAN RIGHTS—Reasonable Use of Water—Evidence.—When the question of reasonable use of water by a riparian owner under given circumstances is in issue, the usage, custom, habit, or conduct of others under similar circumstances is relevant as evidence upon that issue. (p. 150.)

T. M. Maltbie and W. W. Hyde, for the appellant.

A. F. Eggleston and M. H. Holcomb, for the appellee.

172 TORRANCE, C. J. The plaintiff is a corporation engaged in the manufacture of gunpowder in mills at Scitico and Hazardville, in this state, upon the Scantic river; while the defendant is a corporation engaged in the manufacture of woolen goods in a mill at Somerville on said river, above the mills of the plaintiff; and the principal dispute between them in this case is whether the defendant, as an upper riparian proprietor, has made an unreasonable use of the water as against the plaintiff, a lower riparian proprietor.

The complaint alleges, in substance, that the defendant has wrongfully and unreasonably obstructed, detained and used the waters of said river, and has thereby prevented them from flowing to the plaintiff's mills as they had been accustomed to flow, to the great injury of the plaintiff.

The answer denies such wrongful detention and use, and further sets up certain facts going to show that such use and detention of water by the defendant, as was alleged in the answer, was a reasonable and necessary use and did not constitute any invasion of the plaintiff's rights. The reply denies the facts so set up.

Upon the facts stated in the finding the court found the **173** issues for the defendant, and rendered judgment in its favor. The following is a somewhat condensed statement of the controlling facts found: The plaintiff and its predecessors in title have carried on the manufacture of powder at Hazardville and Scitico for more than fifty years. It employs about ninety work people at Hazardville and ten at Scitico. In making powder the plaintiff uses five kinds of mills, called pulverizer, wheel, press, cracker, and glaze mills, respectively. The wheel mills are run by the plaintiff day and night; the glaze mills are sometimes run a portion of the night; the other mills run only a few hours in the daytime. For its night work the plaintiff employs two men at Scitico and five at Hazardville. These night operations of the plaintiff are carried on for the sole purpose of increasing the daily output of powder.

The mill-site of the defendant has been used and occupied as such for more than one hundred years; at first by a sawmill and grist-mill, to which was added later a fulling-mill, subsequently changed into a woolen-mill. Since 1883 the defendant has carried on there the manufacture of woolen goods, and it now employs more than three hundred persons

in its mills. The defendant and its predecessors in title have always operated the mills on said location during the usual working hours of the day only, closing the gates at night and thus filling the pond for use next day; and such detention is necessary to the successful prosecution of the defendant's business. The dam of the defendant has existed in its present condition, except for renewals of planking, since 1836. Prior to 1897 the defendant used upon said dam flash-boards about nine inches in height, and since 1897 it has used thereon flash-boards about seventeen inches in height. Since 1897 there has been no change in the manner of using said stream by the defendant, except that the capacity of its pond has been increased by said increase of height in the flash-boards. The defendant's pond has an area of about fifty-two acres and the fall of defendant's privilege is about twelve feet. The defendant runs its mills week days, beginning at half-past 6 A. M. and shutting down at 6 P. M., with ¹⁷⁴ three-quarters of an hour nooning, excepting Saturdays, when its mills stop at 1 o'clock P. M.; and occasionally upon holidays its mills are shut down. The defendant detains the water of the river during the night, so far as the capacity of its pond will permit, for use the following day or next working day; "and during the working hours of each work-day the defendant discharges through its wheel or wheels the accumulated flow of said river and distributes it evenly through said working hours. . . . The water-wheel capacity of the defendant's mills before 1897 aggregated 196 horse-power, which in the year 1897 was increased to 247 horse-power, consisting of a 26 horse-power Hunt wheel, a 30 horse-power Houston wheel, two McCormack wheels of 58.5 horse-power each, and a 74 horse-power Hunt wheel. The water-wheels of defendant are so arranged that they can be run separately, or any two, three, four, or five of them can be run in combination. The defendant always runs the 26 horse-power Hunt wheel, and next, if there is sufficient water, the 30 horse-power Houston wheel; and then, if there is sufficient water, the No. 1 58.5 horse-power McCormack wheel; and next, if there is sufficient water, the No. 2 58.5 horse-power McCormack wheel; and last of all, if there is water enough, the 74 horse-power Hunt wheel; so that the defendant's mills, so far as its water-wheels are concerned, are 26 horse-power, 56 horse-power, 114½ horse-power, 173 horse-

power, or 247 horse-power mills, depending upon the amount of water flowing in the stream. The water-wheel installation of the defendant is most excellently arranged and is well adapted to the size, capacity and varying flows of the Scantic river, and the arrangement and use by the defendant of said water-wheels are wise, prudent and reasonable. The said water-wheel capacity might properly be increased to about 360 horse-power to utilize the high flows of the river during the usual working hours of the day. The defendant's use of the water of said river and of its water-wheels has been invariably adapted to the size and capacity of said stream, and to all of the varying flows therein, and said use has been and is an entirely reasonable ¹⁷⁵ use; and in its manner of use it has not only followed the custom of mills upon the Scantic river, but the universal custom of textile mills throughout New England, and of all other industries, excepting paper-mills, powder-mills, and some rolling-mills, and some electric light plants, which run day and night. Upon the trial of this cause the plaintiff claimed that the mill owners on the Scantic river, in the use of the waters of the stream for power, previous to 1897, had not exceeded what the plaintiff's expert called the 'standard development' of the stream; and I find that what is thus meant by the 'standard development' of a stream is the power which the stream affords by a natural, unobstructed flow, to be used in a continuous twenty-four hour daily use. And I further find that a wheel development of a mill privilege computed upon the so-called 'standard development' theory will result in a less number of horse-power than a development of the same privilege based upon a ten or ten and three-quarters hours' use of the concentrated flow. And this I find is true of the defendant's privilege. I find that the several mill owners on said stream, with the exception of the defendant and one other, have, up to 1897, been using at their several privileges water-wheels rated at less horse-power than the computations of the plaintiff's experts accord the same privileges under the 'standard development' theory. And I find there has been no custom of such 'standard development' on said stream. The Scantic river is a sensitive stream, quick to feel the effect of rain storms and melting snow and ice, and the high flows of water thus produced are quick to run off. Said stream has always been subject

to very high and very low flows, sometimes pouring over the dam in large volume, and at other seasons of the year being so extremely low that the ponds would not fill by detaining the water during the night." The stages of low water occur at all seasons of the year, but more particularly in summer and winter. There are, besides the plaintiff's, nine developed water sites, with dams and artificial ponds on the Scantic river and a branch of it, six of them being above the defendant's mills and two of them below, one of ¹⁷⁶ which two is a paper-mill. This paper-mill runs day and night, but all the others, the plaintiff's mill excepted, run in the daytime only, closing their gates at night and detaining the water for use as the defendant does. This has been "the custom of mills on the Scantic river." It is the "custom of all water textile mills in New England to run during the day, running fifty-eight to sixty hours per week, with a half-holiday on Saturday, shutting down nights and detaining the water for use the following day. The plaintiff failed to prove that there was a greater diminution from its maximum daily production of powder since the year 1897 than during the years preceding, and the plaintiff admitted, and I find it to be a fact, that the plaintiff suffered no diminution in its product, and sustained no damage by reason of the defendant's closing its mills Saturday afternoon. The plaintiff's ponds at both of its plants are small; and grass and weeds are growing up in the center of the one at Scitico, and this latter one has become largely filled up, and also smaller in area, and has failed to store the water let down from the mills above it. It is not sufficient to retain for use during the night the ten and three-fourths hours' flow of water let down to it by the upper riparian proprietors. It is entirely feasible for the plaintiff, if it desires to run nights, to raise its Scitico dam, or erect a new dam at the site of the present dam at Scitico, so as to create a pond of sufficient capacity to retain and hold all the waters of the river let down by the upper mill owners during the usual working hours of the day; and such a pond would enable the plaintiff to operate its works nights as well as days to the extent of the entire flow of the waters in said stream. The raising of said dam four and one-fourth feet higher would overflow about twenty-five acres of land. The injury which the plaintiff alleges it suffered is imputable to the insufficiency

of its present privilege at Scitico, and is not the result of detention of water by the defendant, as complained of by the plaintiff. The defendant has not diverted the water of said stream, and has never by its use and detention of the waters thereof had a purpose of injuring the plaintiff. It has not acted maliciously or wantonly, ¹⁷⁷ but has acted with the sole purpose of obtaining the beneficial use of the stream for its own mills, and I find that all the acts of the defendant in endeavoring to obtain such beneficial use have been and are reasonable."

Upon these facts the court held that the detention and discharge of the waters of Scantic river, made by the defendant in the manner and under the circumstances detailed in the finding, was a reasonable, and therefore a rightful, use of said waters as against the plaintiff; and whether the court erred in so holding is the principal question in the case.

Upon the facts found the case involves, not the right of an upper riparian proprietor to divert or pollute the water, to the prejudice of a lower proprietor, nor the right of such upper proprietor to wantonly or maliciously detain, discharge or use the water; but merely his right to detain the water for a reasonable time and to discharge it in a reasonable manner for the purpose and in the process of utilizing it for power.

As against a lower, an upper riparian proprietor has clearly the right to use the water for power, and this involves the right to detain it long enough, and to discharge it in such a manner as will make it useful; but he has no right to detain or to discharge the water in an unreasonable manner. In cases like the present, for determining the question whether the use of the water by the upper riparian proprietor was rightful, the only general rule which the law has laid down, or perhaps can lay down, is that the detention, discharge and use must be reasonable under the circumstances of the particular case: *Keeney & Wood Mfg. Co. v. Union Mfg. Co.*, 39 Conn. 576; *Mason v. Hoyle*, 56 Conn. 255, 14 Atl. 786. See, also, cases cited in *Barnard v. Shirley*, 151 Ind. 160, 47 N. E. 671, 41 L. R. A. 737, note. The question in a given case, whether the use proved is a reasonable one, is essentially one of fact, in the sense that it is to be decided by the tribunal empowered to determine the facts; by the trial judge

if the case is tried to the court, and by the jury if the case is tried to the jury: *Keeney & Wood Mfg. Co. v. Union Mfg. Co.*, 39 Conn. 576; ¹⁷⁸ *Mason v. Hoyle*, 56 Conn. 255, 14 Atl. 786; *Parker v. Hotchkiss*, 25 Conn. 321. In this state, however, in cases like the present, where all the subordinate facts bearing upon the question of reasonable use are spread upon the record, the conclusion of the trial judge upon the question of reasonable use may be reviewed by this court: *Nolan v. New York etc. R. Co.*, 70 Conn. 159, 39 Atl. 115, 43 L. R. A. 305. Assuming, then, that this court may do this and that the finding as made is to stand, we are of opinion, upon a careful consideration of the facts found, that, within the principles laid down in our own cases upon this subject hereinbefore cited, the trial judge did not err in holding that the defendant's use of the water was such a reasonable use of the water as it was entitled to make.

Certain other matters assigned for error remain to be considered. The first assignment of error relates to certain rulings upon evidence. Against the objection of the plaintiff, some seventeen witnesses for the defendant were permitted to testify as to what was the custom or usage of textile and other mills upon the Scantic river and upon other streams throughout New England, as to the number of hours per day they ran, and as to whether they ran in the daytime only or at night only, or both day and night, and other matters of like nature. This evidence of the usage, custom or habit of other manufacturers upon the Scantic river, and upon other streams was offered and received solely as bearing upon the question whether the defendant's use of the waters of the Scantic river was a reasonable use under all the circumstances; and we think it was admissible for that purpose. When the question of reasonable conduct under given circumstances is in issue, the usage, custom, habit or conduct of others under similar circumstances may be relevant as evidence upon that issue: 1 *Wigmore on Evidence*, sec. 461; *Cass v. Boston etc. R. Co.*, 14 Allen (Mass.), 448; *Maynard v. Buck*, 100 Mass. 40; and our own court in the case of *Keeney & Wood Mfg. Co. v. Union Mfg. Co.*, 39 Conn. 576, expressly sanctions the admission of such evidence.

The trial court held that the facts stated in certain paragraphs ¹⁷⁹ of the draft-finding, which it was requested to mark "proven" or "not proven," were evidential facts

merely, and refused to so mark them; and this ruling and refusal are each assigned for error.

Upon a careful examination and consideration of the paragraphs in the draft-finding referred to in these two reasons of appeal, we are of opinion that the ruling was correct, and the refusal was justified. While in a proper case the duty of a trial court to mark each paragraph of a draft-finding "proven" or "not proven" might, in a proper proceeding, be enforced, such refusal is not properly assignable for error on appeal, nor is it a ground for reversing the judgment: *Atwater v. Morning News Co.*, 67 Conn. 504, 34 Atl. 865; *McNamara v. McDonald*, 69 Conn. 484, 61 Am. St. Rep. 48, 38 Atl. 54; *Morris v. Winchester Repeating Arms Co.*, 73 Conn. 680, 49 Atl. 180.

Another reason of appeal relates to the action of the trial court in refusing to correct the finding by adding to it certain paragraphs of the draft-finding, namely: 1. All of those which the court refused to mark "proven" or "not proven"—some forty-four in number; 2. Certain of those which the court had marked "not proven"—some ten or more in number.

With reference to the paragraphs of the first class, we think the court was justified in refusing to incorporate them into the finding, on two grounds: 1. Because they embody facts mainly, if not entirely, evidential only, which under the rules of court cannot properly be made part of the finding; and 2. Because, even if added to the finding, they would not at all affect the inevitable result of the other facts found; and whenever this is true there exists no good reason for correcting the finding: *Julian v. Stony Creek Red Granite Co.*, 71 Conn. 632, 42 Atl. 994.

With reference to the second class of paragraphs above mentioned, relating to disputed facts found and marked "not proven," it is perhaps sufficient to say that upon the evidence certified to this court in connection with the exceptions, there is nothing upon the record to show that the court erred in finding said paragraphs not proven. In short,¹⁸⁰ we think the finding as it stands presents fairly all the facts necessary to raise all the questions of law which the plaintiff claimed it desired to raise with reference to the controlling question of reasonable use; and that the trial court committed no error in the trial or in the proceedings since

the trial, or in the conclusion reached by it upon the main question in the case.

There is no error.

In this opinion the other judges concurred.

Every Riparian Proprietor has a right to make a reasonable use of the waters flowing by or through his premises; what is a reasonable use is a question of fact: *Meng v. Coffee*, 67 Neb. 500, 108 Am. St. Rep. 697; *Lawrie v. Silsby*, 76 Vt. 240, 104 Am. St. Rep. 927; *Pierson v. Speyer*, 178 N. Y. 270, 102 Am. St. Rep. 499; *People v. Hurlbert*, 131 Mich. 156, 100 Am. St. Rep. 583. As to the right of a riparian owner to construct a dam in a stream to obtain power for the operation of a mill or the like, see *Canton v. Shock*, 66 Ohio St. 19, 90 Am. St. Rep. 557; *Cleary v. Skiffich*, 28 Colo. 362, 89 Am. St. Rep. 207; *Green Bay etc. Canal Co. v. Kaukauna Water Power Co.*, 90 Wis. 370, 48 Am. St. Rep. 937; *Watts v. Norfolk etc. Ry. Co.*, 39 W. Va. 196, 45 Am. St. Rep. 894; *Mumpower v. Bristol*, 90 Va. 151, 44 Am. St. Rep. 902; *Gaston v. Mace*, 33 W. Va. 14, 25 Am. St. Rep. 848.

GRILLEY v. ATKINS.

[78 Conn. 380, 62 Atl. 337.]

DEEDS—Deposit for Delivery on Grantor's Death.—If a grantor delivers a deed to a third person to be delivered by him to the grantee on the grantor's death, the grantee takes an immediate estate subject to the life use of the grantor. (p. 156.)

DEEDS—Deposit for Delivery on Grantor's Death.—Whether, in a given case, the delivery of a deed to a third person, to be delivered by him to the grantee after the grantor's death, is to be deemed a delivery in praesenti or not, is generally a question of fact depending upon the conduct and intention of the parties to the transaction. To constitute a delivery in praesenti, the grantor must deliver the deed to the third person for the benefit of the grantee ultimately and in some way express his intention to that effect, and the grantor must at the time of such delivery to the third person part both with the possession of the deed and with all dominion and control over it. (157.)

DEEDS—Deposit for Delivery on Grantor's Death—Revocation. A voluntary deed delivered absolutely to a third person to be delivered by him to the grantee upon the death of the grantor, cannot be revoked by the grantor without the consent of the grantee. (p. 157.)

DEEDS—Deposit for Delivery After Grantor's Death—Revocation.—If a grantor delivers a voluntary deed to a third person, not his agent nor attorney, with directions to him to deliver the deed to the grantee on the grantor's death, and such third person accepts

the deed and holds it in escrow, this constitutes a present delivery of the deed, which is irrevocable without the consent of the grantee. (p. 158.)

E. F. Cole, for the appellant.

C. G. Root, for the appellee.

381 TORRANCE, C. J. The plaintiff and the defendant are half-brothers, sons of the same mother, Eunice A. Atkins. She died in September, 1899, aged eighty-six years. The dispute between the brothers relates to the ownership of land lying in the town of Waterbury and described in the first paragraph of the complaint. The plaintiff claims the land under a deed from his mother made in April, 1898, hereinafter for brevity called deed A, while the defendant claims it, or a portion of it, under a deed from her made in June, 1899, hereinafter called deed B.

The controlling facts in the case are in substance as follows: **382** On April 14, 1898, Mrs. Atkins, accompanied by the plaintiff, went to the office of Wilson H. Pierce, Esq., a practicing attorney in Waterbury, and Mrs. Atkins then requested him to draw a deed, to be executed by her, conveying to the plaintiff, subject to her life use, a certain piece of land situated in Waterbury, with a dwelling-house thereon, described in the first paragraph of the complaint. Pierce drew said deed and the same was then and there duly executed by Mrs. Atkins; and thereupon, at her request and by her direction, he placed said deed in an envelope and sealed it up. The deed in said envelope was then delivered to Pierce by Mrs. Atkins, with instruction to keep and hold the same as an escrow, and to deliver the same upon her death to the plaintiff; and, at the request of Mrs. Atkins, Pierce then and there wrote the following words upon said envelope: "I hereby place the within deed as an escrow in the hands of Wilson H. Pierce, my attorney, to deliver the said deed upon my death to my son, William F. Grilley, of Waterbury, or his heirs, to be recorded." Mrs. Atkins then placed her name and seal on said envelope under said words, as follows: "Eunice Atkins (L. S.)," and Pierce then wrote upon said envelope: "April 14, 1898. Deed in my hands as an escrow, to be delivered to William F. Grilley, of Waterbury, upon the death of Eunice A. Atkins. W. H. P." Pierce had never before this time, and never thereafter,

acted as the attorney of Mrs. Atkins. All that Pierce did for Mrs. Atkins on this occasion was to draw the deed and take the acknowledgment, make the indorsement upon the envelope, and place the same in his safe. At the time of the delivery of said deed to Pierce there was no intent upon the part of Mrs. Atkins to keep control of said deed, and she never in fact kept or retained control of the same. The delivery to Pierce was made by Mrs. Atkins with the intention that it should be a delivery in escrow. Said deed was left with Pierce with the knowledge and consent of the plaintiff.

On or about February 20, 1899, Mrs. Atkins went to Pierce's office and demanded of him said deed left by her ³⁸³ with him April 14, 1898, but he refused to give it to her upon the ground that he had no legal right to do so without the consent of the grantee therein. On June 29, 1899, Mrs. Atkins accompanied by the defendant went to an attorney in Waterbury, who drew up a deed which was duly executed by Mrs. Atkins and which purported to convey to the defendant certain lands, including the house and a portion of the lot described in paragraph 1 of the complaint. Neither of said deeds was given upon a valuable consideration.

Mrs. Atkins died at Wolcott early in the morning of September 29, 1899. In the forenoon of said day the plaintiff and defendant were at the home of the defendant, where Mrs. Atkins lay dead, and the defendant pretended to the plaintiff that he was going to Bristol, leaving the plaintiff to come to Waterbury to make some arrangements for the funeral. The plaintiff came to Waterbury, and, after making some arrangements for the funeral, went to the office of Pierce about 3:30 P. M. on said day, demanded and received from him the deed left in escrow, and took the same to the office of the town clerk of the town of Waterbury, where he left it to be recorded at 3:30 P. M., and the same was duly recorded. Instead of going to Bristol, the defendant on said day came to Waterbury and left at the town clerk's office for record said deed of June 29th, at 3:15 P. M. The defendant, before June 29, 1899, knew of the existence of said deed left in escrow, and knew that it was to be delivered to the plaintiff upon the death of Mrs. Atkins. The plaintiff had no knowledge of the defendant's deed of June 29th

until after said September 29th. When Pierce delivered said deed left in escrow to the plaintiff, he wrote on the envelope containing the deed, "received the within deed this 29th day of Sept. 1899, 3:30 P. M."

Upon these facts the trial court set aside deed B, and ordered the defendant to execute and deliver to the plaintiff a release deed of the land described in deed A; and this appeal is based upon alleged errors made by the court in so doing.

³⁸⁴ Where a deed is placed in the hands of a depositary for conditional future delivery to the grantee, a distinction has by some courts been recognized between cases where the future delivery depends upon the performance of some condition and those where it depends upon the death of the grantor. In the former case the deed does not become operative until rightfully delivered by the depositary to the grantee, while in the latter, upon delivery to the depositary it is deemed to be the grantor's deed presently, taking effect for many, if not for most, purposes from the time of its delivery to the depositary. The deed in either of these cases is usually called an "escrow," but perhaps more frequently and more properly that word is used to designate the deed in the former, rather than in the latter, case. In *Foster v. Mansfield*, 3 Met. (Mass.) 412, 37 Am. Dec. 154, Chief Justice Shaw states the distinction in this way: "Where the future delivery is made to depend upon the payment of money, or the performance of some other condition, it will be deemed an escrow. Where it is merely to await the lapse of time or the happening of some contingency, and not the performance of any condition, it will be deemed the grantor's deed presently. Still it will not take effect as a deed until the second delivery; but when thus delivered, it will take effect, by relation, from the first delivery." This distinction between a deed placed in the hands of a depositary to be "delivered" by him upon the performance of some condition and a deed "delivered" to the depositary to be by him handed over to the grantee at the death of the grantor is recognized quite generally throughout the United States: 11 Am. & Eng. Ency. of Law, 2d ed., 342; 16 Cyc. 566, and cases there cited; but the courts are not agreed either as to the complete effect to be given to the "delivery" to the depositary or as to the time when the title passes to the grantee.

Some courts seem to hold that for many purposes the deed becomes operative and title passes when the deed is delivered to the depositary; others, that it does not become operative till the death of the grantor, and then by relation takes effect from the "delivery" to the depositary; while still others seem to ³⁸⁵ hold that the "delivery" to the depositary conveys title immediately to the grantee, subject to the life interest of the grantor: *Foster v. Mansfield*, 3 Met. (Mass.) 412, 37 Am. Dec. 154; *Hathaway v. Payne*, 34 N. Y. 92; *Haeg v. Haeg*, 53 Minn. 33, 55 N.W. 1114; *Bury v. Young*, 98 Cal. 446, 35 Am. St. Rep. 186, 33 Pac. 338; *Baker v. Baker*, 159 Ill. 394, 42 N. E. 867; *Brown v. Westerfield*, 47 Neb. 399, 53 Am. St. Rep. 532, 66 N. W. 439; *Arnegard v. Arnegard*, 7 N. Dak. 475, 75 N. W. 797, 41 L. R. A. 258. To a certain extent such a distinction is recognized in our own reports. In *Belden v. Carter*, 4 Day, 66, 4 Am. Dec. 185, the deeds were left with a third party with directions to keep them, and if the grantor never called for them, to deliver them after the grantor's death to the grantees, but if the grantor called for the deeds to deliver them to him. The grantor died without recalling the deeds. It was held that the delivery to the third person was a delivery of the grantor's deeds presently; that the depositary held them in trust for the grantees; that the title became consummate in the grantees upon the death of the grantor; and that the deeds took effect by relation from the time of the first delivery. The placing of the deeds with the depositary was held to be a delivery of the grantor's deed presently, although the grantor during his life retained full control of the deeds and could recall them at pleasure. The ruling upon this last point in the above case is opposed to the overwhelming weight of authority: See note to the case of *Munro v. Bowles*, 187 Ill. 346, 58 N. E. 331, 54 L. R. A. 865, and cases there cited; and it would not probably be followed in this state to-day: *Porter v. Woodhouse*, 59 Conn. 568, 21 Am. St. Rep. 131, 22 Atl. 299, 13 L. R. A. 64. In *Stewart v. Stewart*, 5 Conn. 317, James Stewart made a deed of land to his children, and delivered it to a third party to hold till the grantor's death and then to deliver it to the grantees. After his death the deed was duly delivered to the grantees. It was held, following *Belden v. Carter*, 4 Day, 66, 4 Am. Dec. 185, that the deed when placed in the depositary's hands was the grantor's deed presently consummate upon his death, and "efficacious to the passing of

the interest conveyed, from the delivery of the deed to the trustee or agent." The instrument was held not to be a devise, "but a deed, taking effect from the first and only delivery, and consummated by the death of the grantor."

³⁸⁶ In *Jones v. Jones*, 6 Conn. 111, 16 Am. Dec. 35, Chief Justice Hosmer says, in effect, that the delivery of a deed to a third party to the use of the grantees, to be delivered to them after the death of the grantor, is by legal operation a delivery to the grantees themselves; and although this was an obiter dictum, it is worthy of note "as the opinion of an eminent judge": Waite, J., in *Woodward v. Camp*, 22 Conn. 457. In the last-named case a married woman united with her husband in the execution of a deed of land, and gave it to her husband with directions to deliver it to the grantee at her death. It was held in effect that the delivery to the husband was a delivery in praesenti, vesting the title in the grantee, to become effectual and consummated upon the death of the grantor.

On the other hand, in the cases cited below, the deeds and other instruments delivered to third parties for future conditional delivery were held to be escrows, having no operative force until the second delivery: *Wolcott v. Coleman*, 1 Conn. 375; *Huntington v. Smith*, 4 Conn. 235; *Coe v. Turner*, 5 Conn. 86; *Sparrow v. Smith*, 5 Conn. 113; *Raymond v. Smith*, 5 Conn. 555; *White v. Bailey*, 14 Conn. 271.

Whether, in a given case, the delivery of a deed to a third party, to be delivered by him to the grantee after the grantor's death, is to be deemed a delivery in praesenti or not, is generally a question of fact depending upon the conduct and intention of the parties to such a transaction. Two of the essential features of such a delivery are these: 1. The grantor must deliver the deed to a third person for the benefit of the grantee ultimately, and in some way express his intention to that effect; and 2. By the very great weight of authority the grantor must, at the time of such delivery to the third person, part both with the possession of the deed and with all dominion and control over it: See the cases cited to this effect in the note to the case of *Munro v. Bowles*, 187 Ill. 346, 58 N. E. 331, 54 L. R. A. 865; *Porter v. Woodhouse*, 59 Conn. 568, 21 Am. St. Rep. 131, 22 Atl. 299, 3 L. R. A. 64. A delivery so made and accepted by the grantee is irrevocable by the grantor, and cannot by him be recalled or revoked or modified, without the consent ³⁸⁷ of the grantee: *Arnegard v. Arnegard*, 7 N. Dak. 475, 75 N. W. 797, 41

L. R. A. 258; *Bury v. Young*, 98 Cal. 446, 35 Am. St. Rep. 186, 33 Pac. 338; *Issitt v. Dewey*, 47 Neb. 196, 66 N. W. 288; *Everett v. Everett*, 48 N. Y. 218; 16 Cyc. 568, and cases there cited.

We think the facts found in the case at bar clearly show that the delivery of deed A to Mr. Pierce was in effect a present delivery of it, to be held by him for the benefit of the grantee and subject to the life use of the grantor, and at her death to be surrendered by him to such grantee. As shown by her request to Pierce, the grantor fully intended to pass the fee of the property to the plaintiff at the date of the deed, subject only to her life use; and the transaction into which she then entered with Pierce and the plaintiff was well adapted to carry out her intent. She intended to, and did, in delivering the deed to Pierce, part with the possession of the deed, and with all her dominion and control over it.

The defendant claims that the delivery to Pierce was of no effect because he was the agent and attorney of the grantor, and consequently that the deed in his hands was in her hands. If the facts found supported the above claim, the claimed consequence would undoubtedly follow; but they do not; on the contrary they clearly show that in taking delivery of deed A Pierce was not the agent of the grantor in any respect.

The defendant further claims that as deed A was made without consideration, the delivery of it to Pierce could be revoked by the grantor at will; and in support of this claim he cites *Belden v. Carter*, 4 Day, 66, 4 Am. Dec. 185, and *Hoig v. Adrian College*, 83 Ill. 267. These cases do not support his claim. In *Belden v. Carter*, 4 Day, 66, 4 Am. Dec. 185, the grantor expressly retained control of the deed during his life; and in the Illinois case cited it was held, merely, that a deed of land intended as a gift may be withdrawn before delivery of it is complete. In the case at bar the gift was accepted and complete before the grantor attempted to revoke the delivery of the deed, and then it was too late, as is held even in cases where the deed was made without consideration: *Brown v. Austten*, 35 388 Barb. 341; *Issitt v. Dewey*, 47 Neb. 196, 66 N. W. 288; *Brown v. Westerfield*, 47 Neb. 399; 53 Am. St. Rep. 532, 66 N. W. 439.

Upon the facts found in this case we think that the delivery to Pierce was irrevocable by the grantor, without the

consent of the grantee; that by such delivery the title to the fee of the land described in deed A immediately passed to the plaintiff, subject to the grantor's life use; and that such title, as against the grantor, and as against the defendant, her subsequent grantee without consideration and with knowledge of the existence and delivery of deed A, is a good and valid superior title.

There is no error.

In this opinion the other judges concurred.

A Deed Placed in Escrow beyond the control of the grantor, to be delivered to the grantee upon the death of the grantor, is valid: Lippold v. Lippold, 112 Iowa, 134, 84 Am. St. Rep. 331; Fulton v. Priddy, 123 Mich. 298, 81 Am. St. Rep. 201; Shea v. Murphy, 164 Ill. 614, 56 Am. St. Rep. 215. It is otherwise, however, if the delivery to the third person is conditional, or the grantor retains any control over the instrument: Osborne v. Eslinger, 155 Ind. 351, 80 Am. St. Rep. 240; Williams v. Daubner, 103 Wis. 521, 74 Am. St. Rep. 902. See the discussion of this question in the monographic notes to Brown v. Bakersfield, 53 Am. St. Rep. 554; Wilson v. Carrico, 49 Am. St. Rep. 219; Wellborn v. Weaver, 63 Am. Dec. 243.

FITZMAURICE v. CONNECTICUT RAILWAY AND LIGHTING COMPANY.

[78 Conn. 406, 62 Atl. 620.]

NEGLIGENCE—Use of Premises—Care Toward Children.—The owner of land is not required, in using it for legitimate purposes, to guard against every possible danger to children, and to children whose presence upon the premises could not reasonably have been anticipated he owes no duty to keep his land free from dangerous conditions. (p. 162.)

NEGLIGENCE—Use of Premises—Trespassing Children.—If an owner of land has no reason to anticipate that a young and unattended trespassing child might come into his dump-yard and upon or near a pile of hot ashes or soot therein, he is not liable for an injury to such child caused by its climbing upon or falling into such ashes or soot. (p. 162.)

J. W. Walsh and J. Keough, for the appellant.

W. T. Hincks, for the appellee.

406 HALL, J. The plaintiff, an infant about three years of age, brings this action by her next friend. On the day alleged in the complaint, while living with her parents in a

house belonging to her uncle, Patrick Fitzmaurice, she strayed upon the defendant's land, and either climbed upon 407 or fell into a pile of hot soot, which one of the defendant's workmen had that day dumped in the defendant's yard, and was severely burned. Upon the following facts the trial court held that she was not entitled to a judgment for substantial damages.

The back yard of the premises of said Patrick Fitzmaurice extended along the west side of land purchased by the defendant, about five years before the time of accident, as a place upon which to dump ashes and soot from the furnace of its power-house located upon land adjoining that of said Patrick Fitzmaurice on the west. This land, in the rear of the defendant's premises, had been used by the defendant as such a dumping ground ever since its purchase, in substantially the same manner as on the day of the accident. It was practically an open lot, the fences on the east and west sides of it having been down or in a dilapidated condition ever since the company bought it. It did not appear that there had been any division of the fence between the defendant's and Patrick Fitzmaurice's land for the purpose of repair.

During most of the time while this yard had been so used the accumulated ashes had formed a pile fifteen to twenty feet wide, extending thirty or forty feet from the rear of the power-house, and sloping from a height of three or four feet down to the ground at what remained of the divisional fence between the land of the defendant and that of said Patrick Fitzmaurice. While cinders and material from the dump sometimes slid down this slope upon the Fitzmaurice property, the ashes did not extend over upon it to any considerable extent at the time of the accident. The ash pile was distant from the street and upon land not used by anyone as a thoroughfare. Poor people of the neighborhood sometimes raked over the edges of the pile for coke and were not driven away by the defendant. The place was not one likely to attract children, nor was there anything to cause the defendant to anticipate that a child of the plaintiff's age would stray unattended upon the premises and be injured. The plaintiff had never gone upon the defendant's lot before, nor 408 had anyone been burned by the ashes or soot upon said land before. The soot by which the plaintiff was burned was dumped by the defendant's workman upon the side of

defendant's lot most distant from the Fitzmaurice property during the forenoon of the day of the accident, which occurred at about 1:30 in the afternoon. There was nothing in the appearance of the pile of soot to indicate its heat. The defendant knew that the soot thus thrown out retained its heat for a considerable time, but did not throw water upon it or attempt to cool it in any other way.

The trial court held that under these circumstances the defendant was not negligent and that the injury to the plaintiff was due to her "infantile inexperience and helplessness."

Of the six reasons of the plaintiff's appeal the first, third, and fourth may be dismissed with the statement that the rulings assigned by them as erroneous do not appear to have been made by the trial court. The remaining reasons of appeal are, in substance, that the court erred in holding that there was no implied invitation to the plaintiff to come upon the defendant's premises; that the facts did not make the doctrine of "attractive nuisance" applicable; and that the defendant was not required to protect and safeguard the heated soot and ash pile upon its land.

None of these assignments of error can be sustained upon the facts found by the trial court.

In support of his claims the plaintiff's counsel cites the case of *Birge v. Gardiner*, 19 Conn. 507, 50 Am. Dec. 261, and many cases of injuries to children whose presence upon the defendant's premises and near the dangerous object should have been reasonably anticipated by the defendant. In *Birge v. Gardiner*, 19 Conn. 507, 50 Am. Dec. 261, the defendant was held liable upon the ground that he was negligent in placing a heavy gate upon or near the line of a lane or public passway, over which the plaintiff, a child under seven years of age, and other children and persons were accustomed to pass in going from their homes to the highway and vice versa, and because the gate, although upon the defendant's land, was left in such an insecure condition ⁴⁰⁹ that it fell upon the plaintiff when, as the defendant claimed to have proved, he put his hands upon it and shook it, as he was passing along the lane from the highway to his home. The opinion states that the court did not decide whether the plaintiff was a trespasser or not, but that if he was, the plaintiff might properly have been found guilty of such

gross negligence as to render him responsible, as in cases of injuries to trespassers by spring-guns and man-traps placed by the owners of land upon their property. Evidently the gross negligence of which he might have been found guilty was the careless leaving of this insecurely fastened and heavy gate where he had reason to know it was liable to fall upon persons who might be lawfully using the public passway.

The case at bar differs from *Birge v. Gardiner*, 19 Conn. 507, 50 Am. Dec. 261, in that in the present case it appears that the plaintiff was a mere trespasser upon the defendant's land; that the object of danger was not or near land used as a thoroughfare; and that the presence of an unattended child of the plaintiff's age near it was not reasonably to have been anticipated. It differs from most of the other cases cited of injuries to children, either in the fact that the present defendant's land was never used as a playground or place of resort for children, or in the fact that the dangerous object was not in the present case calculated to attract or interest children.

The owners of land are not required in using it for legitimate purposes to guard against every possible danger to children. To children whose presence upon the premises could not reasonably have been anticipated, they owe no duty to keep their land free from dangerous conditions. As the facts show that the defendant had no reason to anticipate that a young and unattended child like the plaintiff might come into this dump-yard and upon or near this pile of hot ashes or soot, it is not liable for the injury sustained by the plaintiff.

There is no error.

In this opinion the other judges concurred.

A Property Owner is Generally not Liable for injuries sustained by children who trespass upon his property: *Harris v. Cowles*, 33 Wash. 331, 107 Am. St. Rep. 847; *Friedman v. Snare*, 71 N. J. L. 605, 108 Am. St. Rep. 764; monographic note to *Barnes v. Shreveport City R. R. Co.*, 49 Am. St. Rep. 416. But in the recent case of *Mattson v. Minnesota etc. R. R. Co.*, 95 Minn. 477, 111 Am. St. Rep. 483, a railroad company is held responsible for negligently permitting dynamite to remain unguarded on its premises and accessible to children.

PIERCE v. STAUB.

[78 Conn. 459, 62 Atl. 760.]

SALES—Breach and Rescission of Contract—Recovery of Purchase Money Paid.—If a contract of sale provides for the payment of the price in installments and contains no provision for a forfeiture on default, and the buyer, after paying part of the installments, defaults, whereupon the seller, after giving various extensions, refuses to recognize any right of the buyer to the property, but disables himself from performing his part of the contract by transferring the property to other parties, and both parties thereafter treat the contract as at an end, there is in effect a mutual rescission of the contract, and the buyer is entitled to recover the installments paid by him under the contract. (p. 169.)

CONTRACTS—Rescission.—Money Paid upon a contract which is subsequently rescinded is never forfeited unless there is an express or implied contract to that effect, and upon such rescission the money paid must be returned to him who advanced it. (pp. 169, 170.)

F. L. Hungerford and F. W. Marsh, for the appellant.

M. H. Holcomb and N. E. Pierce, for the appellee.

459 **TORRANCE, C. J.** The plaintiff is the ancillary administrator, in this state, upon the estate of James M. Crosby, who died domiciled in Massachusetts in June, 1900. In May, 1897, the defendant and Crosby entered into a written contract for the sale to Crosby of certain property belonging to **460** the defendant. The property consisted of certain shares of the capital stock of the Falls Village Water Company, of the charter and franchises of the New Milford Power Company, each of this state, and of certain rights in real estate and in water rights, fully described in said contract.

That contract provided, in substance, as follows: In consideration of certain payments made to him by Crosby at and before the execution of the contract, and of the promises of Crosby contained in the contract, the defendant agreed to sell and convey to Crosby on or before the 1st of December, 1897, all the property aforesaid, "upon the faithful performance" by Crosby of his part of said contract. The purchase price of the property was \$150,000. Of this price Crosby paid \$3,000 before the contract was executed, and in the contract he agreed to pay \$10,000 upon its execution, \$10,000 on or before July 1, 1897, and the balance on or before December 1, 1897. Mr. Crosby not having made all the payments required by said contract, the parties, on

the 23d of February, 1899, entered into a supplemental contract in which it was agreed, among other things as follows: 1. That the amount due and unpaid by Crosby under the first contract was \$97,217; 2. That said amount should bear interest at the rate of six per cent per annum from April 1, 1898; 3. That Crosby should pay said sum with interest as aforesaid in one year from February 23, 1899, or sooner, in whole or in part, at his option; 4. That upon such payment being made in full, within such time, the defendant would sell and convey to Crosby all the property agreed to be sold and conveyed in and by both contracts; and 5. That the defendant should have the exclusive use and possession of all said property until it should be so conveyed. It was also agreed that these two contracts should evidence the entire understanding of the parties as to said property, with one exception which need not here be noted. Neither of the contracts contained any forfeiture clauses of any kind, nor did they in terms give any power of rescission to either of the parties.

Crosby paid under both contracts the sum of \$60,000 and ⁴⁶¹ no more. On February 27, 1900, while Crosby was confined to his bed by a serious illness, the defendant called upon him and informed him that he, the defendant, was then ready to carry out said agreement. Crosby said he was then unable to perform his part of the agreement, and asked for an extension of time. Upon Crosby's promising to pay a certain note of his made to the defendant and then in the hands of a third party, the defendant agreed to extend the time for performance of the contracts for a period of thirty days from February 23, 1900. Crosby never paid that note or any part of it, nor did he carry out his part of the contract, nor tender performance thereof within the extended time so given him by the defendant.

On the 20th of March, 1900, the defendant sent to Crosby a written notice of which the following is a copy:

"My Dear Sir: I beg to say that I am ready and prepared to perform on my part our agreements of May 8th, 1897, and February 23d, 1899, by conveying, transferring, and assigning to you all the property therein mentioned, in accordance with the terms of said agreements, and as you know, have been ready and willing to do so at all times since the dates thereof. Inasmuch as the extended time for carrying out said agreements on your part expired nearly a month

ago (February 23d, 1900), and I cannot compatibly with my own rights and my purposes with regard to said property allow the matter to remain open indefinitely, I hereby request that without further delay you make the payments agreed by you to be made as fixed and determined in said last-named contract, and you may consider this a demand therefor. Please take notice that unless said agreements are performed and said payments made on or before the 31st day of March, 1900, I shall regard and treat said property as divested of all interest which you may now have (if any) therein. If not convenient for you to come here, I will, on notice from you, meet you in New York any day this week or next week, for the purpose of mutually carrying out our engagements in said contracts made."

Nothing further was heard by the defendant from Crosby, ⁴⁶² after giving said notice, and nothing was done by Crosby with reference to said contracts, except that he endeavored, until he became too ill to do business, to dispose of the property and to raise money upon the contracts to pay the balance due thereon. Nothing else, save the giving of said notice, was ever done by the defendant in the lifetime of Crosby to put him in default under said contracts, or to terminate his rights of purchase thereunder. Crosby died in June, 1900. He never made demand upon the defendant for the payment of the whole or any part of the money paid under the contracts; nor did he, after March 31, 1900, make any claim to the defendant that he, Crosby, had any rights in the property described in the contracts; but he did make such claim to his wife and brother a few days before he died. Up to the thirty-first day of March, 1900, the defendant was ever ready and willing to carry out his part of said contracts, but no offer or tender of performance was ever made by Crosby, or by anyone in his behalf, or since his death on behalf of his estate. On the 27th of June, 1900, the widow of Crosby called upon the defendant to ascertain the amount due upon the contracts, and whether she could have time in which to pay it. The defendant then informed her that as her husband's time for performance had expired, his heirs had no interest in the property; but said that if the amount due was paid within thirty days then next ensuing, he would, unless the property was sold within that time before the payment was made, convey the property to

Mr. Crosby's heirs. He requested her to write him next day as to whether she could raise the money. This she did not do, nor did she or anyone else thereafter ever tender performance on behalf of the Crosby estate. After this, but exactly when did not appear, the defendant sold all of said property to a third party. Such sale appears to have been made some time in 1902.

In September, 1900, the widow of Crosby was appointed and qualified as administratrix upon his estate, and in February, 1903, the plaintiff was in this state appointed and qualified as ancillary administrator of said estate. Demand ⁴⁶³ upon the defendant for the repayment of the money paid him by Crosby under the two contracts was made by the administratrix in January, 1903, and by the plaintiff in February, 1903. The defendant refused to pay. The defendant, until he sold said property, was in the sole and exclusive use and occupation thereof. The defendant did not in this case, by his pleadings or otherwise, make any claim for damages on account of the default of Crosby under said contracts.

Upon these facts the defendant made divers claims of law, which in substance and effect amounted to this: that the plaintiff was not entitled to recover back the money paid by Crosby, either in whole or in part; in other words, that upon Crosby's default the defendant became entitled, at his option, to keep the property and the purchase money, too. The court overruled this claim, and held that as the defendant had made no claim for damages on account of the default, the plaintiff was entitled to recover the amount of the money paid by Crosby, with interest from the date of the demand made upon the defendant by the plaintiff.

In the case at bar the sale and conveyance to be made by the defendant were undoubtedly conditioned upon the payment of the price in full. If Crosby had paid ninety-nine per cent of the price in advance, he could not obtain the property without paying or tendering the remaining one per cent; and if he, without legal excuse, failed to make such payment or tender in the manner prescribed by the contract, he might lose his right to such sale and conveyance; and the defendant's claim is that he would, in such case, also lose the entire purchase money paid in advance, although the contract might contain no clause of forfeiture. The view of the law embodied in this last claim seems to put the

vendee who pays a substantial part of the price in advance and then defaults in a much worse position than the vendee who pays nothing in advance and ultimately refuses to go on with the contract. In the former case the vendor may get very much more than compensation for the loss caused by his breach; while in the latter case he gets only compensation ⁴⁶⁴ for his actual loss, frequently measured by the difference between the contract price and the value of the property at the time of the breach, which may be merely a nominal amount.

Founded upon the doctrine of the entirety of contracts, the general rule undoubtedly is, that if a party without legal excuse fails to perform the conditions of a contract, he can recover no compensation for benefits conferred upon the other party by a part performance: Keener on Quasi Contracts, 215, and cases there cited. To this general rule two exceptions, real or apparent, are not without authority for their support: one, in the case of contracts for personal services for a given time for a given sum; and the other, in case of contracts to do a specific work, as to build or repair a house, or a machine, and the like. In the former class of cases it is held by many courts that even a party who willfully breaks his contract may recover for the value of work done in excess of the damages caused by the breach: *Britton v. Turner*, 6 N. H. 481, 26 Am. Dec. 713; *Pixler v. Nichols*, 8 Iowa, 106, 74 Am. Dec. 298; *Wheatly v. Miscal*, 5 Ind. 142; *Fuller v. Rice*, 52 Mich. 435; *Chamblee v. Baker*, 95 N. C. 98; *Parcell v. McComber*, 11 Neb. 209, 38 Am. Rep. 366, 7 N. W. 529; *Duncan v. Baker*, 21 Kan. 99. In the latter class of cases it is held by many courts that a party who in good faith attempts to perform his contract and undesignedly deviates from it in some respects may recover for benefits conferred, less damages caused by the breach: See *Pinches v. Swedish Lutheran Church*, 55 Conn. 183, 10 Atl. 264, and cases cited therein.

Assuming, without deciding, that the principles applied in the above two classes of cases, if sound, are not applicable in the present case, does that case fall within the rule invoked by the defendant? We think not. That rule is based upon the proposition that a party who advances money in part performance of a contract and then stops short and refuses to go on, while the other remains ready and willing to perform, cannot recover back the money advanced. This prop-

osition is supported by the following cases, and by many others that might be cited: *Ketchum v. Evertson*, 13 Johns. ⁴⁶⁵ (N. Y.) 359, 7 Am. Dec. 384; *Lawrence v. Miller*, 86 N. Y. 131; *Rounds v. Baxter*, 4 Greenl. (Me.) 454; *Plummer v. Bucknam*, 55 Me. 105; *Hill v. Grosser*, 59 N. H. 513; *Steinbach v. Pettingill*, 67 N. J. L. 36, 50 Atl. 443; *Downey v. Riggs*, 102 Iowa, 88, 70 N. W. 1091; *Hansbrough v. Peck*, 5 Wall. (U. S.) 497, 18 L. ed. 520.

The decisions in these cases all proceed upon the assumption that the special contract, though broken by one of the parties remains open and unrescinded; and the defendant's claim in the present case proceeds upon such an assumption; but we think that in this case the fact thus assumed is not true. We are of the opinion that the parties in this case have, in effect, rescinded and put an end to the contracts. It clearly appears that Crosby made default. In one sense it was not a willful default, for to the last he tried to fulfill his contract; nevertheless his failure was without legal excuse and gave the defendant the right to put an end to the contract if he chose to do so. By his written notice to Crosby the defendant said, in effect, that unless by a certain day the price was paid in full, the defendant would consider all the rights of Crosby, and all the obligations of the defendant, under the contracts, as at an end, and all the rights of Crosby to the money paid, or to the land, as at an end. From the time of Crosby's default even until now the defendant has acted with respect to the property, the money, and the contracts, according to the tenor of his notice to Crosby. He has recognized no rights of Crosby or of his estate to the property covered by the contracts, or to the money paid by Crosby under the contracts, or any obligations of his own under the contracts. He has denied the existence of any such rights and obligations, has treated the property as his own, and has disabled himself from performing the contracts, by transferring the property to other parties. In short, since Crosby's default the defendant has treated the contracts as at an end. The position thus assumed by the defendant must be regarded, upon the facts found, as having been acquiesced in by Crosby in his lifetime, and by his representatives since his decease; for after his default he neither paid nor tendered any money in performance ⁴⁶⁶ of the contracts; and since his decease his representatives have done nothing save to bring this action, and that

is based upon the assumption that the contracts are at an end. Under these circumstances both parties must be regarded as having treated the contracts as at an end, and such action is equivalent in equity to a formal and mutual rescission; and this being so, the defendant cannot be allowed to treat the contracts as dead to the prejudice of Crosby's estate, and yet alive to the advantage of himself.

The contracts being thus at an end, the defendant claims by right of forfeiture the sixty thousand dollars paid by Crosby, although the contracts contained no clause of forfeiture. If this claim is sustained Crosby pays, and the defendant receives, that sum of money for nothing, save the promise of the defendant from which he now claims to be freed; and, save this promise, the defendant parted with nothing, not even the possession and use of the property agreed to be conveyed; and it nowhere appears that he lost one dollar by reason of his promise or by reason of Crosby's default.

In cases like the present it has been said by high authority that the better remedy of the vendor, and in some instances his only safe remedy, is to institute proceedings in the proper court "to foreclose the equity of the purchaser where partial payments or valuable improvements have been made": *Hansbrough v. Peck*, 5 Wall. (U. S.) 497, 18 L. ed. 520. Upon Crosby's default, the defendant, instead of bringing him into court to have their respective rights as against each other adjusted and determined, decided for himself that the money advanced was forfeited, and that Crosby had no rights whatever as against the defendant; and he is now in court asking it, in effect, to aid him in enforcing that forfeiture. Equity abhors, and the law does not favor, a forfeiture; and if there be any difference between the defendant's position as determined by the rules of law, and his position as determined by the rules of equity, it must be judged by the latter: Gen. Stats., sec. 532.

In view of the conclusion reached that the contracts were in effect rescinded, the right of the defendant to retain the ⁴⁶⁷ money advanced cannot be sustained; and as he made no claim whatever for damages suffered by the default, the plaintiff, if entitled to recover anything, was entitled to recover all. "Money paid upon a contract which is subsequently rescinded is never forfeited unless there is an express or implied contract to that effect": *Hickock v. Hoyt*, 33 Conn. 553; and upon such rescission it must be returned

to him who has advanced it: *Guy v. Alter*, 102 U. S. 79, 26 L. ed. 48; *Frink v. Thomas*, 20 Or. 265, 25 Pac. 717, 12 L. R. A. 239; *Wheeler v. Mather*, 56 Ill. 241, 8 Am. Rep. 683; *Drew v. Pedlar*, 87 Cal. 443, 22 Am. St. Rep. 257, 25 Pac. 749; *Merrill v. Merrill*, 103 Cal. 287, 35 Pac. 768, 37 Pac. 392; *Gilbreth v. Grewell*, 13 Ind. 484, 74 Am. Dec. 266; *Glock v. Howard etc. C. Co.*, 123 Cal. 1, 69 Am. St. Rep. 17, 55 Pac. 713, 43 L. R. A. 199.

Whether the defendant, upon proper pleadings and proof in this case, might have recovered the damages, if any, caused to him by Crosby's default, is a question that does not arise in this case, and therefore need not be considered.

There is no error.

In this opinion the other judges concurred.

On the Rescission of a Contract of Sale for the failure of the purchaser to pay the balance of the purchase price, he is ordinarily entitled to recover of the vendor all moneys paid on account of the purchase, less such actual damages as the latter may have suffered from the breach of contract: *Drew v. Pedlar*, 87 Cal. 443, 22 Am. St. Rep. 257. See, too, *Wileox v. San Jose Fruit etc. Co.*, 113 Ala. 519, 59 Am. St. Rep. 135. But in *Neis v. O'Brien*, 12 Wash. 358, 50 Am. St. Rep. 894, it is affirmed that one who purchases personal property, paying part of the price, and afterward, without fault on the part of the seller, refuses to receive it or to pay the balance due, forfeits the amount paid, although the vendor resells at an advanced figure to a third person. See, too, *Tufts v. D'Arcambal*, 85 Mich. 185, 24 Am. St. Rep. 79.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

FENTON AND THOMPSON RAILROAD COMPANY v.
ADAMS.

[221 Ill. 201, 77 N. E. 531.]

SURFACE WATERS—Drainage on Land of Another.—One may deepen the depression in the rim of a natural basin on his land, through which the water naturally passes upon the land of his neighbor, so as to entirely drain the basin and discharge upon the servient estate large quantities of water which otherwise would never have reached it. (p. 177.)

SURFACE WATERS—Changing Course and Increasing Discharge—Debris.—Where the natural course of water across a dominant estate is from a ravine to a basin and thence through a depression in the rim of the basin to the servient estate, the owner of the dominant estate may construct a ditch on his land which cuts out the basin and carries the water directly to its natural outlet upon the servient estate, although debris and large quantities of water which otherwise would have remained in the basin are thereby cast upon the servient estate. (p. 180.)

SURFACE WATERS—Changing Place of Outlet.—One who changes the natural course of waters on his premises must restore the water to its natural channel within the limits of his own land, and see that the water passes from his land upon the land of his neighbor at the precise place where it would naturally do so, and at no other place. (p. 181.)

A. A. Wolfersperger and L. T. Stocking, for the appellants.

C. C. McMahon, for the appellees.

204 SCOTT, J. The appellants filed a bill in the circuit court of Whiteside county against the appellees, seeking an injunction. Appellees answered and filed a cross-bill against the railroad company, likewise for an injunction. An answer was interposed to the cross-bill. Replications were filed,

a hearing had on oral testimony before the chancellor in open court, and a decree entered dismissing the original bill for want of equity and awarding substantially the relief sought by the cross-bill. Complainants in the original bill, including the railroad company, which was defendant in the cross-bill, appealed to the appellate court for the second district, and the decree being there affirmed, the record is now brought to this court for review.

In the summer of 1904 the Fenton and Thompson Railroad Company was engaged in constructing its roadbed upon its right of way, then recently acquired, across sections 205 13 and 24, in Fulton township, in the county of Whiteside. Coming from a northerly direction the road enters section 13 near the northwest corner thereof. It runs on a straight line east of south through these two sections and crosses the south line of section 24 near the southeast corner of that section. The land that it crosses near the center of section 24 is low, flat, bottom land. Something less than a mile east of this right of way across section 24, and running generally in a northerly and southerly direction, is a bluff which drains to the west. A little more than a half mile east of the center of section 24, and a quarter of a mile north of that point, a ravine comes out of the bluff, through which, in wet weather, a stream pours, draining the country for several miles to the east. As it comes out of this ravine it flows through a natural ditch on the land of appellant Akker in a northwesterly direction, crosses under a bridge (known in this litigation as bridge No. 1) on a highway which runs in an easterly and westerly direction near the north line of section 24, and the water, after passing upon section 13 through this ditch, first fills a basin one hundred and twenty-five to one hundred and fifty acres in extent in a natural state, being on the land of Akker and one Kustes in the east half of section 13, and on the land of appellee Adams in the west half of section 18, just over the town line to the east in Ustick township. When this basin is filled until it overflows, the water passes out of the basin on the land of Akker to the southwest and crosses the east and west highway at a place where there is a bridge (known herein as bridge No. 2), a little less than a half mile west of the place where the water crosses this highway when going north, and after crossing the highway, going south, it follows a natural depression, which has been slightly deepened by a ditch, and finally passes across the

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right of way of the railroad company near the center of section 24, and, following the depression, continues on south and west, on the west side of that right of way, across the lands of the appellants John Holleran and John Wolters. Other hollows, leading out of the bluff farther ²⁰⁶ north than the ravine above mentioned, also empty their waters into this basin. Except in very wet seasons and immediately following rains the ravine and these hollows are all dry.

Near the north line of section 13 Otter creek runs in a westerly direction. The surface of the water in Otter creek, at an ordinary stage, is higher than the bottom of the basin, and the bottom of the basin is higher than the point at which the depression crosses the right of way of the railroad company. On October 10, 1904, when the levels which appear in the record were taken, measuring from datum the elevation of the surface of the water in Otter creek, at the town line, was eighty-one and forty-six one-hundredths feet. That of the left bank of the stream on the same line was eighty-three and forty one-hundredths feet. The surface of the ground then sloped downward to the south to the bottom of the basin, where the elevation was seventy-seven and eighty-seven one-hundredths feet. Continuing toward the outlet of the basin the ground again rises, the elevation at the outlet being seventy-nine and nine one-hundredths feet. From there it slopes generally downward, with one or two slight rises in height, to where the depression reaches the right of way of the railroad company, where the elevation is seventy-five and thirty-nine one-hundredths feet.

Akker owns the northeast quarter of section 24, the south half of the southeast quarter of section 13, in Fulton township, and the northwest quarter of section 19 in Ustick township. Adams owns the west half of section 18 in Ustick township, while Kustes owns the land lying between Akker's land, in section 13, and Otter creek.

In times of heavy rainfall the water pouring out of the ravine comes with great rapidity and in great quantities, carrying with it logs, brush, stumps and other debris, and deposits them in the basin. At such times large quantities of water are also poured into the basin from the territory directly east of it, and when Otter creek overflows its banks the water runs south across the land of Kustes and Adams to this same basin. Where the water flows out of the basin, crossing the highway at and near bridge No. 2, the fall is not

207 great and the current is not sufficient to carry the debris out of the basin, and it consequently remains there. The water which flows south across the highway at and near bridge No. 2 is in flood times a considerable stream. Several disinterested witnesses, who had long been residents of the vicinity, testified that they had on several occasions seen a stream flowing across there to the south ten or twelve rods in width, and belly-deep to a horse or hub-deep to a wagon.

In the present condition of the surface of the land, the basin not only retains large quantities of the debris which comes out of the ravine, but it also retains large quantities of water, owing to the fact that the ground at its outlet is practically two and one-half feet higher than the ground in its lowest portion. The water so retained passes away in dry times by seepage and evaporation, and never reaches the line of the railroad's right of way.

In the summer of 1904 Akker and Adams proposed to put a dam in the ditch just at the mouth of the ravine, and then dig an artificial ditch from the mouth of the ravine, above the dam, in a westerly direction, terminating in the depression, through which the water flows south, at a point twenty-three rods from the railroad's right of way. The purpose was to carry the water, which comes down the ravine, west, so that it would intersect the watercourse shortly before it reached the right of way and prevent the water flowing north to or through the basin. The length of the proposed new ditch would be two thousand seven hundred feet and its fall from the east to the west would be about seventeen feet. Its width at the bottom was to be six feet, and at the top—at least through the higher portion of the ground—fifteen feet. At the same time the railroad company was about to build a solid earth embankment twenty feet in height across this bottom land, and, for the purpose of permitting the drainage to pass through, was about to place in the grade an iron pipe four feet in diameter, which was the only opening to be left through the grade. This pipe, however, was **208** not to be located at the point where the water naturally flows across the right of way, but at a point some fifty rods to the southeast, the purpose of the company being to carry the water, after it came upon the right of way, alongside its

grade, southeast to this iron pipe. The drawing below will perhaps assist in arriving at a correct understanding of the situation:



200 On September 19, 1904, appellants filed their bill seeking to enjoin the construction of the proposed new ditch, charging that it would cast large quantities of water and debris upon the right of way of the railroad company and upon the lands of the other appellants, which, but for said proposed ditch, would be carried into the basin, where the

debris would remain, and where large quantities of water would evaporate and seep away and never reach the right of way of the railroad company or the lands of the other appellants at all; that the effect of the proposed new ditch would be to greatly damage and endanger the grade and track of the railroad company, and if the water could find a way across the right of way it would ruin the lands of the other appellants, flooding the same and depositing thereon great quantities of sand, brush and other rubbish. The bill further stated that in seasons of great rainfall some water would flow out of the basin and down the course heretofore outlined to the right of way of the railroad company and the farms of the other appellants, but stated that as that water flowed south from the basin it spread out over land which was almost level, forming a very wide and shallow stream, moving south very slowly, seeping away and evaporating as it went, and that the iron pipe which the railroad company expected to lay under its grade would easily care for and carry off all the water that would reach there. Appellees answered substantially admitting the material averments of fact contained in the bill, except they denied that the iron pipe would be sufficient to care for the drainage that now flows to the right of way, and denied that the proposed new ditch would visit any unlawful damage upon appellants, and averred that such ditch would be wholly upon the land of Akker, and showed that while the ditch would in the first instance take the water out of its natural course, yet that it would return it to that natural course at a point on the land of Akker.

The defendants in the original bill then filed their cross-bill against the railroad company, charging that the railroad ²¹⁰ company was about to construct the large embankment above mentioned, leaving no culvert or opening whatever in the natural course of the water, but locating the iron pipe as above mentioned; averring that the consequence would be that large bodies of stagnant water would remain for indefinite periods upon the land of appellees, rendering their lands comparatively worthless and the locality unsanitary, and praying an injunction against the railroad company restraining it from filling up said water-way and compelling it to leave a way for the water through its grade where the natural course of the water passes across the right of way, which way for the water through the grade should be of the

width of fifty feet and of the height of the proposed embankment. The answer of the company substantially follows the theory of the bill, and denies that appellees are entitled to the relief asked by their cross-bill.

As heretofore stated, the chancellor, upon the hearing, dismissed the original bill for want of equity, and enjoined the railroad company from grading or filling in with earth or other material the natural watercourse across its right of way in any manner that will cause an obstruction to the free flow of water, and requiring it to leave a passage for the water at least forty feet in width, measured along the line of the proposed grade, and the opening to extend upward fifteen feet from the natural surface of the ground.

In *Peck v. Herrington*, 109 Ill. 611, 50 Am. Rep. 627, the conclusion is reached that the owner of a dominant heritage may, by ditches or drains, drain his own land into the natural or usual watercourse, even if the quantity of water thrown upon the servient heritage is thereby increased; and the right of *Peck* to drain water out of ponds and cause it to flow upon the land of *Herrington* along the natural course of the water was expressly recognized, where, had the drain not been put in, the water would have remained in the ponds until it seeped away or evaporated, and never would have flowed upon the lands of *Herrington*. From this case, and the numerous ²¹¹ cases which have followed it the law deduced is this: If an owner have upon his land when the surface is in its natural state, a basin in which water accumulates, and from which, when filled and overflowing, the water passes in a particular place where the rim of the basin is lower than elsewhere, and then flows through a depression to and upon the land of another, the natural outlet and natural course for that water is through that low place in the rim and through that depression, and the owner may lawfully cut down the rim and deepen the depression upon his own land so as to entirely drain the basin and cause the water therefrom to pass through the depression to and upon the land of his neighbor, if the neighbor's land be low enough to entirely drain the basin, even though the amount of water flowing through this depression to the servient heritage is thereby increased, and water which would be retained in the basin if the rim and depression were left as in a state of nature and never reach the land of the neighbor is thereby cast upon his heritage. It follows, therefore, that *Akker* would

have the right to so deepen the natural course leading from the basin to the railroad's right of way as to entirely drain that basin, and cast all its water, except such as disappears by percolation and evaporation while flowing through the drain, upon the property of the railroad company, although it is apparent that in so doing he would pour large quantities of water upon the right of way which in a state of nature must remain in the basin. As said in *Peck v. Herrington*, 109 Ill. 611, 50 Am. Rep. 627, quoting from *Kauffman v. Griesemer*, 26 Pa. St. 407, 67 Am. Dec. 437: "Because water is descendible by nature, the owner of a dominant or superior heritage has an easement in the servient or inferior tenement for the discharge of all waters which by nature rise in or flow or fall upon the superior." It is to be observed that the easement is not for the discharge upon the servient estate of all the waters which may flow from the dominant estate while the natural surface of the ground remains undisturbed, and not for the discharge of all ²¹² the waters which may not be, by the natural depressions of the earth or natural obstructions to the waters' flow, retained upon the dominant heritage, but is for the discharge of "all waters which by nature rise in or flow or fall upon" the superior estate.

Appellants rely upon a number of cases decided by this court subsequent to *Peck v. Herrington*, 109 Ill. 611, 50 Am. Rep. 627, an examination of which discloses that where the right of drainage has been denied it has been because the owner of the higher land has sought to drain upon the lower land water whose natural course did not lead to that land—where, as to that particular water, the higher land and lower land did not sustain the relation of dominant and servient estate. Particular reliance is placed upon identical language found in several of these authorities, and which we quote from *Dayton v. Drainage Commrs.*, 128 Ill. 271, 21 N. E. 198, as follows: "But the owner has no right to open or remove natural barriers and let onto such lower lands water which would not otherwise naturally flow in that direction. That would subject the servient heritage to an unreasonable burden, which the law will not permit, and against which the owner ought reasonably to have protection." The meaning of this language, when applied to this case, is simply this: The owners of the land on which this basin is located would have no right to cut through the rim at some place other than

the lowest point therein, and thereby drain the water upon the land of another which is not reached by the course which the water follows when it overflows naturally. As long as the drainage results in carrying the water along the natural course the servient proprietor may not complain, even though natural barriers on the higher land have been cut down and the flow of water both accelerated and increased. Were the rule otherwise there would be no method by which any one owner could improve his land by the construction of ditches and drains which would carry the drainage upon another's property, because the purpose of such improvements in every instance is ²¹³ to hasten and increase the flow of water, and this object is only attained by the removal of natural barriers.

Appellants also urge upon our attention the case of *Hicks v. Silliman*, 93 Ill. 255, and we are of the opinion that language is used in that case that is somewhat inconsistent with *Peck v. Herrington*, 109 Ill. 611, 50 Am. Rep. 627, and the many cases which follow, and in so far as such inconsistency exists the earlier case must yield to the later ones.

The fact alone, therefore, that additional quantities of water will by the proposed new ditch be cast upon the lands of appellants does not establish the right to have the appellees enjoined from constructing that ditch.

In *Daum v. Cooper*, 208 Ill. 391, 70 N. E. 339, we said: "A proprietor of land may change the course of a natural watercourse within the limits of his own land if he restores it to the original channel before the lands of another are reached, provided in changing the course of the stream he does not cast upon the lands of an adjoining proprietor water which would not in a course of nature flow upon such adjoining premises." In that case there was before the court no question as to what water or what amount of water the owner of the dominant heritage was seeking to cast upon the land of his neighbor, and the expression "water which would not in a course of nature flow upon such adjoining premises," means water the natural way of which does not lead upon such adjoining premises, and not water which, though naturally draining through a course which leads to the servient heritage, would not reach there except for the change in the channel of the stream.

The proposed new ditch is wholly upon the land of Akker. It takes the water from the ravine and by a short cut empties it again into the natural course of that water, thereby ob-

viating the necessity of the water flowing northerly into the basin and such portions of it as are not there retained flowing southerly past bridge No. 2 to the point where the new ditch will intersect its natural channel. It ²¹⁴ is true that a part of this water, in following its natural course, flows upon land other than that owned by Akker—namely, the land of Adams and the land of Kustes. They, or either of them, possess the right to have the water continue to flow into the basin, but as Adams joins with Akker in this enterprise and Kustes makes no objection it is unnecessary to consider their right to object. The matter was therefore properly disposed of by the circuit court on precisely the same basis that it would have been had it appeared that in following its natural course the water from the ravine never passed off the land of Akker until it passed upon the land of the appellant railroad company.

Another objection urged to the decree with great vehemence is, that it is unjust, for the reason that the new ditch will carry down to the lands of appellants brush and other debris that never could reach there if the water followed the natural course. Any drain that accelerates the flow of water will increase the amount of solid matter that it carries to the servient estate, and we do not think it is a good objection to the exercise of the right of a dominant proprietor to say that the increased flow will carry debris beyond the boundary line which would not reach there except by reason of the artificial drainage.

We are satisfied that appellees were entirely within their right, as fixed by the decisions of this state, in seeking to shorten the course of this water from the mouth of the ravine to the place where it would naturally reach the railroad's right of way. We would have been better satisfied with the decree, however, had it been different in one respect. The proposed new ditch will have a fall of seventeen feet in a little more than a half mile. By the undisputed evidence of all the witnesses great quantities of water will pour down there in times of heavy rains, and the amount of fall in the ditch will make the stream a veritable torrent. The mouth of the ditch is but twenty-three rods from the line of the railroad company's property, and from the mouth west and ²¹⁵ southwest to the right of way the surface of the ground is almost level and to the south it slopes but a little along the natural water-way. It would seem to us probable that this

ditch, emptying there in that manner, would cause the water conducted by it to flow in great quantities upon the right of way and against the railroad grade north of the place where the natural course of the water intersects the line of the railroad property. As said in *Daum v. Cooper*, 208 Ill. 391, 70 N. E. 339, where the proprietor changes the natural course of the water he must restore the water to its natural channel within the limits of his own land. He must not only do that, but he must also see that the water passes from his land upon the land of his neighbor at the precise place where it would naturally do so, and at no other place. He cannot empty it out of a ditch or drain into the natural channel in such quantities that it will overflow the natural channel and pass upon the lands of his neighbor at a place other than that at which it would naturally flow upon such lands, without becoming amenable. It seems to us, from the evidence contained in this record, that the decree would have been more equitable had it provided that from a point on the line of the proposed ditch at least eighty rods distant from the right of way of the railroad company the ditch should be constructed, on a direct line to a point where it would lead into the natural course within a few feet of the place where that course passes upon the right of way. Had this been done it would have insured the water emptying out of the ditch and passing upon the railroad company's property through the natural channel and just at the opening which the company is required by the decree to leave in its grade. On the trial of the cause, however, defendants offered to construct their proposed ditch to the railroad right of way so that it would lead to and through a culvert to be constructed by the company. This offer appellants refused. Had it been accepted the difficulty of which we speak would have been obviated, and we think the rights of all parties would thereby have been properly ²¹⁶ conserved. We cannot reverse the decree for the purpose of permitting the appellants to obtain relief which they refused to accept when it was offered them on the original trial in the circuit court.

Appellees' obligation, however, to pour this water upon the land of the railroad company at no other place than that at which the water naturally flows upon that land is not, by the decree which has been rendered herein, in anywise lessened or changed. If the water from this ditch, when it is completed, passes upon the land of the railroad company at

any such other place, appellees will be liable in damages, and appellees may then, in other proceedings, be restrained from maintaining the ditch in such manner as that it will pour water upon the right of way of the Fenton and Thompson Railroad Company at any place other than that at which the water from the basin naturally passes upon that right of way.

The appellants complain bitterly of the onerous burdens which the decree in this case casts upon them, but they are only such as accompany the ownership of servient estates.

The judgment of the appellate court and the decree of the circuit court will be affirmed.

The Right of One Land Owner to accelerate or diminish the flow of water to or from the lands of another is the subject of an extended note to Mizell v. McGowan, 85 Am. St. Rep. 707-735. Generally speaking, every landed proprietor has the right to take any measures necessary to the protection of his property from surface water, even if in so doing he throws it back upon a coterminous owner: Johnson v. Southern Ry. Co., 71 S. C. 241, 110 Am. St. Rep. 572. See, too, Uhl v. Ohio River R. R. Co., 56 W. Va. 495, 107 Am. Rep. 968. And the owner of lands through which a natural watercourse flows may accumulate and cast into it in a body the surface water flowing upon lands adjacent thereto, without becoming liable to the lower riparian proprietor, if the natural capacity of the watercourse is not exceeded and overflow thereby caused: Baldwin v. Ohio Township, 70 Kan. 102, 109 Am. St. Rep. 414. A man may dig ditches wherever he pleases on his own land, provided he runs them into a natural watercourse before leaving it, subject only to the limitation against diversion: Mizell v. McGowan, 129 N. C. 93, 85 Am. St. Rep. 705.

HILL v. GIANELLI.

[221 Ill. 286, 77 N. E. 458.]

WILLS—Cutting Down Fee to Life Estate.—A devise of a fee may be restricted by subsequent words in the will and changed to an estate for life. (p. 185.)

WILLS—Creation of Life Estate.—If the first sentence in one section of will, standing alone, vests a fee simple in the husband of the testatrix, although there are no words of inheritance in the devise, but the second sentence provides that after his death the property shall revert to her heirs upon their paying his heirs the value of the improvements thereon, he takes an estate for life only. (p. 185.)

WILLS—Rule Against Perpetuity—When not Offended.—A devise of land by a woman to her husband providing that the property shall, after his death, revert to her heirs, but only after their pay-

ment to his heirs for improvements on the land, does not create a perpetuity, for the heirs of the testatrix referred to are those living at the time of her death, and the payment is to be made within their lifetime. (p. 187.)

R. V. Gustin and Keefe & Sullivan, for the appellant.

Eggmann & Eggmann, James M. Dill and Kramer & Kramer, for the appellees.

287 MAGRUDER, J. This is a suit in partition, brought to the September term, 1904, of the circuit court of St. Clair county by two of the heirs of one Marianna Solari, deceased, asking for the partition of lot 1 in block 3 of the Third Ferry division of East St. Louis, in said county. Marianna Solari died on January 16, 1885, testate, and owning the lot above described. She had no children at the time of her death, but her heirs were six nephews and nieces, all of whom are parties to this proceeding for partition. She had been married to one Frederick Sauer, from whom she had obtained a divorce. By the terms of her will, which was admitted to probate on January 20, 1885, in the probate court of St. Clair county, after directing that her debts and funeral expenses be paid, she, by the second clause thereof, gave and bequeathed to her former husband, Frederick Sauer, all her personal property and choses in action of every kind and nature **288** whatsoever; and the third section of her will is as follows, to wit: "I give and devise unto him, the said Frederick Sauer, all the real estate I own in the city of St. Louis, and all interest I may own in and to any property, real, personal or mixed in Switzerland. Provided that after his death the real estate shall revert to my heirs in Switzerland; but only after the payment by them to the heirs of Frederick Sauer of any improvements made on the real estate herein devised." By the fourth section of the will she appointed Frederick Sauer sole executor thereof. The bill for partition made parties defendant thereto all the heirs of Marianna Solari, except the complainants filing the bill and also the heirs of Frederick Sauer, deceased. The bill also made as parties defendant the administrator of the estate of Frederick Sauer, deceased, and the administrator with the will annexed of the estate of Marianna Solari, deceased, and also made a defendant thereto the appellant, Nancy K. Hill.

Default was entered against the heirs of Marianna Solari, and answer was filed by the heirs of Frederick Sauer,

denying the material allegations of the bill. An answer was also filed by the appellant, Nancy K. Hill, denying the allegations of the original bill. Appellant, Nancy K. Hill, also filed a cross-bill in the case, which was demurred to by the complainants in the original bill, and also by the heirs of Frederick Sauer, deceased. The demurrers to the cross-bill were sustained, and the same was dismissed for want of equity. The theory of the cross-bill, filed by the appellant, was that Frederick Sauer, by the terms of the will, took the fee simple title to the property. The cross-bill sets up that appellant took care of Frederick Sauer, while he and she lived upon the property in question from May 17, 1901, to the time of his death, which occurred on July 3, 1903. Appellant claims in her bill that Frederick Sauer was addicted to the habit of drinking intoxicating liquors, and was in a bad condition of health during the time she took care of him, and that in consideration of her care of him he made a contract ²⁸⁹ with her by the terms of which he agreed to will to her all his interest in the lot above described. Although the cross-bill alleges that he made a will in pursuance of said contract, yet it is admitted in the cross-bill that, after his death, no such will was found. The original bill also alleges that Frederick Sauer executed a mortgage upon the property in his lifetime to one Schaub, and also that the appellant, Nancy K. Hill, executed a mortgage upon the property in question to one Gustin.

The decree entered in the case was substantially in accordance with the prayer of the original bill. It finds that the six heirs of Marianna Solari were entitled to undivided interests in the property, and that partition be made accordingly. The decree also finds that, by the terms of the will, it was provided that the real estate above described should descend to Frederick Sauer during his lifetime, and, upon his death, to revert to the heirs of the testatrix, Marianna Solari, residing in Switzerland, after the payment to the heirs of Frederick Sauer of any amount for improvements made on said premises, and that the said improvements amounted to eight hundred dollars. The decree, besides dismissing the cross-bill for want of equity, found that the mortgages made by Frederick Sauer and by appellant were clouds upon the title, and declared the same null and void, and removed the same as such clouds. The decree found that the heirs of Marianna Solari were entitled to the prop-

erty in certain proportions, subject to the payment to the heirs of Frederick Sauer, deceased, of the above-stated sum of eight hundred dollars for improvements made on said premises. The decree also found that the appellant had no legal title or interest in said real estate, or any part thereof, and appointed commissioners to partition the property among the heirs of Marianna Solari, deceased, or appraise the same, if it could not be divided. The commissioners reported that the property could not be divided, and it was thereupon ordered to be sold by the master of the court. The present appeal is prosecuted by the ²⁹⁰ appellant, Nancy K. Hill, alone, from the decree so entered by the circuit court of St. Clair county.

The questions involved in this case depend upon the proper construction to be given to the third section of the will of Mrs. Solari, as the same is above set forth. Section 3 gives and devises to Frederick Sauer the real estate of the testatrix in the city of East St. Louis, which includes the lot here in controversy. The devise, however, does not contain words of inheritance. "Where an estate is devised to A without the use of the words 'heirs and assigns,' A will take a fee simple estate of inheritance, unless the will or instrument of conveyance reduces the estate to an estate less than a fee by express words, or by construction or operation of law": *Turner v. Hause*, 199 Ill. 464, 65 N. E. 445; *Wolfer v. Hemmer*, 144 Ill. 554, 33 N. E. 751; *Saeger v. Bode*, 181 Ill. 514, 55 N. E. 129; *Smith v. Kimball*, 153 Ill. 368, 38 N. E. 1020. This court has held that a devise of the fee may be restricted by subsequent words in the will and changed to an estate for life: *Bergan v. Cahill*, 55 Ill. 160; *Johnson v. Johnson*, 98 Ill. 564. In the case at bar the first sentence of the third section of the will of Mrs. Solari, standing alone, vested in Frederick Sauer a fee simple title to the lot in question. But the second sentence of the will, which provided that, after the death of Frederick Sauer, the real estate should revert to the heirs of the testatrix in Switzerland, reduced the estate to an estate less than a fee—that is to say, to an estate for life only. The natural and proper construction of the will is, that Frederick Sauer took only a life estate in the lot, while the heirs of the testatrix in Switzerland took the fee, subject to said life estate.

That the heirs in Switzerland took the fee, and that Frederick Sauer had only a life estate, which ended at his death,

was the theory upon which the decree of the circuit court was based. If that theory is correct—that is to say, if Frederick Sauer only took a life estate, which ended when he died—then appellant took nothing by any will in her favor which Frederick Sauer may have made, or by any contract ²⁹¹ providing for the execution of a will in her favor which he may have made before his death. Whatever interest the heirs of Frederick Sauer took in the property they took by virtue of the will of Marianna Solari, and they derived no interest whatever from Frederick Sauer. The heirs of Frederick Sauer could only be held bound to carry out his alleged contracts, or to answer for his debts with property that they derived from him. But in the case at bar, under the construction given to the will by the court below, which in our opinion was the correct construction, they derived whatever interest they had in this property from Marianna Solari, and not from Frederick Sauer.

The contention on the part of the appellant, however, is that, by the terms of section 3 of the will, the real estate after the death of Frederick Sauer was only to revert to the heirs of the testatrix in Switzerland after the payment by such heirs to the heirs of Frederick Sauer of any improvements made upon the real estate thereby devised. The rule is invoked that no interest subject to a condition precedent is good unless the condition must be fulfilled, if at all, within twenty-one years after the expiration of some life in being at the creation of the interest; and that the rule prohibiting perpetuities requires that the absolute ownership of property must vest in some one within the period of a life or lives in being, and twenty-one years and nine months thereafter: *Lawrence v. Smith*, 163 Ill. 149, 45 N. E. 250; *Owsley v. Harrison*, 190 Ill. 235, 10 N. E. 89. It is said that the provision that the realty should only revert to the Switzerland heirs after the payment by them to the heirs of Frederick Sauer, deceased, of the amount paid for improvements violated the above-stated rule against perpetuities. It is true that the will does not fix any time within which the condition was to be performed. Counsel for appellant say in their brief that the payment of the amount due for improvements could be made at any time after the death of Frederick Sauer without limitation as to time, and that “it could be made as well within one hundred ²⁹² years after the death of Frederick Sauer as it could be made within a

year after his death." In other words, the contention of counsel for appellant is that the clause in question required the heirs of Marianna Solari to pay to the heirs of Frederick Sauer the amount above mentioned as a condition precedent to their rights to the property in question, and that the condition precedent was not required to be performed, by the terms of the will, within the life or lives then in being and twenty-one years beyond, and was, therefore, void, as violating the rule against perpetuities. We cannot agree with this contention. The improvements made by Frederick Sauer were to be paid for by the heirs of the deceased testatrix in Switzerland. The expression in the will, "my heirs in Switzerland," refers to those who were the heirs of the testatrix at the time of her death: *Kellett v. Shepard*, 139 Ill. 433, 28 N. E. 751, 34 N. E. 254. This is admitted by counsel for appellant in their argument. The improvements were to be paid for then by the heirs of the deceased testatrix who should be living at the time of her death. They were to be paid for by such heirs, and by no others, and the payment was to be made in the lifetime of such heirs. If the payment was to be made in the lifetime of the heirs, it was to be made within the lives then in being, and not after the expiration of such lives and the expiration of twenty-one years beyond such lives.

Again, there was introduced in evidence a treaty between the United States and the Swiss Confederation, made in 1847, and, by the second section of this treaty, it was provided that, if by the death of a person owning real estate in one of the high contracting parties such property should descend either by the laws of the country, or by testamentary disposition, to a citizen of the other party, who, on account of being an alien, could not be permitted to retain the actual possession of such property, he should have not less than three years' time in which to dispose of it. Under our present statute six years are allowed for the disposition of property in such cases. The will shows upon its face that these ²⁹³ heirs were aliens living in Switzerland, and their interest in the property under the treaty could only last three years, and, therefore, a perpetuity was not created by this will giving the real estate to these aliens. The neglect on their part to comply with the condition precedent—that is, to pay for the improvements—could not create a perpetuity, but would only defeat the title of the defaulting devisees.

It is to be noted, however, that this appeal is taken by the appellant alone. The heirs of Marianna Solari are not complaining of the decree of the court below, nor are the heirs of Frederick Sauer complaining of such decree. The decree fixed the value of the improvements at the sum of eight hundred dollars, and directed that the heirs of Mrs. Solari should be entitled to their undivided interest in the property, subject to the payment to the heirs of Frederick Sauer of said sum of eight hundred dollars for improvements. This part of the decree seems to be satisfactory to the heirs of Frederick Sauer, who are parties to the proceeding below. They could waive the payment in cash for the improvements if they chose, and accept in lieu thereof a decree which made the amount due them for improvements a lien upon the property. In *Jones v. Bramblet*, 1 Scam. 276, this court held that the performance of a condition precedent, where it has been voluntarily dispensed with by the beneficiary, is not essential to the perfection of an estate. In *Nevius v. Gourley*, 95 Ill. 206, this court held that "where land is devised upon condition that the devisee shall pay a money legacy specified in the will, if the legatee sees proper to accept the promissory note of the devisee of the land in payment of the legacy, that will be regarded as a good payment under the will." So, in the case at bar, the heirs of Frederick Sauer had a right to accept, instead of money, a decree giving them a lien upon the property for the amount due them for improvements.

The heirs in Switzerland have filed this bill, and prayed that the value of the improvements, which the will required them to pay, should be ascertained. It might take time to ²⁹⁴ascertain who the heirs of Frederick Sauer were, and it would naturally take some time to ascertain by a judicial proceeding what the improvements made by Frederick Sauer were worth. Evidently, therefore, the intention of the testatrix was that these improvements should be paid for within a reasonable time: 1 *Underhill on Wills*, 646; *Ross v. Tremain*, 2 Met. 495; *Carter v. Carter*, 14 Pick. 424. The heirs of Frederick Sauer filed an answer claiming the value of the improvements, and did not insist upon a payment of this value, instead of having the payment made a first lien on the land. The heirs of Frederick Sauer are the only parties who can complain in reference to the manner and time within which these improvements were to be paid for,

and as they are not complaining here, it does not lie in the mouth of appellant to complain. She is not entitled to the land in any event.

It is said by the appellant that the proof does not show that the persons who were decreed by the court to be the owners of the property as the heirs of Mrs. Solari were really her heirs. It is unnecessary to investigate or discuss this question because it does not concern the appellant. The only matter which concerns her is whether or not Frederick Sauer had any greater interest in the property than a life estate. If he had no greater interest than a life estate, then she took nothing from him either by will or contract, and whether or not the real estate was partitioned among the correct parties is a subject in which the appellant has no interest.

For the reasons above set forth, we are of the opinion that the decree of the court below was correct. Accordingly, it is affirmed.

The Rule Against Perpetuities is the subject of an extended note to *In re Walkerly*, 49 Am. St. Rep. 117-139; and the severability of perpetuities is discussed in the monographic note to *Johnston's Estate*, 64 Am. St. Rep. 634-646.

When the Words of a Will at the outset clearly indicate a disposition to give the entire estate absolutely to the first donee, the estate, it has been held, will not be cut down to a less estate by subsequent or ambiguous words inferential in their intent: *Gannon v. Albright*, 183 Mo. 238, 105 Am. St. Rep. 471.

HART v. CARLSLEY MANUFACTURING COMPANY.

[221 Ill. 444, 77 N. E. 897.]

BUILDING CONTRACT—Failure to Obtain Architect's Certificate—Pleading.—A builder who is unable to obtain a certificate from the architect showing the amount due, as his contract requires, cannot recover for work done and materials furnished on the common counts, but only on the contract, upon a declaration setting up the contract, averring performance as to furnishing the material and performing the work, and stating his reason for not furnishing the certificate. (p. 190.)

PLEADING.—Though an Excuse for not Performing a Condition is for some purpose equivalent to performance, yet it is not the same thing, and in pleading, therefore, performance must never be averred by one who relies upon an excuse for not performing, but he must state his excuse. (p. 190.)

Action by a contractor, who was unable to procure a certificate from the architect to the effect that payment was due, to recover for work performed and materials furnished under a building contract expressly providing that such a certificate shall be a condition precedent to the right to require payment. The declaration consisted of the common counts and one special count. The special count was so drawn that the contract could not be admitted thereunder, but it was admitted under the common counts, and a verdict for the plaintiff was allowed. The jury, in addition to the general verdict, returned special findings to the effect that the architect's final certificate was withheld through fraud and collusion with the defendants, and not as a result of the exercise of honest judgment.

Julius & Lessing Rosenthal, for the appellants.

Pierson, Pease & De Young, for the appellee.

445 SCOTT, J. This was a building contract. By its terms the right to recover was dependent upon the builder obtaining the certificate of the architect showing the amount due. This appellee was unable to do. Under these circumstances the builder **446** was permitted to recover upon the common counts. In this we think there was error. In such case recovery should only be had on the contract, upon a declaration setting up the contract, averring performance as to furnishing the material and performing the work, and stating the reason for the builder's failure to satisfy the condition precedent and comply with the terms of the contract by furnishing the architect's certificate.

The true rule is this: "Though an excuse for not performing a condition is for some purposes equivalent to performance, yet it is not the same thing, and therefore in pleading, performance must never be averred by a party who relies upon an excuse for not performing, but he must state his excuses": Coke on Littleton, 304; Langdell on Contracts, sec. 175; 1 Chitty on Pleading, 14th Am. ed., 340; Colt v. Miller, 10 Cush. 49; Palmer v. Sawyer, 114 Mass. 1; Speake v. Shepard, 6 Har. & J. 81; Michaelis v. Wolf, 136 Ill. 68, 26 N. E. 384; Parmly v. Farrar, 169 Ill. 606, 48 N. E. 693; City of Peoria v. Fruin-Bambrick Construction Co., 169 Ill. 36, 48 N. E. 435.

We regard the case last cited as in point. That was on a paving contract which provided that the work was to be done under the supervision of the city engineer, and was to be accepted, after completion, by the commissioner of public works before the contractor was entitled to payment or to maintain a suit. The action was commenced without the work having been so accepted, the theory of the plaintiff being that the captiousness and fraudulent conduct of the city engineer and the commissioner of public works prevented the acceptance of the work. The declaration consisted only of the common counts. A recovery was had in the court below, but the judgment was reversed by this court, and we there said (page 39): "The declaration gives the city no notice of any such a charge of fraud or misconduct as a ground for not performing the conditions of the contract, yet there can be no doubt that the question of the misconduct of the city engineer and the commissioner of public works is ⁴⁴⁷ the decisive one in this case. We think there is abundant authority for the rule that when work is done under contract, as was the case here, the plaintiff can only recover therefor when he has fully or substantially performed the conditions precedent to his right of recovery, as stated in the contract, or else averred and proved a sufficient excuse for his noncompliance with its conditions: *Michaelis v. Wolf*, 136 Ill. 68, 26 N. E. 384; *Barney v. Giles*, 120 Ill. 154, 11 N. E. 206. The necessary averment is lacking, and the court committed error in permitting testimony to go to the jury for the purpose of impeaching the good faith of the city engineer and the commissioner of public works, and also in refusing the instruction offered by the city, on the theory that under the pleadings of this case plaintiff could only recover upon a complete performance of the contract on his part." In *Michaelis v. Wolf*, 136 Ill. 68, 26 N. E. 384, the following language was used by the court: "Such compliance with the conditions precedent, or excuse for noncompliance, must be averred in the pleadings and established by the evidence."

The only case differing from the authorities to which we have above referred, to which our attention has been called, is that of *Foster v. McKeown*, 192 Ill. 339, 61 N. E. 514. The opinion in that case is based upon the theory that the parties had waived the condition of the contract by which the architect's certificate was necessary to the right of recov-

ery, and that, the contract having been modified in that manner, the condition precedent was no longer a part thereof. That case is so distinguished from the one at bar. The precise effect of that distinction we do not now determine. In any event, however, the language found in *Foster v. McKeown*, 192 Ill. 339, 61 N. E. 51, which indicates that a building contract should be excepted from the rule of pleading which we have above quoted, is not in accordance with the general current of authority, and we have reached the conclusion that there is no reason why there should be any variance from that rule in pleading a contract of the character of the one under consideration.

⁴⁴⁸ Complaint is made of the second instruction given at the request of appellee. That instruction was inaccurate in one respect. Whether a reversal of the judgment would thereby be necessitated if the record were otherwise free from error is now immaterial.

The judgments of the circuit and appellate courts will be reversed, and the cause will be remanded to the circuit court for further proceedings consistent with the views herein expressed.

Proof of an Excuse for not Performing a Contract is said not to sustain an averment in a complaint that the contract has been performed: *Shinn v. Haines*, 21 N. J. L. 340; *Thompson v. Jewell*, 8 Ky. (1 A. K. Marsh.) 195.

TEEL v. DUNNIHOO.

[221 Ill. 471, 77 N. E. 906.]

INFANTS—Impeachment of Decree.—A Court of Equity may entertain an original bill on behalf of a minor to impeach a decree for fraud or for errors of law appearing upon the face of the record; and such a bill may be filed during minority, or within the period allowed after majority for the prosecution of a writ of error. (p. 195.)

INFANTS—Impeachment of Decree—Intervening Rights.—Equity will not set aside a decree at the suit of a minor, if the court entering it had jurisdiction of the parties and the subject matter, and persons who were not parties have, in good faith and in reliance upon the decree, acquired interests in the subject matter of the suit. (p. 196.)

INFANTS—Impeachment of Decree—Finding of Jurisdiction. Findings in a decree that the parties have been duly served with process, or have entered their appearance, are not overcome, on a collateral attack by minors, by the return of the sheriff upon a sum-

mons issued against Nona Stocks that he had served "Noma" Stocks, nor by a written appearance of other defendants from which it appears that Nona Stocks was a complainant, and not a defendant. (p. 196.)

INFANTS—Reformation of Deed—Inoperative Decree.—If, in a suit to correct a deed by striking out the words "bodily heirs," the decree recites that such words were improperly inserted, but, instead of ordering them to be stricken out, directs a new deed to be made, the decree, and the master's deed executed in pursuance thereof, do not divest the title of the children of the grantee, vested in them by virtue of the words "bodily heirs," and are not to be considered in determining the children's right to partition, even as against subsequent purchasers. (p. 198.)

F. W. Raymond, for the appellants.

James H. Martin, William W. Clemens and William H. Warder, for the appellees.

472 HAND, J. This is an appeal from a decree of the circuit court of Williamson county sustaining a demurrer to, and dismissing for want of equity, a bill in chancery filed by Harry C. Teel and Nona Teel, and Elmo Stocks, by his guardian, John Stocks, against the appellees, for the partition between Nona Teel and Elmo Stocks of the west half of the southwest quarter of section 22, and the northeast quarter of the northeast quarter of section 28, in township 8 south, range 2 east of the third principal meridian, Williamson county, Illinois, and to impeach and set aside as a cloud upon the title of Nona Teel and Elmo Stocks, for fraud and for errors of law appearing upon the face of the record, a certain decree entered by the circuit court of Williamson county on April 17, 1891, in a suit in chancery then pending in said court, wherein Mary E. A. Stocks and John Stocks were complainants, and Nona Stocks, William L. Henderson and Harriet Henderson were defendants, and wherein it was found by the court that William L. Henderson and Harriet Henderson by deed conveyed to said Mary E. A. Stocks and "her bodily **473** heirs," on the seventeenth day of August, 1886, said described lands, and that the words "her bodily heirs" were improperly inserted in said deed, and that said Mary E. A. Stocks was entitled to have said deed corrected by eliminating therefrom the words "her bodily heirs," and decreed that said William L. Henderson and Harriet, his wife, execute a good and sufficient warranty deed conveying to Mary E. A. Stocks said lands in fee simple, without any qualification or restriction what-

ever, within sixty days, and that in default of the execution and delivery of said deed the master in chancery of said court execute a deed of conveyance conveying to Mary E. A. Stocks, in fee simple, said lands; also to set aside and cancel as a cloud upon the title of Nona Teel and Elmo Stocks a master's deed made to Mary E. A. Stocks in pursuance of the terms of said decree; also to set aside and cancel certain deeds made by Mary E. A. Stocks, and her grantees, to said lands, through which the parties now in possession of said lands claim title.

It appears from the averments of the bill filed in this case that Mary E. A. Stocks was a daughter of William L. Henderson and Harriet Henderson; that on the seventeenth day of August, 1886, William L. Henderson and Harriet Henderson conveyed to Mary E. A. Stocks and "her bodily heirs" the land in question for one thousand dollars, and that Mary E. A. Stocks and her husband, John Stocks, immediately moved upon the lands and improved the same and made their home thereon for a number of years; that on February 18, 1891, Mary E. A. Stocks and husband, and after the birth of their child Nona and when she was of the age of three years, filed a bill in chancery against Nona Stocks, William L. Henderson and Harriet Henderson for the purpose of having corrected said deed by striking out therefrom the words "her bodily heirs"; that upon the hearing upon said bill the court made the findings and entered the decree above referred to; that William L. Henderson and Harriet Henderson failed to make a deed as provided by said decree, whereupon the ⁴⁷⁴ master in chancery executed a deed to Mary E. A. Stocks in accordance with the terms of said decree; that Mary E. A. Stocks subsequently sold and conveyed said lands by absolute deed, and the lands have been transferred from time to time by her grantee and his grantees, and are now in the possession of persons who were not parties to said chancery suit commenced by Mary E. A. Stocks and husband against Nona Stocks and William L. and Harriet Henderson; that Mary E. A. Stocks died on October 21, 1902, leaving her surviving her husband, John Stocks, and Nona Teel, born March 21, 1887, and Elmo Stocks, born August 22, 1891, as her children and sole heirs at law, and that said Nona Teel was about eighteen years of age and said Elmo Stocks about fourteen years of age at the time this bill was filed.

The decree of April 17, 1891, is sought to be impeached, and the court is asked to annul, set aside and disregard the same on the grounds, first, that the court did not have jurisdiction of the persons of Nona Stocks and William L. Henderson and Harriet Henderson; second, that the guardian ad litem appointed for Nona Stocks neglected and failed to properly represent and protect the interests of Nona Stocks; third, that the testimony of John Stocks, Mary E. A. Stocks and William L. Henderson, upon which the finding in the decree was based, that the words "her bodily heirs," found in the deed from William L. Henderson and Harriet Henderson to Mary E. A. Stocks, were improperly inserted in said deed, was false; and fourth, that the deed from William L. Henderson and Harriet Henderson to Mary E. A. Stocks conveyed to Mary E. A. Stocks a life estate in said lands only, and that the fee simple estate therein vested in Nona Teel and Elmo Stocks, and that the decree entered by the court in said chancery case, and the deed of the master in chancery based thereon, did not have the effect to divest said Nona Teel and Elmo Stocks of their title in and to said lands, and that the title to said lands was in Nona Teel and Elmo Stocks at the time of filing the bill herein in fee simple.

475 The complainants in the bill filed in this case set out their title to said lands as derived through the deed made by William Henderson and Harriet Henderson to Mary E. A. Stocks and "her bodily heirs"; also copies of the bill filed in the suit commenced by Mary E. A. Stocks and husband, the master's report, the evidence taken before the master and the decree entered by the court in that case, and the master's deed by which it was sought to divest them of their title to said lands; also the chain of title of the parties now alleged to be in possession of the lands, showing those parties deraigned title through the decree entered in said chancery suit and the master's deed based thereon, and averred that said decree and master's deed did not have the effect to divest them of their title. The defendant demurred to the bill, and thereby admitted to be true all the facts properly pleaded in said bill, and the question is presented for decision here whether the decree entered in the chancery suit commenced by Mary E. A. Stocks and husband, and the master's deed based thereon, divested the complainants of their title to said lands.

It is clear a court of equity in this state may entertain an original bill on behalf of a minor to impeach a decree for fraud or for errors of law appearing upon the face of the record (*Lloyd v. Malone*, 23 Ill. 43, 74 Am. Dec. 179; *Kuchenbeiser v. Beekert*, 41 Ill. 172; *Gooch v. Green*, 102 Ill. 507; *Lloyd v. Kirkwood*, 112 Ill. 329; *Haines v. Hewitt*, 129 Ill. 347, 21 N. E. 930; *Griswold v. Hicks*, 132 Ill. 494; *Crane v. Stafford*, 217 Ill. 21, 75 N. E. 424); and that such bill may be filed during minority, or within the period allowed after majority for the prosecution of a writ of error: *Haines v. Hewitt*, 129 Ill. 347, 21 N. E. 930; *Crane v. Stafford*, 217 Ill. 21, 75 N. E. 424. When, however, the court entering the decree had jurisdiction of the parties and the subject matter of the suit, and persons who were not parties to the suit and who have dealt with the subject matter of the suit in good faith, relying upon the decree, have acquired interests in the subject matter of the suit, the court will not set aside the decree ⁴⁷⁶ and thereby divest and destroy their interests in the subject matter of the suit: *Hedges v. Mace*, 72 Ill. 472; *Lloyd v. Kirkwood*, 112 Ill. 329; *Lambert v. Livingston*, 131 Ill. 161, 23 N. E. 352. The court, in the decree sought to be impeached by the bill filed in this case, found Nona Stocks had been duly served with process, and that William L. Henderson and Harriet Henderson had entered their appearance in said cause, and that the court had jurisdiction of their persons and the subject matter of the suit, and, as against a collateral attack upon that decree (which this suit must be held to be), we think the findings in the decree that the parties had been duly served with process or had entered their appearance, and that the court had jurisdiction of the parties and of the subject matter of the suit, are not overcome by the return of the sheriff upon a summons found among the files of the case, issued against Nona Stocks, that he had served "Noma" Stocks, or by a paper found among the files purporting to be the written appearance of William L. Henderson and Harriet Henderson, from which it appears Nona Stocks was a complainant, and not a defendant. The bill filed in that case was sufficient to give the court jurisdiction of the subject matter of the suit, and the court having found it had jurisdiction of the parties, which was a matter upon which it was authorized to adjudicate, the fact that errors may have afterward intervened on the hearing or in the entering of the

decree would not have the effect to defeat the title of the defendants, who dealt in good faith with the property, relying upon such decree, if the effect of the decree was to divest the title of the complainants: *Hedges v. Mace*, 72 Ill. 472. If, however, the decree entered in that case, and the master's deed based on that decree, did not have the effect to divest the complainants of their title to said lands, but the decree was inoperative in that regard, the decree may be disregarded as being inoperative, and the title to said lands still be held to remain in the complainants.

477 It is clear the deed made by William Henderson and Harriet Henderson to Mary E. A. Stocks and "her bodily heirs" had the effect to vest only a life estate in the lands in Mary E. A. Stocks, and the fee thereof, upon the birth of Nona Stocks and Elmo Stocks, vested in them as her bodily heirs. (*Frazer v. Board of Supervisors of Peoria County*, 74 Ill. 282; *Hagan v. Waldo*, 168 Ill. 646, 48 N. E. 89; *Kyner v. Boll*, 182 Ill. 171, 54 N. E. 925; *Atherton v. Roche*, 192 Ill. 252, 61 N. E. 357, 55 L. R. A. 591); and by the execution and delivery of said deed to Mary E. A. Stocks, the title to said lands passed out of William L. Henderson and Harriet Henderson, and they had remaining therein no title in the lands which they could thereafter convey to Mary E. A. Stocks by a second deed, and thereby impair the fee simple title which they had already conveyed to Nona Teel and Elmo Stocks: *Frazer v. Board of Supervisors of Peoria County*, 74 Ill. 282; *Kyner v. Boll*, 182 Ill. 171, 54 N. E. 925. And while a court of equity, upon a proper bill supported by the requisite proof, could have corrected the alleged error in the deed by striking out the word "her bodily heirs" (*Kyner v. Boll*, 182 Ill. 171, 54 N. E. 925), such was not the effect of the decree of the court. The recital in the decree that the words "her bodily heirs" were improperly incorporated in the deed and that Mary E. A. Stocks was entitled to have the deed corrected was no part of the mandatory part of the decree, and did not operate to correct what was found to be an error in the deed. The mandatory part of the decree was, that William L. Henderson and Harriet Henderson execute and deliver to Mary E. A. Stocks a deed conveying to her the absolute title to said lands, and in case of their default the master make the deed. If the deed ordered by the court to be made had been voluntarily executed by William L. Henderson and Harriet

Henderson, it would have been fruitless to transfer any title in the lands to Mary E. A. Stocks which she did not then have or to divest the title already conveyed to Nona Stocks and Elmo Stocks, and had a deed been made by William L. Henderson and Harriet Henderson under the decree in the **478** form in which it was entered, its effect would have been the same as a deed voluntarily made by William L. and Harriet Henderson, and the fact that it was made under the direction of the court would not have added any force to it as a conveyance. Nor did the fact that the deed was executed by the master in default of one having been executed by William L. Henderson and Harriet Henderson have any effect to transfer title which would not have been conveyed by the deed had it been executed by William L. Henderson and Harriet Henderson, as the statute expressly provides that a deed made by a master in chancery for and on behalf of a party ordered to execute a deed by the court, who has made default, shall have only the effect to convey the title which the party ordered to make the deed would have conveyed had he complied with the order and executed a deed: Hurd's Stats. 1903, c. 22, sec. 46.

We think it therefore clear that the decree entered in the chancery suit commenced by Mary E. A. Stocks and husband, and the master's deed based upon that decree, did not divest the fee simple title of the complainants in said lands, and are of the opinion that decree should have been disregarded by the court in determining in whom the title to said lands was vested. The complainants, therefore, as appears from the averments of their bill filed in this case, were the owners of the fee simple title to said lands, and were entitled to have the clouds resting thereon removed and have a partition of said lands, and the court erred in sustaining a demurrer to their bill.

The decree of the circuit court will therefore be reversed and the cause remanded to that court, with directions to overrule the demurrer.

BILLS BY INFANTS TO IMPEACH OR AVOID DECREES.

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I. Validity and Effect of Decrees Against Infant.

a. In General.—Where infants are plaintiffs in an action brought and prosecuted in good faith for their benefit, they are ordinarily bound by the judgment the same as adults would be: *McCreary v. Creighton* (Neb.), 107 N. W. 240, citing *Kingsbury v. Buckner*, 134 U. S. 650, 10 Sup. Ct. Rep. 638, 33 L. ed. 1047; *Corker v. Jones*, 110 U. S. 317, 4 Sup. Ct. Rep. 19, 28 L. ed. 161. And a judgment at law or a decree in equity rendered against an infant properly before the court is as obligatory upon him as though he were an adult, except in those cases where he is allowed time after arriving at his majority to show cause against the judgment or decree: See the note to *Porter v. Robinson*, 13 Am. Dec. 159; *Joyce v. McAvoy*, 31 Cal. 273, 89 Am. Dec. 172, and note; *Allison v. Drake*, 145 Ill. 500, 32 Atl. 537; *Cook v. Edison Keith & Co.*, 5 Ind. Ter. 595, 82 S. W. 918; *Bickel v. Erskine*, 43 Iowa, 213; *Sites v. Eldredge*, 45 N. J. Eq. 632, 14 Am. St. Rep. 769, 18 Atl. 214; *Vaccaro v. Cicalla*, 89 Tenn. 63, 14 S. W. 43; *Harrison v. Wallton's Exr.*, 95 Va. 721, 64 Am. St. Rep. 830, 30 S. E. 372, 41 L. R. A. 703; *Wilson v. Hubbard*, 39 Wash. 671, 82 Pac. 154. Even if a guardian ad litem is not appointed, the judgment is not for that reason void, but only irregular or voidable: *Levystein v. O'Brien*, 106 Ala. 352, 54 Am. St. Rep. 56, 17 South. 550, 30 L. R. A. 707; *Childs v. Lanterman*, 103 Cal. 387, 42 Am. St. Rep. 121, 37 Pac. 382; *Manfull v. Graham*, 55 Neb. 645, 70 Am. St. Rep. 412, 76 N. W. 19; *Robertson v. Blair*, 56 S. C. 96, 76 Am. St. Rep. 543, 34 S. E. 11.

“By the law as it is judicially declared in England, and in many of the states here,” to quote from the language of the supreme court of Illinois, “a decree against an infant is not absolute in the first instance. It is binding sub modo only. On becoming of age he is entitled to his day in court to show cause against the decree, and his right to do so must be expressly reserved by the decree itself, otherwise it will be erroneous, and subject to be reversed and set aside. In many of the states, however, including our own, a decree against an infant, like that against an adult, is absolute in the first instance, subject to the right to attack it by original bill, for either fraud or error merely; but until so attacked and set aside, or reversed on error or appeal, it is binding to the same extent as any other decree or judgment”: *Lloyd v. Kirkwood*, 112 Ill. 329.

“An infant defendant,” it is said in *Ralston v. Lahee*, 8 Iowa, 17, 74 Am. Dec. 291, “is as much bound by a decree in equity against her as a person of full age. Therefore, if there be an absolute decree against a defendant who is under age, she will not be permitted to

dispute it, unless upon such grounds as an adult might dispute it, as fraud, collusion or error. To impeach the decree on the ground of fraud or collusion, she may proceed either by bill of review or by original bill; and she is not obliged to wait for that purpose until she has arrived at the age of twenty-one. In ordinary cases, where an infant is allowed time after her arrival at the age of twenty-one years, to show cause against a decree, the decree, in such cases, is deemed complete; but the infant has the time allowed to show cause against it. If no cause is shown within the time specified, the infant is bound."

b. Presumption of Validity.—Moreover, "there is," to quote from *White v. Morris*, 107 N. C. 92, 12 S. E. 80, "a presumption in favor of the validity of every judgment of a court of competent jurisdiction, and in this there is no distinction between judgments against adults and judgments against infants, where the parties are properly within the jurisdiction of the court. And while it is, for obvious reasons, the duty of the courts to see that the rights and interests of infants are guarded and protected, and, where they are without regular guardians, to see that suitable and fit persons are appointed guardians ad litem to protect and defend them in their rights when litigated before the courts, yet, in the absence of any charge that the court has been imposed upon by fraud and collusion, it will be presumed that every court having jurisdiction of the parties and the subject matter does what is necessary to give effect to its proceedings; and this presumption in favor of judicial proceedings will not permit the judgments of courts to be set aside or annulled, in the absence of fraud, for mere informalities, technicalities or omissions that do not affect their merits or defeat the ends of justice."

c. Right to Vacate Judgment.—And, in general, it may be said that an infant has no absolute right to avoid a judgment or decree against him; even if it is irregular, he is not entitled to have it vacated as a matter of course: *Robertson v. Blair*, 56 S. C. 96, 76 Am. St. Rep. 543, 34 S. E. 11. To the same effect are *Regla v. Martin*, 19 Cal. 463; *Manfull v. Graham*, 55 Neb. 645, 70 Am. St. Rep. 412, 76 N. W. 19.

II. Impeachment of Decrees Against Infant.

a. By Original Bill in General.—It appears to be a well-settled rule of equity practice that an infant who has been wronged by a decree of a court of chancery may maintain an original bill to impeach or avoid the decree. And, unlike an adult, he may question such a decree without applying for a rehearing or filing a bill for review. He may exercise this right at any time before he attains his majority, or thereafter within the time in which he may prosecute a writ of error to reverse the erroneous decree: *Hains v. Hewitt*, 129 Ill. 347, 21 N. E. 930; *Grimes v. Grimes*, 143 Ill. 550, 32 N. E. 847; *Johnson v. Buck*, 220 Ill. 226, 77 N. E. 163; *Mauzey v. Dazey*, 114 Ill. App. 652; *Ralston v. Lahee*, 8 Iowa, 17, 74 Am. Dec. 291; *Wright v. Miller*,

1 Sand. Ch. 103; *Long v. Mulford*, 17 Ohio St. 484, 93 Am. Dec. 638; *Harrison v. Wallton's Exr.*, 95 Va. 721, 64 Am. St. Rep. 830, 30 S. E. 372, 41 L. R. A. 703; *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262; *Seymour v. Alkire*, 47 W. Va. 302, 34 S. E. 953.

It is not necessary, in order to maintain such a bill, that the infancy of the complainant appear upon the face of the proceedings attacked: *Grimes v. Grimes*, 143 Ill. 550, 32 N. E. 847. But it is said that an original suit cannot be maintained to vacate an erroneous judgment against an infant, without at least showing a good defense to the first action: *Manfull v. Graham*, 55 Neb. 545, 70 Am. St. Rep. 412, 76 N. W. 19.

b. Leave of Court to File Bill.—An original bill by an infant to impeach a decree against him may be filed without first obtaining leave of court: *Grimes v. Grimes*, 143 Ill. 550, 32 N. E. 847. "An original bill in the nature of a bill of review may be brought for the purpose of impeaching a decree for fraud. It is a matter of right, and may be filed at any time until barred by the statute, without the leave of court, and may be brought for fraud in fact or fraud in law": *Gooch v. Green*, 102 Ill. 507.

c. Grounds for Impeachment.—The generally accepted doctrine is, that an infant cannot avoid a judgment or decree against him merely on the ground of infancy, and that he cannot impeach such a judgment or decree by an original bill, except upon grounds that would be available to an adult, such as fraud, collusion or prejudicial error: *Bickel v. Erskine*, 43 Iowa, 213; *Johnson v. Johnson* (Tex. Civ. App.), 85 S. W. 1023; *Harrison v. Wallton's Exr.*, 95 Va. 721, 64 Am. St. Rep. 830, 30 S. E. 372, 41 L. R. A. 703; *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262; notes to *Porter v. Robinson*, 13 Am. Dec. 159; *Little Rock etc. Ry. Co. v. Wells*, 54 Am. St. Rep. 253. And this general subject of relief in equity, other than by appellate proceedings, against judgments, decrees and other judicial determinations, will be found discussed at length in the monographic note to *Little Rock etc. Ry. Co. v. Wells*, 54 Am. St. Rep. 218-261.

For particular instances where the power of courts of equity has been invoked by infants to impeach decrees against them, see the notes to *Little Rock etc. Ry. Co. v. Wells*, 54 Am. St. Rep. 253, 260; *Joyce v. McAvoy*, 89 Am. Dec. 189. It is clear that an infant may proceed by original bill to impeach a decree, not only for fraud, but for error of law or error appearing upon the face of the record: *Loyd v. Malone*, 23 Ill. 43, 74 Am. Dec. 179; *Stunz v. Stunz*, 131 Ill. 309, 23 N. E. 410; *Coffin v. Argo*, 134 Ill. 276, 24 N. E. 1068; *Crane v. Stafford*, 217 Ill. 21, 75 N. E. 424; *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262.

d. Parties Entitled to File Bill.—The right to attack a decree for error upon the face of it by an original bill is said to be given only to an infant defendant, and not to an adult defendant who has been duly served: *Clark v. Shawen*, 190 Ill. 47, 60 N. E. 116. Infancy

is a personal privilege available only to the infant himself or his personal representative. A decree may be voidable by him while valid and binding on all other parties, in which event they cannot invoke his infancy to protect them against the operation and effect of the decree, nor join with him in a bill for relief against it: *Hutton v. Williams*, 60 Ala. 107; *Back v. Combs*, 96 Ky. 522, 29 S. W. 352.

c. Time for Filing Bill.

1. **During Minority.**—An infant need not wait until he reaches his majority to file a bill to impeach a decree against him, but he may proceed during his minority: *Loyd v. Malone*, 23 Ill. 41, 74 Am. Dec. 179; *Johnson v. Buck*, 220 Ill. 226, 77 N. E. 163; *Ralston v. Lahee*, 8 Iowa, 17, 74 Am. Dec. 291. And a statute giving an infant a year after he becomes of age to show cause against a judgment does not require him to wait until his majority before exercising his right; but if he once exercises the right, he is precluded from again exercising it after becoming of age: *Park v. Bolinger* (Ky.), 8 S. W. 914; *Bohannon v. Tabbin*, 25 Ky. Law Rep. 515, 76 S. W. 46.

2. **After Majority.**—The practice in some states is well settled that an infant may file an original bill to impeach a decree after he reaches his majority, and he has the same time within which to do so that he has to prosecute a writ of error for the reversal of the judgment: See the principal case, ante, p. 192; *Kuchenbeiser v. Becket*, 41 Ill. 172; *Haines v. Hewit*, 129 Ill. 347, 21 N. E. 930; *Johnson v. Buck*, 220 Ill. 226, 77 N. E. 163. In Illinois, where the foregoing decisions were rendered, the ancient practice of reserving in a decree affecting infants the right to show cause against it after becoming of age seems never to have prevailed. The statutes of many of the states now give an infant a specified time, usually one year, after attaining his majority, within which to show cause against a decree or judgment or to have it modified or vacated: *Blanton v. Rose*, 70 Ark. 415, 68 S. W. 674; *Wise v. Schloesser*, 111 Iowa, 16, 82 N. W. 439; *Delashmutt v. Parrent*, 39 Kan. 548, 18 Pac. 712; *McCreary v. Creighton* (Neb.), 107 N. W. 240; *Morriss v. Virginia Ins. Co.*, 85 Va. 588, 8 S. E. 383; *Wilson v. Hubbard*, 39 Wash. 671, 82 Pac. 154. And, generally speaking, it may be said that if an infant would attack a judgment after he becomes of age, he must act promptly or within a reasonable time: *Childs v. Lanterman*, 103 Cal. 387, 42 Am. St. Rep. 121, 37 Pac. 382; *Eisenmenger v. Murphy*, 42 Minn. 84, 18 Am. St. Rep. 493, 43 N. W. 784. Otherwise he will be barred by laches: *Kemp v. Cook*, 18 Md. 130, 79 Am. Dec. 681; *Schimpf v. Rohnert*, 129 Mich. 103, 88 N. W. 384; *Barnes v. Gill*, 13 Abb. Pr., N. S., 169; *Williams v. Williams*, 94 N. C. 732.

III. Intervening Rights of Third Persons.

A court of equity will not set aside a decree at the suit of a minor, if the court entering it had jurisdiction of the parties and of the subject matter, and persons who were not parties have, in good faith

and in reliance thereon, acquired interests in the subject matter of the suit: See the principal case, ante, p. 192; *England v. Garner*, 90 N. C. 197; *Hare v. Hollomon*, 94 N. C. 14. "A decree against an infant, like that against an adult, is absolute in the first instance, subject to the right to attack by original bill for either fraud or error merely, but until so attacked and set aside or reversed on error or appeal, it is binding to the same extent as any other decree or judgment. This right to attack by original bill may be exercised at any time before the infant attains his majority, or at any time afterward in which he may, under the statute, prosecute a writ of error for the reversal of such decree. The rule thus established is, of course, subject to the qualification that the decree of a court having jurisdiction of the subject matter of the suit and the person of the infant against whom it is rendered will not be thus set aside as against third parties who have, in good faith, acquired rights under it; but as against original parties to the suit and their legal representatives, the rule as above stated will be enforced": *Allison v. Drake*, 145 Ill. 500, 32 N. E. 537.

Under a statute which provides that a minor may, within one year after arriving at his majority, show cause against any order or judgment taken against him in which a reservation of the right to show cause would, but for the statute, have been proper, a purchaser of land from one whose title depends on a decree taken against a minor is bound with notice of his rights to show cause against the decree: *Blanton v. Rose*, 70 Ark. 415, 68 S. W. 674.

VAUGHN v. NEWMAN.

[221 Ill. 576, 77 N. E. 1106.]

JUDICIAL SALE—Requiring Deposit to Secure Bid.—If the successful bidder at a partition sale fails to make good her bid within the time prescribed therefor, and her default thus necessitates another sale, the master may require her, in case she becomes the highest bidder at the second sale, to put up a cash deposit at once to secure her bid; and if she fails to do so, he may sell to other bidders. (p. 206.)

PARTITION SALE—Rights of Occupying Tenant to Crops.—If one in possession of property, with no claim or rights other than as a tenant in common, plants a crop after a decree of sale in partition has been rendered, and when she knows that in a few days the land will be sold thereunder, she receives more than she is entitled to, and will not be heard to complain, when the master reserves and gives to her one-half of the growing crop. (p. 207.)

Hubbard & Manny, for the appellant.

Matthews & Anderson, for the appellees.

577 WILKIN, J. At the April term, 1905, of the circuit court of Pike county, Edward Newman filed a bill against Mary W. Crane and others for partition of certain lands situate in that county. A decree of sale was rendered, and on May 22, 1905, the master in chancery sold the lands to Mary W. Crane (afterward Mary W. Vaughn, the appellant in this case) for ten thousand one hundred and fifty dollars. She failed to pay the purchase price, or any part thereof, to the master, which fact was reported to the court, and on July 1, 1905, a resale was ordered. The master readvertised the property, and on August 1, 1905, sold it to Benjamin Newman for nine thousand two hundred dollars. On August 3, 1905, the master filed his report of sale. Within twenty days thereafter appellant filed her objections to the approval of the sale, which objections were overruled, from which order she has prosecuted her appeal to this court.

Objection is first made to the manner in which the sale was advertised, it being insisted that there is no proof that the notices which were posted before the sale were in the most public places in the vicinity of the land; also that there is no proof that the notices posted in the vicinity of the land were posted twenty-one days before the sale.

The provisions of the decree as to the notices were as follows: "Said special commissioner will first give notice of said sale by causing a notice, containing the time, terms and 578 place of sale, together with a particular description of the premises to be sold, to be published for at least twenty-one days in some public newspaper of general circulation of Pike county, Illinois, printed and published weekly in Pike county, Illinois, and by causing printed notices of said sale to be posted in at least five of the most public places in the vicinity where said premises are situated." There is no dispute but that a notice containing the time, terms and place of sale, together with a description of the premises to be sold, was published for four successive weeks in the "Pike County Times," a weekly newspaper of general circulation published in the city of Pittsfield, the first publication being on July 7, 1905, and the last publication on July 28, 1905. This publication was in strict conformity with the provisions of the decree, and no point is made as to it, but the sole complaint is as to the notices which the decree required to be posted. The report of the master as to the notices posted, after reciting the publication, was as follows: "And by caus-

ing printed copies of said notices to be posted in at least five of the most public places in said county in the vicinity where said premises are situated." Upon the hearing of the objections before the court the master testified that he posted a copy of the notices, personally, in the Farmers' State Bank of Pittsfield on July 8th, one in the circuit clerk's office in Pittsfield on the same day, and one in the livery-stable of John Allan Smith on the same day. He also sent one notice to the Farmers' State Bank of Pittsfield and saw it posted the first of the following week. On Sunday, July 9th, he posted a number of notices on the road to Hadley—one at Preble's cross-roads, which was about a mile from the post-office at New Salem; one at the Girard place, about two miles from the Preble cross-roads; one at the corner of Colonel Bailey's lot in New Philadelphia, and one on the bulletin board at the postoffice in Baylis. All of these notices were posted twenty-one days before the sale. He also testified that on July 7th he mailed notices to C. B. Newman, to the Griggsville National Bank ⁵⁷⁹ and to the Illinois Valley Bank, and requested that they be posted; that on July 8th he mailed a copy to Mr. Ackright, at Tempest, Illinois; Powell Bros., at Fish Hook, Illinois; Dan Cover, at New Salem, Illinois; George Crump, at New Salem, Illinois; W. R. Hooper, at New Salem, Illinois; Boyd Johnson, at New Salem, Illinois; Weber Grammer, at Baylis, Illinois; Rufus Grammer, postmaster at Baylis, Illinois; Oroville Whitmore, at Tempest, Illinois; Ed. Corey, at Tempest, Illinois; Perry State Bank, at Perry, Illinois; J. E. Morton, at Perry, Illinois; and also other notices to various parties in Mason county, Illinois. Other witnesses were called who testified to seeing some of these notices posted at the places specified by the master.

When a decree of sale specifies the manner in which the notices are to be posted by the master, it becomes his duty, in order to make a valid sale, to post the notices in the manner specified by the decree. The evidence shows that he not only complied with the decree, but also sent these various notices in addition to the ones required, and it is apparent from the sale that there was full and complete knowledge of those interested as to the time, place and terms. There is no question raised but that the price obtained for the land was adequate, as it was within eight hundred dollars of the full appraised value as made by the commissioners. For these

reasons we think the court committed no error in overruling this objection.

It is next complained that the master did not comply with the terms of the decree, in that he required the purchaser to put up one thousand dollars in cash to secure the bid. The terms of sale provided in the decree were cash in hand on the day of sale. The record shows that on the first sale the premises were struck off to the appellant. She was given twenty days after the sale in which to make payment, and wholly failed and refused to make good her bid. At the second sale she again became a bidder and the premises were struck off to her for the sum of nine thousand five hundred dollars. The master then told her that before he would finally declare her to be the successful bidder she must ⁵⁸⁰ put up the sum of one thousand dollars or secure the same, and upon her failure so to do that he would re-offer the premises, and he requested the other bidders to remain until she had decided what she would do. She again failed or refused to put up the one thousand dollars or in any way secure her bid. Upon this failure or refusal the master again offered the premises, and sold them for nine thousand two hundred dollars to the present purchaser, Benjamin Newman. We do not see how appellant has any cause for complaint as to this action of the master. In the light of his past experience with her it certainly was his duty to protect bona fide bidders against one who was bidding without funds and who was in no way able or willing to comply with her bid. The second sale was necessitated by her default, and it was the duty of the master to see that the default of the first sale was not repeated in the second.

Complaint is also made of the action of the master in selling one-half of the corn growing upon the land. The bill for partition was filed in April and the first sale was made on May 22d. At the time the bill was filed the premises were occupied by appellant, and the crop of corn was planted just a few days before the first sale, and at that time appellant knew that the premises were to be sold within a few days. There is no evidence that she had any lease upon them, or any other claim to them other than her rights as a tenant in common. At the time the decree of sale was rendered no crops had been planted, and therefore the decree was silent as to the disposition of any corn which might subsequently be planted. Under this state of facts the land might have

been sold and the corn growing on the land have been conveyed to the purchaser (Talbot v. Hill, 68 Ill. 106), but, on the contrary, one-half of it was reserved by the master and given to appellant. By this act she received more than she was entitled to and will not now be heard to complain.

The court properly overruled appellant's objections to the approval of the report of sale, and the decree will be affirmed.

Upon the Failure of a Purchaser at a sheriff's sale to pay the amount of his bid, or to make some arrangement with reference to it satisfactory to the judgment creditor, it is the duty of the officer to disregard the bid and again offer the property for sale: May v. Sturdivant, 75 Iowa, 116, 9 Am. St. Rep. 463.

NORTH CHICAGO STREET RAILROAD COMPANY v. AUFMANN.

[221 Ill. 614, 77 N. E. 1120.]

STATUTE OF LIMITATIONS—Application to Matters of Pleading.—A statute of limitations requiring suits for personal injuries to be brought within two years does not apply to matters of pleading, and should not be given that effect indirectly by holding that an imperfect statement of a cause of action is no statement at all. (p. 210.)

STATUTE OF LIMITATIONS—Amendment of Pleadings.—If the statute of limitations declares that actions for personal injuries shall be brought within two years, and an employé brings such an action within that time against his employer, charging, in one count, want of sufficient assistance and incompetency of other employés, thus stating a good cause of action in a defective manner, to which a demurrer is sustained, whereupon, within two years after the injury, he files an amended declaration of one count, alleging the incompetency of other employés, additional counts, which state no other cause of negligence than those charged in the original or in the amended declaration, may be filed after the expiration of two years. (p. 211.)

MASTER AND SERVANT—Assumption of Risk—Dangerous Work.—An employé who performs dangerous work under the orders of his employer, or under his promise to furnish a safe place or a sufficient number of employés, does not assume the risk incident to the service, unless the danger is so imminent that no man of ordinary prudence would engage in the work. (p. 212.)

Action for personal injuries, which resulted in a judgment for the plaintiff. This judgment was affirmed in the appellate court.

John A. Rose, Albert M. Cross and W. W. Gurley, for the appellant.

David K. Tone and H. M. Ashton, for the appellee.

616 WILKIN, J. It is first insisted by appellant as a ground of reversal that the court committed error in sustaining appellee's demurrer to its plea of the statute of limitations.

The accident happened on December 23, 1896. This suit was begun on April 22, 1898. The original declaration, of one count, was filed on May 7, 1898, and charged that the defendant was the owner of a certain barn, known as the Lincoln avenue car barn; that said barn was supplied with **617** switches, turntables and appliances for turning about, reversing and removing cars from the main line; that a certain car was moving along the main line of the defendant in said barn and that the plaintiff was switching another car from said main track, and the first-mentioned car collided with the car which he was switching, striking the rear end of the same and injuring him while he was in the act of applying the brake to the car. The negligence charged was, that defendant failed to furnish plaintiff sufficient assistance to enable him to properly perform his duties, and that the gripman in charge of the cable train was incompetent to perform his duties, and negligently propelled and ran the cable car against the plaintiff while the plaintiff was in the exercise of ordinary care. A demurrer was sustained to this declaration, and on June 22, 1898, within two years after the accident, plaintiff filed an amended declaration of one count, alleging that he was in defendant's employ as a groom, and while handling the car in question, and while in the exercise of ordinary care, the defendant, through its servants, negligently and carelessly ran another cable train upon and into the car upon which he was, thereby injuring him. To this amended count the defendant pleaded the general issue.

On January 17, 1901, more than two years after the alleged injury, the plaintiff filed two additional counts, the first charging that the defendant negligently ordered certain men whose duty it was to handle the horse used in switching the cars, to leave this regular employment and to work upon the snow sweeper; that it was highly dangerous for one person to handle said cars and switch them without assistance; that plaintiff kept on switching said cars and act-

ing under the immediate direction of said defendant without any person to assist him, and that by reason of such negligence to supply sufficient assistance in managing the cars, plaintiff was unable to stop the car upon which he was working in time to avoid the injury. The second additional count charged that the defendant caused the plaintiff to remain ⁶¹⁸ and continue in said employment, promising that it would within a reasonable time supply him with additional assistance or help in starting the cars, and that, acting under the immediate direction of said defendant, and without any person to assist in switching the cars, plaintiff, while in the exercise of ordinary care, was injured by reason of said negligence.

On February 5, 1901, plaintiff filed two other additional counts, the first of which alleged that he complained and notified the defendant that he was not supplied with any help or assistance in switching cars over said loop, and that the switching of said cars without help was highly dangerous; that it promised to furnish additional assistance within a reasonable time, and plaintiff, relying upon said promise, continued to operate said cars and was injured. The second additional count is substantially like the preceding one.

To these additional counts of January 17th and February 5th the defendant filed a plea of the statute of limitations, to which plaintiff demurred, and the demurrer was sustained. The sustaining of this demurrer is assigned as error.

It seems to be conceded by both parties that if the additional counts are simply a restatement of the cause of action alleged in the declaration, or some amendment thereto filed within two years after the date of the accident, the demurrer to the plea of the statute of limitations was properly sustained. But it is insisted by appellant that whether any of the additional counts are simply a restatement of the cause of action alleged in the declaration filed within two years, or whether all of such counts state an entirely new cause of action, must be determined by a comparison of the additional counts with the amended declaration filed June 22, 1898; that they cannot be compared with the original declaration of May 7, 1898, for the reason that a demurrer was sustained to that declaration, and is not, as is said, now in the case, and is not a sufficient basis for the additional counts; also, that the amended declaration of June 22, 1898, did not ⁶¹⁹ state a cause of action and was fatally defective on mo-

tion in arrest of judgment, and therefore it cannot be the basis of additional counts. In determining this last question there must be a distinction made between a defective cause of action and the statement of a cause of action in a defective manner. If it is a wholly defective cause of action it cannot be made a sufficient basis for additional counts filed after the expiration of two years; but if the original declaration and the amendments thereto were merely the statement of a cause of action in a defective manner, they would be a sufficient basis for such additional counts.

The original declaration in the present case alleged two separate and distinct causes of the injury—one, the want of sufficient assistance, and the other, the negligence and incompetency of the servant in charge of the cable train. The demurrer was probably sustained on the grounds of duplicity. Either of the charges of negligence, if properly alleged and proven, might constitute a good cause of action, and a good cause of action was therefore stated, but in a defective or objectionable manner.

The amended declaration filed on June 22d alleged the incompetency or negligence of those in charge of the cable train, and it is insisted by appellant that the recovery was not upon that ground, but for failing to furnish sufficient help, and therefore the additional counts filed after the expiration of two years were barred unless the original declaration could be made the basis for filing them. We are of the opinion that the allegation of the original declaration as to the failure of appellant to furnish necessary help was a sufficient basis for the allegations of the additional counts. The statute of limitations requiring a suit for a personal injury to be brought within two years does not apply to matters of pleading, and should not be given that effect indirectly by holding that an imperfect statement of a cause of action is no statement at all. In the case of *Chicago City Ry. Co. v. Hackendahl*, 188 Ill. 300, 58 N. E. 930, we said (page 304): "It has ⁶²⁰ never been held by this court that a restatement, in a more perfect manner, of a cause of action in an amended declaration can be regarded as the beginning of the suit on such cause of action. As a general rule, the very purpose of an amended declaration is to state in a more accurate and legal manner than it had been previously stated the cause of action for which the suit was brought, and if the rule contended for by appellant were adopted, no declaration could be

amended in any substantial respect after the time limited by the statute for bringing the suit had run. The statute of limitations does not apply to matters of mere pleading, and it should not be given that effect indirectly by holding that an imperfect statement of a cause of action is no statement of it. In *Eylenfeldt v. Illinois Steel Co.*, 165 Ill. 185, 46 N. E. 266, no cause of action whatever was stated in the original declaration, and it was held that the statute was properly pleaded to the amended declaration, which set up a good cause of action after the statute had run. If the cause of action, whether perfectly or imperfectly stated in the original declaration, had been abandoned and a new cause of action had been stated in the amended declaration in this case the plea would have been good; or if not abandoned, the plea would have been good as to any new cause set up after the running of the statute: *Phelps v. Illinois Cent. R. R. Co.*, 94 Ill. 548. There was no error in sustaining the demurrer to the plea." And so here, if the additional counts filed after the expiration of the two years had stated some other causes of negligence than those charged in the original declaration or the amended declaration, then there would be force in appellant's contention, but as the original declaration and all additional counts charged either the negligent operation of the cars or the want of sufficient help as the cause of the accident, we are of the opinion that the court did not err in sustaining the demurrer to the plea.

Complaint is made of the fourth instruction given on behalf of the plaintiff, to the effect that where a master confers ⁶²¹ authority upon one of his employés to take charge and control of a certain class of workmen, such employé, in governing and directing the movements of the men under his charge, is the direct representative of the master, and not a fellow-servant, and his orders and directions, within the scope of his authority, are the commands of his master. It is insisted that this is but the statement of an abstract proposition of law not applicable to the facts of the case, and was calculated to mislead the jury. The evidence offered upon the trial refutes this contention. Appellee testified that one Jim Cross was in charge of the barns at the time of the accident, as the representative of the appellant, and that he (appellee) made complaint of the insufficiency of the help in moving the cars, and was instructed to go ahead and do it, and that the foreman would send him some help soon and

look out for him. This was at least some evidence upon which to base the instruction, and it was not error to give it.

Complaint is also made of the giving of the fifth instruction on behalf of appellee, which is to the effect that if the jury have fairly and impartially considered the evidence, facts and circumstances in the case, and believe, from a preponderance thereof, that the plaintiff had proven his case as laid in the declaration or any count thereof, they should find the defendant guilty. It is insisted that no count in the declaration avers that the plaintiff did not know, or in the exercise of ordinary care could not have known, of the risk which caused the accident—in other words, that he did not negative the assumption of risk. It is also insisted that the instruction is in conflict with the decision of this court in *Illinois Terra Cotta Lumber Co. v. Hanley*, 214 Ill. 243, 73 N. E. 373. But the facts in that case are unlike the facts in the present case. In the case at bar the allegation of the declaration is, that while appellee was engaged in switching cars over said loop and acting under the immediate direction of said defendant, etc., “said defendant carelessly and negligently ordered the plaintiff to switch said cars over said loop to their place of ⁶²² destination without the assistance of said servant or without any help or assistance.” We have held that where a servant is acting under the orders of the master in the performance of dangerous work, or is doing dangerous work under promise on the part of the master to furnish him a safe place or a sufficient number of servants, the servant is relieved from the assumption of risks incident to the work he is doing, and is only precluded from recovering, under the above circumstances, where the danger is so imminent that no man of ordinary prudence would engage in the work: *Chicago etc. R. R. Co. v. Heerey*, 203 Ill. 492, 68 N. E. 74; *Henrietta Coal Co. v. Campbell*, 211 Ill. 216, 71 N. E. 863. In this respect the case at bar materially differs from the *Illinois Terra Cotta Lumber Co.* case (214 Ill. 143, 73 N. E. 373). There was no error in giving the instruction.

Complaint is next made that the verdict is not supported by the evidence. As is well known, we have nothing to do with the weight of the evidence, as that is conclusively determined by the finding of the appellate court, which in this case is against the contention of appellant. At the close of all the evidence appellant requested the court to instruct the

jury to find it not guilty, which motion was overruled. The ruling of the court upon that motion would only raise the question of law whether there was any evidence in the record fairly tending to support the allegations of the declaration, which would be the only point we could consider. That question is not urged, and could not reasonably be in the light of the testimony in this record. There is certainly some evidence fairly tending to support the verdict.

We find no reversible error, and the judgment will be affirmed.

When an Amendment to a Declaration sets up no new matter or claim, but merely restates in a different form the cause of action, it relates to the commencement of the suit, and the statute of limitations is arrested at that point. But when the amendment introduces a new or different cause of action, it is treated as a new suit begun at the time when the amendment is filed: Chicago etc. R. R. Co. v. Jones, 149 Ill. 361, 41 Am. St. Rep. 278. See, too, Frost v. Witter, 132 Cal. 421, 84 Am. St. Rep. 53; First Nat. Bank v. Shoemaker, 117 Pa. St. 94, 2 Am. St. Rep. 649; note to Flanders v. Cobb, 51 Am. St. Rep. 430, 431. On amendments changing the cause of action, see the extended notes to Flanders v. Cobb, 51 Am. St. Rep. 414-435; Stevenson v. Mudgett, 34 Am. Dec. 158-162.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

FIRST NATIONAL BANK v. STAFF.

[165 Ind. 162, 74 N. E. 987.]

BANKS AND BANKING.—A Certificate of Deposit is in Legal Effect a promissory note transferable by indorsement. (p. 215.)

BANKS AND BANKING.—The Indorsee of a Certificate of Deposit has a remedy against an immediate or any remote indorser, where due diligence has been used. (p. 216.)

NEGOTIABLE INSTRUMENTS.—An Indorser is Liable to the Indorsee Whether the Latter has Used Due Diligence or not, if the maker had no property subject to execution, and diligence, therefore, must have been unavailing. (p. 216.)

BANKS AND BANKING.—Demand for Payment, How Must be Made.—A proper demand is made on a bank when the depositor, during business hours, presents, or causes to be presented, his check or other writing for payment, which, when owned and in the hands of the bank, will be evidence of the authority and direction of the depositor to pay, as well as of the fact of payment. (p. 216.)

BANKS AND BANKING.—Demand for Payment, When not Sufficient.—Though a banker may pay on an oral order or direction, he is not required to do so. Hence, an oral demand for payment is not sufficient.—(p. 216.)

Anderson, De Shane & Crabill, for the appellant.

Joseph G. Orr and E. A. Howard, for the appellee.

162 MONTGOMERY, J. Appellee brought this action against appellant for money alleged to be due on a deposit account. Appellant answered the complaint (1) by general denial; (2) by plea of payment; and (3) by setoff. Appellee's demurrer to the third paragraph of answer was sustained, and he replied by denial to the second. A trial resulted in

a finding and judgment for appellee. Appellant's motion for a new trial was overruled, and an exception duly saved.

The assignment of errors calls in question the decision of ¹⁶³ the court in sustaining appellee's demurrer to the third paragraph of answer, and in overruling the motion for a new trial.

Appellee held a certificate of deposit in the following terms:

"Certificate of Deposit. Indiana National Bank, No. 8,408.

"Elkhart, Indiana, November 7, 1903.

"George Stapf has deposited in this bank \$600, payable to the order of self in current funds on return of this certificate properly indorsed. This deposit is not subject to check.

W. C. COLLINS,

"Cashier."

On November 13, 1903, appellee indorsed this certificate and delivered the same to appellant, and the face value thereof was placed to his credit on his deposit account with appellant bank.

The third paragraph of answer is founded upon this certificate and its indorsement, and, after alleging the transfer of the certificate as the consideration for one of the items of account sued on, avers that appellant immediately forwarded the same, with proper indorsements, for collection; that payment was not made; that suit was instituted thereon, and a judgment for six hundred and four dollars and costs recovered against the Indiana National Bank of Elkhart, at the earliest possible date; that execution was issued at once and returned "No property found." It further charged that said bank had no property subject to execution at any time after the thirteenth day of November, 1903, and sought to have the sum of money named in said certificate, with interest, set off against any amount due on appellee's complaint, and to have judgment over against appellee for the excess.

The certificate of deposit above set out is in legal effect a promissory note, and transferable by indorsement under the statute of this state: Burns' Rev. Stats. 1901, sec. 7515; Rev. Stats. 1881, sec. 5501; Gregg v. Union County Nat. Bank (1882), 87 Ind. 238; National State Bank v. Ringel (1875), 51 Ind. 393; Drake v. Markle (1863), 21 Ind. 433, 83 Am. Dec. 358; ¹⁶⁴ Long v. Straus (1886), 107 Ind. 94,

104, 57 Am. St. Rep. 87, 6 N. E. 123; 2 Daniel on Negotiable Instruments, 5th ed., sec. 1698a.

The indorsee of such an instrument, having used due diligence to collect, has a right of action against his immediate or any remote indorser: Burns' Rev. Stats. 1901, sec. 7518; Rev. Stats. 1881, sec. 5504; 2 Daniel on Negotiable Instruments, 5th ed., sec. 1702; Miller v. Deaver (1868), 30 Ind. 371; Gwin v. Moore (1881), 79 Ind. 103; Spears v. Clark (1852), 3 Ind. 296.

The answer further avers that the Indiana National Bank of Elkhart had no property subject to execution at any time after the transfer of this certificate. Under these circumstances appellee would be liable as indorser without regard to the question of diligence, as no action on the part of appellant, however diligent, would have been availing: Herald v. Scott (1850), 2 Ind. 55; Reynolds v. Jones (1862), 19 Ind. 123; Roberts v. Masters (1872), 40 Ind. 461; Huston v. First Nat. Bank (1882), 85 Ind. 21; Williams v. Osbon (1881), 75 Ind. 280; Dick v. Hitt (1882), 82 Ind. 92. The answer appears to contain all essential averments. No specific defect has been pointed out, and we accordingly hold it sufficient. The court erred in sustaining appellee's demurrer to the same.

Appellant's motion for a new trial alleged that the decision of the court was not sustained by sufficient evidence, was contrary to law, and that the amount of recovery was too large.

It is particularly urged that there was a failure to prove a proper demand preliminary to bringing suit. Appellee alleged a demand in general terms, and the evidence shows an oral request for payment. A proper demand of a bank for money on deposit is made when the depositor during business hours presents or causes to be presented at the bank his check, order, draft, receipt or other writing for the payment of money in the amount desired, which writing, when honored and in the hands of ¹⁶⁵ the bank, will be evidence of the authority and direction of the depositor to pay, as well as evidence of the payment: McEwen v. Davis (1872), 39 Ind. 109; 1 Morse on Banks and Banking, 4th ed., sec. 313. A banker may pay upon an oral order or direction, but under the usages of the banking business he is not required to do so. No proper demand was shown by the evidence.

The judgment is reversed, with directions to overrule the demurrer to the third paragraph of answer, and for further proceedings in accordance with this opinion.*

Certificates of Deposit are discussed at length in the monographic note to *Hillsinger v. Georgia R. R. Bank*, 75 Am. St. Rep. 43-61. They are, as will be seen from this note, generally regarded as possessing the essential qualities of a promissory note and as having the usual incidents that pertain to negotiable paper: See, also, *Hatch v. First Nat. Bank*, 94 Me. 348, 80 Am. St. Rep. 401.

The Fact that the Maker of a Note was Insolvent at the time of its execution and ever afterward does not prevent the release of an indorser by the failure of the holder to give due notice of dishonor: *Leonard v. Olson*, 99 Iowa, 162, 61 Am. St. Rep. 230.

CLARK v. AMERICAN CANNEL COAL COMPANY.

[165 Ind. 213, 73 N. E. 1083.]

CONSTITUTIONAL LAW—Special Statutes Extending the Life of Corporations.—The statute of Indiana purporting to extend the life of certain private corporations created by special act of the legislature is unconstitutional. (p. 219.)

CORPORATIONS.—The Corporate Existence of a De Facto Corporation can be Questioned Only in a direct proceeding brought for that purpose. (p. 219.)

CORPORATIONS.—To the Existence of a Corporation It is Essential that there be a valid law under which a corporation with the powers assumed might be incorporated, a bona fide attempt to organize a corporation under such law, and an actual exercise of its powers. (p. 219.)

CORPORATIONS, Collateral Attack on, When Sustainable.—If There is No Law Under Which a Corporation De Jure May Exist, its nonexistence may be set up in a collateral proceeding. (p. 220.)

CORPORATIONS—Unconstitutional Statute Purporting to Authorize.—There cannot be a Corporation De Jure under an unconstitutional statute. (p. 220.)

CORPORATIONS—Termination of.—If the law under which a corporation is organized, or the special act relating to it, fixes a definite time when its corporate life must end, when that date is reached the corporation is ipso facto dissolved without any direct action on the part of the state or the members of the corporation, and no corporate powers can subsequently be exercised by it, except such as are given it for the purpose of winding up its affairs. (p. 220.)

CORPORATION, Estoppel to Deny the Existence of, When Terminates.—Though a party dealing with a corporation may be estopped to deny its corporate existence at that time, the estoppel does not continue after the life of the corporation has terminated by the passing of the time fixed by law for its corporate existence. (p. 221.)

CORPORATIONS De Facto.—After the Expiration of the Time Fixed for the Life of the Corporation, it is not a de facto corporation, and its corporate existence may be questioned collaterally. (p. 221.)

CORPORATION, Power of to Sue, Termination of.—If the time fixed by law for the existence of a corporation terminates, and also the time within which by law it must wind up its affairs, it has no power to sue. (p. 221.)

Hatfield & Hemenway and C. A. Weathers, for the appellant.

Logsdon, Chappell & Veneman and Patrick & Minor, for the appellee.

214 MONKS, J. This suit was brought by appellee to enjoin appellant from mining and removing fire-clay from certain real estate in Perry county, and to quiet appellee's title to said fire-clay. Appellee sold and conveyed said real estate by deed to a remote grantor of appellant on September 20, 1866, and claims to own said fire-clay by virtue of the reservation contained in said deed. A trial of said cause resulted in a final decree quieting appellee's title to said fire-clay and enjoining appellant from removing the same.

The first question to be determined is: Was appellee, when it commenced this suit, an existing corporation having the power to sue? If this question be answered in the negative this case must be reversed. It appears from the record that appellee—a corporation—was created by special act (Local Laws 1838, p. 216), to continue for a period of fifty years from December 23, 1837. The powers granted were to mine for coal, "purchase, receive, hold and enjoy lands, coal, iron and other mines, . . . and the same to sell, convey and demise." In 1885 the legislature ²¹⁵ passed an act (Acts 1885, p. 121; Burns' Rev. Stats. 1901, secs. 5124-5128), which purported to extend the corporate existence of every private corporation, created or organized by special act for the purposes of mining stone, coal, iron ore, etc., thirty years after the passage of said act, whose board of directors, within sixty days after the passage of said act of 1885, shall avail itself of the provisions of said act by adopting resolutions to that effect, and filing the same with a statement giving the title and date of the act creating said corporation and of each act amendatory or supplemental to said creative act. The board of directors of appellee complied with the

requirements of said act of 1885 on May 30, 1885, and appellee claims that thereby its corporate existence was extended thirty years from that time. Since 1837 until the commencement of this action appellee has exercised corporate powers under said special act of 1837 and the act of 1885. Appellant's position is that, as the special act of December 23, 1837, creating appellee a corporation, fixed the life of said corporation at fifty years, it ceased to exist when that period was ended, in 1887; that said act of 1885 was unconstitutional, and the attempt to continue the corporate existence of appellee by complying with its provisions was without effect; that appellee, having ceased to exist as a corporation, cannot maintain this action. The act of April 2, 1885, *supra*, which appellee claims continued its corporate existence for thirty years from the date of its passage, is clearly unconstitutional under the rule declared in *Re Bank of Commerce* (1899), 153 Ind. 460, 53 N. E. 950, 55 N. E. 224, 47 L. R. A. 489.

Appellee insists, however, that appellant cannot raise any question in regard to the constitutionality of said act of 1885 in this case, because: (1) it is at least a *de facto* corporation, and therefore impervious to collateral attack; (2) that appellant is estopped from denying its corporate existence. It is true, as claimed by appellee, that the corporate existence of a *de facto* corporation ²¹⁶ can only be questioned in a direct proceeding brought for that purpose: *Doty v. Patterson* (1900), 155 Ind. 60, 56 N. E. 668, and authorities cited. It is essential to the existence of a *de facto* corporation, however, that there be (1) a valid law under which a corporation with the powers assumed might be incorporated; (2) a bona fide attempt to organize a corporation under such law; (3) and an actual exercise of corporate powers: *Doty v. Patterson*, 155 Ind. 60, 56 N. E. 668; 10 Cyc. of Law & Proc. 252-256; 1 Clark & Marshall on Private Corporations, secs. 82a, 82b. It follows, therefore, that there cannot be a corporation *de facto* when there cannot be one *de jure*. If there is no law under which a corporation *de jure* might exist, its nonexistence may be set up even in a collateral proceeding: 10 Cyc. of Law & Proc. 255, 256; 1 Clark & Marshall on Private Corporations, sec. 82c; *Heaston v. Cincinnati etc. R. Co.* (1861), 16 Ind. 275, 79 Am. Dec. 430; *Harriman v. Southam* (1861), 16 Ind. 190; *Snyder v. Studebaker* (1862), 19 Ind. 462, 81 Am. Dec. 415; *Eaton v. Walker* (1889), 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102;

Georgia etc. R. Co. v. Mercantile Trust etc. Co. (1894), 94 Ga. 306, 47 Am. St. Rep. 153, 21 S. E. 701, 32 L. R. A. 208. "To be a corporation *de facto* it must be possible to be a corporation *de jure*, and acts done in the former case must be legally authorized to be done in the latter, or they are not protected or sanctioned by the law. Such acts must have an apparent right": *Everson v. Ellingson* (1887), 67 Wis. 634, 31 N. W. 342. It necessarily follows that there cannot be a corporation *de facto* under an unconstitutional statute, for such a statute is void, and a void law is no law: 1 Clark & Marshall on Private Corporations, 246; Black on Constitutional Law, 64; *Snyder v. Studebaker*, 19 Ind. 462, 81 Am. Dec. 415; *Harriman v. Southam*, 16 Ind. 190; *Heaston v. Cincinnati etc. R. Co.*, 16 Ind. 275, 79 Am. Dec. 430; *Eaton v. Walker*, 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102; *Norton v. Shelby County* (1886), 118 U. S. 425, 6 Sup. Ct. Rep. 1121, 30 L. ed. 178.

²¹⁷ If the law under which a corporation is organized, or the special act creating the corporation, fixes a definite time when its corporate life must end, it is evident that when that date is reached, said corporation is *ipso facto* dissolved without any direct action on the part of the state or its members. And no corporate powers can thereafter be exercised by it except such as are given it by statute for the purpose of winding up its affairs, which in this state is limited to three years after the dissolution: *Burns' Rev. Stats.* 1901, sec. 3429; *Rev. Stats.* 1881, sec. 3006 (*Horner's Rev. Stats.* 1901); 10 *Cyc. of Law & Proc.* 1271; 2 Clark & Marshall on Private Corporations, sec. 305; 2 Morawetz on Private Corporations, 2d ed., sec. 1031; 2 Beach on Private Corporations, sec. 780; *People v. Anderson etc. R. Co.* (1888), 76 Cal. 190, 18 Pac. 308; *Scanlan v. Cranshaw* (1878), 5 Mo. App. 337; *La Grange etc. R. Co. v. Rainey* (1870), 47 Tenn. 420; *Grand Rapids Bridge Co. v. Prange* (1877), 35 Mich. 400, 24 Am. Rep. 585; *Bradley v. Reppell* (1896), 133 Mo. 545, 54 Am. St. Rep. 685, 32 S. W. 645, 34 S. W. 841; *May v. State Bank* (1843), 2 Rob. (Va.) 56, 40 Am. Dec. 726; *Rider v. Nelson etc. Factory* (1836), 7 Leigh (Va.), 154, 30 Am. Dec. 495.

Appellee in 1866, at the time its deed for the land in controversy was executed to appellant's remote grantor, was a corporation *de jure* by virtue of the special law of December 23, 1837 (*Local Laws* 1838, p. 216). Even if appellant, who

claims the real estate in controversy and the right to mine said fire-clay and remove the same under appellee's deed of September 20, 1866, is estopped to deny its corporate existence, such estoppel only operates to prevent a denial of its corporate existence at the time the deed was executed in 1866, and in no way prevents appellant from alleging facts showing that the period fixed for its existence as a corporation expired in 1887, and that there was no such corporation in existence when this action was commenced. This is true, because after a corporation is dissolved by a judicial decree or by the expiration ²¹⁸ of the period fixed for its existence in the law under which it is organized, it is not even a de facto corporation, and its existence as a corporation may be questioned collaterally: 1 Clark & Marshall on Private Corporations, 247; 2 Clark & Marshall on Private Corporations, sec. 305; Guaga Iron Co. v. Dawson (1836), 4 Blackf. 202; Morgan v. Lawrenceburgh Ins. Co. (1852), 3 Ind. 285; Brookville etc. Turnpike Co. v. McCarty (1856), 8 Ind. 392, 65 Am. Dec. 768; Bradley v. Reppell, 133 Mo. 545, 54 Am. St. Rep. 685, 32 S. W. 645, 34 S. W. 841; Krutz v. Paola Town Co. (1878), 20 Kan. 397; Marysville Investment Co. v. Munson (1890), 44 Kan. 491, 24 Pac. 977; Supreme Lodge Knights of Pythias v. Weller (1896), 93 Va. 605, 25 S. E. 891; Dobson v. Simonton (1882), 86 N. C. 492; Asheville Division etc. v. Aston (1885), 92 N. C. 578; Sturges v. Vanderbilt (1878), 73 N. Y. 384; White v. Campbell (1844), 5 Humph. (Tenn.) 38.

As the corporate existence of appellee fixed by the special act of 1837 ended in 1887, and the three years given by section 3429 of Burns' Revised Statutes of 1901, section 3006 of Revised Statutes of 1881, and Horner's Revised Statutes of 1901, for the purpose of winding up its affairs ended in 1890, and the act of 1885 (Acts 1885, p. 121), under which appellee claims its corporate existence was extended thirty years, is unconstitutional, it follows that appellee had no power to sue when this action was commenced.

Judgment reversed, with instructions to sustain appellant's motion for a new trial of the issues joined on the answers in abatement, and for further proceedings in accordance with this opinion.

De Facto Corporations are discussed generally in the note to *People v. Montecito Water Co.*, 33 Am. St. Rep. 176-186. There cannot ordi-

narily be a corporation de facto where a corporation de jure is impossible: *Bradley v. Reppell*, 133 Mo. 545, 54 Am. St. Rep. 685; note to *Cannon v. Brush Elec. Co.*, 94 Am. St. Rep. 595. It is said, however, that a corporation organized and acting under an unconstitutional charter may be a de facto corporation: *Georgia etc. R. R. Co. v. Mercantile Trust etc. Co.*, 94 Ga. 306, 47 Am. St. Rep. 153. A corporation whose existence has expired by the terms of the law creating it is not a de facto corporation: *Bradley v. Reppell*, 133 Mo. 545, 54 Am. St. Rep. 685.

Transactions in the Name of Supposed but Nonexisting Corporations are discussed in the note to *Cannon v. Brush etc. Co.*, 94 Am. St. Rep. 593-598. As a rule, persons contracting with a corporation are estopped to deny its corporate existence: *Snider v. Troy*, 91 Ala. 224, 24 Am. St. Rep. 887; *Nebraska Nat. Bank v. Ferguson*, 49 Neb. 109, 59 Am. St. Rep. 522; *Owensboro Wagon Co. v. Bliss*, 132 Ala. 253, 90 Am. St. Rep. 907. But this rule does not apply, unless the corporation has at least a de facto existence: *Jones v. Aspen Hardware Co.*, 21 Colo. 263, 52 Am. St. Rep. 220.

PORTER v. ROSEMAN.

[165 Ind. 255, 74 N. E. 1105.]

BANKS AND BANKING, Agency of.—If a party selects a bank to collect a note and payment is made to such bank, it is the agent of the person so selecting it, and payment to it is equivalent to payment to him. (p. 224.)

MONEY, Title to, not Acquired by Conversion of.—If a clerk takes money of his employer and applies it to the payment of the former's debt, such clerk acquires no title to the money so converted and transfers none to the person so receiving it. (p. 225.)

MONEY Wrongfully Paid by an Agent in Satisfaction of His Own Debt, Right of His Principal to Recover.—If an agent applies money of his principal to the payment of the agent's debt, the creditor receiving such money acquires no title thereto, though, when receiving it, he does not know that it is not the money of his debtor. (p. 225.)

MONEY Wrongfully Paid by Agent, Right to Recover Though the Identical Money cannot be Traced.—It is not necessary for a principal, in order to recover money wrongfully paid by his agent in satisfaction of the latter's debt, to trace the identical money. It is sufficient to show that it went into the bank account of the person sought to be held liable therefor. (p. 225.)

AN ACTION for Money Had and Received Lies Whenever the defendant has money in his possession which, ex aequo et bono, belongs to the plaintiff, and it is not material how the money came into the hands of the defendant if the plaintiff is entitled to receive it. (p. 225.)

SETOFF, When Allowable in Equity.—A court of equity will take cognizance of cross-claims between litigants, though wholly disconnected and wanting in mutuality, and set off one against another

whenever it becomes necessary to effect a clear equity and prevent irremediable injustice. (p. 226.)

SETOFF.—The Nonresidence of the Plaintiff is a Good Ground for the interposition of an equitable setoff by the defendant. (p. 227.)

Gifford & Gifford, for the appellant.

John P. Kemp, for the appellee.

256 HADLEY, J. This is an ordinary action by appellee against appellant, on an open account for goods sold and delivered. Answer in setoff. Reply said to be by general denial, but it is not in the record. Special findings, conclusion of law, and judgment in favor of appellee. The evidence is not in the record. The question for decision arises upon the conclusion of law and motion to modify the judgment.

The special findings disclose the following facts: Prior to the commencement of this action there was owing the plaintiff (appellee), a resident of New York, from the appellant, two hundred and forty-nine dollars, for goods sold and delivered. There was also owing the plaintiff from William Mount, a former merchant of Elwood, for goods sold and delivered prior and subsequent to June 10, 1897, four hundred and thirty-two dollars. On said June 10, 1897, Mount was in the employ of the defendant on a fixed salary, and had charge of the defendant's jewelry store in Elwood. On the latter date the plaintiff's agent, knowing that Mount had no interest in the defendant's said store except as salesman, called upon Mount therein for a settlement of his indebtedness to the plaintiff, and during the call assisted Mount in making a sale of a diamond belonging to the defendant, and received thirty-five dollars of the proceeds, which he credited to the account of Mount, and turned it over to the plaintiff. The balance of the account was arranged by Mount's executing to the plaintiff and delivering to said **257** agent his notes for the amount, payable in monthly installments of twenty dollars each, beginning October 31, 1899. The notes were delivered to the plaintiff in New York, and as they severally became due were placed by the plaintiff in a bank in New York for collection, and by that bank forwarded to a bank in Elwood, at which latter bank eight of said notes first maturing were paid by Mount from money belonging to the defendant, which he had received from sales made from said store. The plaintiff had no knowledge of the ownership of

the money used in the payment of his notes. As they were paid the Elwood bank remitted a like sum of money to the New York bank, where it was credited to plaintiff's account, but there was no evidence that any part of the identical money paid by Mount was remitted to New York or received by the plaintiff.

The conclusion of law is that the defendant is entitled to a setoff for the thirty-five dollars knowingly received by the plaintiff's agent from the sale of the defendant's diamond, and that the plaintiff is entitled to recover the balance of his claim.

The facts pleaded as an answer and equitable setoff are substantially the same as those found to be true in the special findings, and the exception reserved to the conclusion of law raises the question: Do these facts show appellant to be entitled to set off against the claim of appellee an amount equal to the sum of appellant's money found to have been converted and used by Mount in payment of the latter's debt to the appellee? The thirty-five dollars received directly by appellee's agent from the purchase money for the diamond, with knowledge that it was appellant's money, was allowed by the court as a proper setoff, but the sum converted by Mount in the payment of his notes to the bank, to wit, one hundred and sixty dollars, was disallowed, presumably, because (1) the identical money converted was not traced to appellee; and (2) when received appellee had no knowledge of the conversion. Was the conclusion of law right?

²⁵⁸ One of the facts found is that Mount wrongfully converted one hundred and sixty dollars of appellant's money and delivered it to appellee in discharge of a debt. It is true, the immediate delivery of the money was to the bank at Elwood, which bank transmitted it to the bank in New York, where it was credited to appellee. These banks constituted the agency selected by appellee for the collection of his notes, and in every proper sense a payment to the bank was payment to appellee: *Jones v. Kilbreth* (1892), 49 Ohio St. 401, 31 N. E. 346; *Bank of Antigo v. Union Trust Co.* (1894), 149 Ill. 343, 36 N. E. 1029, 23 L. R. A. 611.

It is plain that Mount acquired no title by the conversion, and that he transferred to appellee no better title to the money than he himself possessed: *Alexander v. Swackhamer* (1886), 105 Ind. 81, 55 Am. Rep. 180, 4 N. E. 433, 5 N. E.

908; *Shearer v. Evans* (1883), 89 Ind. 400; *Breckenridge v. McAfee* (1876), 54 Ind. 141.

Appellant's money, having reached the possession of appellee without authority or right, remained as much his property in the hands of appellee as it was in the hands of Mount (*Shearer v. Evans* (1883), 89 Ind. 400); and this, too, without reference to whether appellee, at the time of its receipt, did, or did not, know whose money it was. He received it from one who had no authority to dispose of it, and its appropriation to his own use was conversion: *Alexander v. Swackhamer*, 105 Ind. 81, 55 Am. Rep. 180, 4 N. E. 433, 5 N. E. 908; *Harlan v. Brown* (1892), 4 Ind. App. 319, 30 N. E. 928. Appellee's innocence and good faith afford no protection against the rightful owner who has been tortiously dispossessed: *Breckenridge v. McAfee*, 54 Ind. 141.

To charge appellee, it is not essential that appellant shall trace his identical money into the possession of appellee. It is sufficient to show that it went into his bank account: *Pearce v. Dill* (1897), 149 Ind. 136, 48 N. E. 788, and cases cited.

²⁵⁹ Appellee thus having in his possession money which *ex aequo et bono* belonged, and ought to have been returned, to appellant, an action for money had and received might have been well brought for its recovery; and it was not material how the money came into his hands, if the plaintiff is justly entitled to receive it. In such a case the law implies a promise to pay: *Daily v. Board etc.* (1905), 165 Ind. 99, 74 N. E. 977, and authorities cited; *Glasecock v. Lyons* (1863), 20 Ind. 1, 83 Am. Dec. 299; 15 Am. & Eng. Ency. of Law, 2d ed., 1096, 1098, and cases collated.

The case then comes to this: The defendant, a resident of this state, at the commencement of this suit, owed the plaintiff, a resident of New York, the sum of two hundred and forty-nine dollars; and at the same time the plaintiff, in equity and good conscience, owed the defendant one hundred and ninety-five dollars. In this state of cross-demands, the plaintiff having come into this jurisdiction and entered suit for the recovery of his claim against the defendant, may the latter carry the case into equity and have set off against the plaintiff's demand the sum that is rightfully due him from the plaintiff; or shall the defendant be required to go to the state of New York for his remedy?

It is insisted by appellee's counsel that, conceding the validity of appellant's demand against appellee, there can be no setoff, because there is no such mutuality as is required by section 351 of Burns' Revised Statutes of 1901, section 348 of Revised Statutes of 1881. As applied to statutory actions, the force of the contention would be admitted, but since appellant rests his answer not upon the statute, but wholly upon the broad principles of equity, his right must be determined within the limits of that jurisdiction.

It is recognized by the courts of this state, and perhaps all other American states, that the court of equity will take cognizance of cross-claims between litigants, though wholly disconnected and wanting in mutuality, and set off one against the other whenever it becomes necessary to effect a ²⁶⁰ clear equity or prevent irremediable injustice: *Keightley v. Walls* (1866), 27 Ind. 384; *Carter v. Compton* (1881), 79 Ind. 37; *Cosgrove v. Crosby* (1881), 86 Ind. 511; *Sefton v. Hargett* (1888), 113 Ind. 592, 15 N. E. 513; *Eigenmann v. Clark* (1898), 21 Ind. App. 129, 51 N. E. 725.

In *Barbour on Law of Setoff*, 190, it is said: "If a court finds a case of natural equity, not within the statute, it will permit an equitable setoff, if from the nature of the claim, or from the situation of the parties, it is impossible to obtain justice by a cross-action." To same effect, see *Bispham on Principles of Equity*, 6th ed., sec. 27.

Some of the conditions and circumstances recognized by the courts as invoking an equitable setoff are where joint credit has been given on account of individual indebtedness, and where the joint debt is a mere security for the separate debt of the principal, and when the action is upon a note or other contract against several defendants, any one of whom is principal and the others sureties, and in cases of insolvency and nonresidence.

With respect to nonresidence as a ground for an application of the principle, *Frazer, J.*, in *Keightley v. Walls* (1865), 24 Ind. 205, says: "The rule in equity seems to be, not to grant the relief where the demands are wholly disconnected, as in this case, unless there are some special circumstances, such as the insolvency or nonresidence of the defendant, or other extraneous facts, to form the basis of equity jurisdiction": See, also, *Hannon v. Hilliard* (1882), 83 Ind. 362. Nonresidence is recognized as a basis for the

remedy in the following cases: *Forbes v. Cooper* (1889), 88 Ky. 285, 11 S. W. 24; *Bibb Land-Lumber Co. v. Lima Machine Works* (1898), 104 Ga. 116, 30 S. E. 676, 31 S. E. 401; *Quick v. Lemon* (1883), 105 Ill. 578; *Edminson v. Baxter* (1817), 4 Hayw. (Tenn.) 112, 9 Am. Dec. 751; *Davis v. Milburn* (1856), 3 Iowa, 163; *North Chicago etc. Co. v. St. Louis etc. Steel Co.* (1894), 152 U. S. 596, 14 Sup. Ct. Rep. 710, 38 L. ed. 565.

²⁶¹ In enforcing an equitable setoff the court proceeds upon the principle that one demand is, pro tanto, a satisfaction of the other, and that the real indebtedness is merely the balance: *Keightley v. Walls* (1866), 27 Ind. 384; *Hannon v. Hilliard* (1882), 83 Ind. 362.

It is said in *Forbes v. Cooper*, 88 Ky. 285, 11 S. W. 24: "It is certainly unconscientious for an insolvent party to coerce the payment of his claim when he is owing the other party an equal or larger sum, and thus leave the latter remediless; nor should a nonresident be allowed, under like circumstances, to enforce through the agency of the courts, the collection of his debt, and compel the other party to seek a foreign jurisdiction for relief, and then perhaps find the debtor insolvent. If the object of litigation be the attainment of justice, assuredly such results should be prevented. Indeed, the doctrine of equitable setoff, to the extent it was formerly applied, was based upon moral justice, and to meet such cases as the above, thus preventing wrong. It was then not uncommon to stay an insolvent or nonresident debtor in the collection of his claim until damages, to which the complainant might be entitled against him, were liquidated under the order of the chancellor, and then apply them in satisfaction of his independent debt."

In *Quick v. Lemon*, 115 Ill. 578, the following language is used: "It would seem to be inequitable to require the corporation to go to another state to collect its demand in an action at law, and we are inclined to hold that the nonresidence of the complainant, in connection with the fact he calls upon a court of equity to enforce his judgment, is sufficient to allow the defendant corporation to prove and set off its demand set up in the cross-bill against the judgment of the complainant."

These considerations lead us to the decision that the conclusion of law drawn from the facts proved under the answer of setoff was erroneous. The special findings are ²⁶² so

indefinite and uncertain in some important particulars that we are led to believe that the ends of justice may be best subserved by ordering a new trial.

The judgment is therefore reversed, with instructions to grant appellant a new trial.

Trover may be Maintained, in a proper case, for the conversion of money: See the monographic note to *Bolling v. Kirby*, 24 Am. St. Rep. 818. Thus, trover lies for the conversion of specific money susceptible of identification, such as money in a bag or package which has been intrusted to a person for safekeeping, and by his administrator mingled with other money without authority to the exclusion of the owner's dominion over it and in denial of his rights: *Hunnicutt v. Higginbotham*, 138 Ala. 472, 100 Am. St. Rep. 45. But it has been held that trover will not lie for money delivered to one person to be expended in behalf of another and by the former converted to his own use: *Larson v. Dawson*, 24 R. I. 317, 96 Am. St. Rep. 716.

On the Effect of a Payment with Funds not belonging to the debtor, where the creditor acts in good faith, see *Newhall v. Wyatt*, 139 N. Y. 452, 36 Am. St. Rep. 712.

CITY OF ELKHART v. MURRAY.

[165 Ind. 304, 75 N. E. 593.]

MUNICIPAL ORDINANCE, Arbitrariness of.—If a municipal ordinance restricts the right of dominion which the owner may otherwise exercise without question not according to any universal rule, but assumes to make the absolute enjoyment of his own depend upon the arbitrary will of the city, such ordinance is invalid, because it fails to furnish a universal rule of action, and leaves the right of property to the will of such authorities, who may exercise it so as to give exclusive profits or privileges to particular persons. (p. 229.)

MUNICIPAL ORDINANCE Requiring a Street Fender to be Approved by the Common Council.—An ordinance making it unlawful to run a street-car not equipped with a designated fender or one equally good, "to be approved by the common council or its street committee," undertakes to vest an arbitrary discretion which the council or its committee may exercise or not at pleasure, and is therefore void. (p. 231.)

John M. Van Fleet and Vernon W. Van Fleet, for the appellant.

Brick & Bates and Perry L. Turner, for the appellee.

304 MONKS, C. J. This action was brought by the city of Elkhart for the violation, by appellee, of an ordinance which provides that "It shall be unlawful on and after May 1,

1903, to run any street-car within the limits of said city without having securely fastened to its front end a Hunter Automatic Fender, made by the Hunter Automatic Fender Company, of Covington, Kentucky, or some other fender equally as good, to be approved by the common council or its street committee." The court below held the ordinance invalid, and rendered judgment in favor of appellee.

³⁰⁵ There was no law in force in 1903, when said ordinance was passed, granting, in express words, to cities of the class to which appellant belonged the power to require street-cars running within the city limits to be equipped with fenders. But assuming that such power may be implied from those granted (*People v. Detroit United Railway* (1903), 134 Mich. 682, 104 Am. St. Rep. 626, 97 N. W. 36, 63 L. R. A. 746, and cases cited), was said ordinance a reasonable exercise of that power? Such power, if possessed by the city, must be exercised by ordinance. The ordinance must contain permanent legal provisions operating generally and impartially upon all within the territorial jurisdiction of such city, and no part thereof be left to the will or unregulated discretion of the common council or any officer. If an ordinance upon its face restricts the right of dominion which the owner might otherwise exercise without question, not according to any uniform rule, but so as to make the absolute enjoyment of his own depend upon the arbitrary will of the city authorities, it is invalid, because it fails to furnish a uniform rule of action and leaves the right of property subject to the will of such authorities, who may exercise it so as to give exclusive profits or privileges to particular persons: *City of Richmond v. Dudley* (1891), 129 Ind. 112, 28 Am. St. Rep. 180, 28 N. E. 312, 13 L. R. A. 587, and cases cited; *Bills v. City of Goshen* (1889), 117 Ind. 221, 20 N. E. 115, 3 L. R. A. 261; *Bessonies v. City of Indianapolis* (1880), 71 Ind. 189; *City of Plymouth v. Schulthies* (1893), 135 Ind. 339, 35 N. E. 12; *Mayor etc. v. Radecke* (1878), 49 Md. 217, 33 Am. Rep. 239; *State v. Dering* (1893), 84 Wis. 585, 36 Am. St. Rep. 948, 54 N. W. 1104, 19 L. R. A. 858; *Cicero Lumber Co. v. Town of Cicero* (1898), 176 Ill. 9, 68 Am. St. Rep. 155, 51 N. E. 758, 42 L. R. A. 696, and authorities cited; *Noel v. People* (1900), 187 Ill. 587, 79 Am. St. Rep. 238, 58 N. E. 616, 52 L. R. A. 287; *City of Chicago v. Trotter* (1891), 136 Ill. 430, 26 N. E. 359; *State v. Tenant* (1892), 110 N. C. 609, 28 Am. St. Rep. 715, 14 S. E. 387, 15 ³⁰⁶ L.

R. A. 423, and cases cited; *Town of State Center v. Barenstein* (1885), 66 Iowa, 249, 23 N. W. 652; *City of Jacksonville v. Ledwith* (1890), 26 Fla. 163, 23 Am. St. Rep. 558, and authorities cited on pages 575, 576, 7 South. 885, 9 L. R. A. 69; *Newton v. Belger* (1887), 143 Mass. 598, 10 N. E. 464; *State v. Mahner* (1891), 43 La. Ann. 496, 9 South. 480; *May v. People* (1891), 1 Colo. App. 157, 27 Pac. 1010.

In *Bessónies v. City of Indianapolis*, 71 Ind. 189, this court said: "Without any provision as to the location or management of hospitals, the ordinance attempts to make it unlawful for anyone to establish or conduct one without a license or permit from the common council and board of aldermen; and the granting or refusal of the license or permit is not governed by any prescribed rules, but rests, in such case, in the uncontrolled discretion of the common council and board of aldermen. It is apparent, that, under the ordinance, if valid, the common council and board of aldermen have the power to grant or refuse the license in any given case, at their mere pleasure; and that no one can conduct or maintain a hospital within the city, however harmless or beneficial it might be, except by the consent of the common council and board of aldermen. It is not necessary to suppose that the common council and board of aldermen would abuse the power thus assumed by them, to grant or refuse the license, as they might think proper, or that they would exercise it otherwise than as they might think for the public good. It is sufficient to say that, if the ordinance is valid, the common council and board of aldermen have it in their power to grant one person a license and refuse another, under the same circumstances. No law could be valid which, by its terms, would authorize the passage of such an ordinance. The twenty-third section of the Bill of Rights provides that 'The General Assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms, shall not equally belong ³⁰⁷ to all citizens.' What the legislature cannot do directly in this respect, it cannot authorize a municipal corporation to do."

In *City of Richmond v. Dudley*, 129 Ind. 112, 28 Am. St. Rep. 180, 28 N. E. 312, 13 L. R. A. 587, this court said: "It seems from the foregoing authorities to be well established that municipal ordinances placing restrictions upon lawful conduct, or the lawful use of property, must, in order to be

valid, specify the rules and conditions to be observed in such conduct or business; and must admit of the exercise of the privilege by all citizens alike, who will comply with such rules and conditions; and must not admit of the exercise, or of an opportunity for the exercise, of any arbitrary discrimination by the municipal authorities between citizens who will so comply."

It will be observed that said ordinance requires the use of the particular fender described therein, or some other fender equally as good, to be approved by the common council or street committee. The ordinance, if valid, vests in the common council and street committee an arbitrary discretion which they may exercise or not at their pleasure. They have the power to approve a fender for use by one street railroad company, and refuse approval of the same fender for use by another company under the same circumstances and conditions. They also have the power to approve one or more fenders, and refuse approval of other fenders equally as good or better, whether made by the street railroad company or some one else, thus arbitrarily discriminating in favor of some manufacturers and against others. It is the fact that said officers have the power to do this, and not that they will do so, that renders said ordinance invalid.

Judgment affirmed.

The Power of Municipal Corporations to make and enforce regulations respecting street railways for the protection of the public is the subject of an extended note to People v. Detroit United Railway, 104 Am. St. Rep. 636-658.

AETNA LIFE INSURANCE COMPANY v. FITZGERALD.

[165 Ind. 317, 75 N. E. 262.]

ACCIDENT INSURANCE, When Covers Loss by Disease.—An accident policy insuring against loss of business time resulting from bodily injuries effected through external, violent and accidental means covers loss of business time from disease, if the disease was proximately caused by a bodily injury occasioned through external, violent and accidental means. (p. 233.)

ACCIDENT INSURANCE—Definition.—The Word “Accident” as used in an accident policy should be given its ordinary and usual signification as being an event that takes place without one’s forethought or expectation. (p. 234.)

ACCIDENT INSURANCE, Interpretation of, When Should Favor the Insured.—When an injury approximately proceeds from a cause which falls within the limits of a policy according to the ordinary interpretation of the force of words, that interpretation is to be preferred rather than one which defeats the protection of the assured in a large class of cases. (p. 235.)

ACCIDENT INSURANCE—Injury Resulting from Turning in Bed While Asleep.—If one, on going to bed, places his hand between the pillow and his head, and while asleep moves so that it rests on the edge of the bed rail, and on awakening finds the hand wholly numb, culminating in a difficulty technically termed periostitis, he is entitled to recover under a policy insuring against his loss of business time resulting from an injury effected through external, violent and accidental means. (p. 235.)

ACCIDENT INSURANCE—Provision Requiring Immediate Notice, Construction of.—If a policy of accident insurance requires immediate notice of an injury, this amounts to the requirement of notice within a reasonable time. (p. 236.)

ACCIDENT INSURANCE.—Notice of Injury is not Waived by the Denial of All Liability nor by placing the denial solely on one ground, if, at the time of such denial, the period within which notice might be given by the terms of the policy had expired. (pp. 236, 237.)

ACCIDENT INSURANCE—Notice of Injury, Question of Reasonable Time to Give, When for the Jury.—Where a notice of the injury was not given until fifty days after it was suffered, the question of reasonable time is for the jury in view of the evidence and the condition of the assured, and the appellate court cannot, therefore, regard as harmless an instruction that the insurer had waived its right to urge the not giving of the notice within a reasonable time by denying its liability and placing its denial on another ground. (pp. 237, 238.)

Miller, Elam & Fesler, for the appellant.

Robert W. McBride, Caleb S. Denny and George L. Denny, for the appellee.

³¹⁸ GILLETT, J. Action by appellee against appellant on an ³¹⁹ accident policy. By the contract the company in-

sured appellee "against loss of business time resulting from bodily injuries effected during the term of this insurance through external, violent and accidental means." The motion for a new trial presents the question as to whether the disability involved was due to an injury within the terms of the policy.

It appears from the testimony that on July 31, 1902, appellee, being much fatigued from an extended business trip, retired about 8 o'clock P. M. As he was somewhat restless, he placed his left hand between the pillow and his head, in order to raise it higher. The hand was placed on edge, with the thumb next to the head, and he fell asleep in that position. Sometime during the night, while asleep, he moved so that his hand, with his head continuing upon it as before, rested upon the edge of the bed rail and he continued to sleep in that posture until 4 o'clock A. M., when he awoke. He found that his hand was wholly numb, and it continued in that condition for the space of half an hour. There was a black mark upon it, where it had rested upon the rail, and this mark existed for some time thereafter. The hand pained him a great deal during the following day, and during the next night he was compelled to call a physician. The testimony of the latter, as well as that of the family physician, who took charge of the case upon returning from a vacation, shows that the pressure on the hand while upon the bed rail resulted in an inflammation of the periosteum of the metacarpal bones lying back of the third and fourth fingers, a condition which made an operation necessary and caused a protracted illness. The expert evidence shows that cases of inflammation of the periosteum, or, as the difficulty is technically termed, periostitis, are traumatic, at least for the most part, and that it is the opinion of the medical profession that all of such cases are due to some injury, perhaps forgotten.

The principal contention of counsel for appellant on the ³²⁰ question of the sufficiency of the evidence is that appellee's loss of time was due to disease, and not to an injury within the terms of the contract. We hold that the policy in suit was an insurance against loss of business time by disease, provided that the disability was proximately caused by a bodily injury occasioned through external, violent and accidental means. It is the general understanding that this class of policies insures against diseases so occasioned, and

where medical science reveals the fact that back of the disease stands a proximate cause, answering in all respects to the terms of the policy, it will not suffice to discharge the company that the consequence is accounted a disease. The insured cannot know what may befall him as the result of possible injuries, and it must be taken to have been the understanding of the parties that loss of time occasioned by disease was insured against, where the disability was proximately occasioned by an injury within the provisions of the contract. It will be time enough to deal with the difficult cases suggested by appellant's counsel, involving subtle, external causes of disease, when they arise. There was no evidence tending to show that the inflammation from which appellee suffered was due to any cause other than that of the long-continuing force exerted by the weight of the head. It was said in *McCarty v. Travelers' Ins. Co.* (1878), 8 Biss. 362, Fed. Cas. No. 8682: "An efficient, adequate cause being found must be deemed the true cause, unless some other cause not incidental to it, but independent of it, is shown to have intervened between it and the result": See, also, *Continental Casualty Co. v. Lloyd* (1905), 165 Ind. 52, 73 N. E. 824; *National Benefit Assn. v. Grauman* (1886), 107 Ind. 288, 7 N. E. 233.

It was declared by this court, in *Supreme Council etc. v. Garrigus* (1885), 104 Ind. 133, 54 Am. Rep. 298, 3 N. E. 818, that the word "accident," as used in an accident policy, "should be given its ordinary and usual signification, as being an event that takes place without one's foresight³²¹ or expectation." We are not here called on to consider a case where the result is one which follows from ordinary means, voluntarily employed, and in which the only element of unexpectedness lies in the fact that the pursuit of the means unexpectedly brings about a physical condition which makes disease possible. Here the element of volition was wholly absent, and the fact that during a period of unconsciousness there was a distinct and long-continued force applied, which compressed the tissues and blood vessels surrounding the bones, and thereby caused the inflammation, marks the case as one of accident.

We are also of the opinion that the injury was a violent one within the terms of the policy. The degree of violence is not always a controlling consideration: *Southard v. Railway Passengers Ins. Co.* (1868), 34 Conn. 574, Fed. Cas. No.

13,182. We are not to be understood as holding that violence will be wholly implied to bring an accident within the terms of the policy. Our holding is that where an injury approximately proceeds from a cause which falls within the limitations of the policy interpreted according to the ordinary understanding of the force of words, that interpretation is to be preferred, rather than one which would defeat the protection of the assured in a large class of cases: *Trew v. Railroad Passengers Assur. Co.* (1861), 6 Hurl. & N. 839; *Paul v. Travelers' Ins. Co.* (1889), 112 N. Y. 472, 8 Am. St. Rep. 758, 20 N. E. 347, 3 L. R. A. 443; *Healey v. Mutual Accident Assn.* (1890), 133 Ill. 556, 23 Am. St. Rep. 637, 25 N. E. 52, 9 L. R. A. 371. There were present in this instance, in a substantial sense, all of the elements necessary to bring the proximate cause of the disability within the requirement that the loss of time must result from a bodily injury effected through external, violent and accidental means. The only thing that was extraordinary about the case was the result; but this will not relieve, for the company was paid for its undertaking to provide a conventional measure of indemnity against the fortuitous, provided that ³²² it proximately proceeded from such an injury as the policy describes. We hold that the evidence was sufficient to support the verdict.

Appellant has assigned as an error that the court below erred in overruling a demurrer to the complaint. As the only objection which is urged to that pleading has, in effect, been determined by us to be untenable, in passing on the question as to the sufficiency of the evidence it is enough to announce that appellant is not entitled to a reversal based on the overruling of said demurrer.

The policy in suit provided that an immediate notice of the injury should be given the company. Appellee did not give notice until about fifty days after the injury. October 23, 1902, the company, by its general agents at Indianapolis, sent to appellee a letter, stating that the company declined to approve the claim, on the ground that it did not "come within the classification of an accident." The trial court, by instructions which are not complained of, submitted to the jury trying the cause the question, as one of fact, whether, in view of appellee's condition, notice was given within a reasonable time; but the court also gave to the jury the following instruction, for which a reversal is sought: "On the question of waiver and the provision of the policy requiring immediate

notice, I instruct you that if you should find from the evidence that the notice required by the policy was not given within a reasonable time after the happening of the alleged accident and injury, but was given some time later and that after it was given a claim was made upon the defendant on said policy for the injury in controversy, and that in response to said claim the defendant denied all liability, and placed its denial of liability solely on the ground that the policy sued on did not cover such an injury as this was, without saying anything about the failure to have given this notice required in the policy, such fact would amount to a waiver of the provisions requiring immediate notice."

323 Under the provisions of the Indiana statutes concerning foreign insurance companies, the provision of the policy above referred to amounted to a requirement of notice within a reasonable time: Burns' Rev. Stats. 1901, sec. 4923; Rev. Stats. 1881, sec. 3770; Insurance Co. of North America v. Brim (1887), 111 Ind. 281; 12 N. E. 315; Pickel v. Phenix Ins. Co. (1889), 119 Ind. 291, 21 N. E. 898; Peele v. Provident Fund Society (1897), 147 Ind. 543, 41 N. E. 661, 46 N. E. 990. It will be observed, however, that by the instruction above set forth the court instructed upon the hypothesis that notice was not given within a reasonable time, and informed the jury that a subsequent denial of liability on another ground, without mentioning the failure to give notice, would amount to a waiver. If this was a correct exposition of the law as applied to the facts, there was no question, under the uncontradicted evidence, to submit to the jury.

We considered the doctrine of waiver of proofs of loss at some length in *Germania Fire Ins. Co. v. Pitcher* (1903), 160 Ind. 392, 64 N. E. 921, 66 N. E. 1003; and in view of what was there said this case can be disposed of without much further discussion. It is true that we held in the case last cited that there might be a waiver after the time for making proofs of loss had expired, but it will be observed that there the disagreement was as to the amount of the loss. A protracted negotiation over such a question after the expiration of the time for the making of proofs might warrant a jury in concluding that the company was recognizing a subsisting obligation to the extent of what it conceived to be the amount of the loss; but we cannot sanction the view that, after the assured has sinned away all right of recovery under the policy, he may yet recover, by proof that the

company refused to pay on the ground that the policy did not cover the claim asserted in the notice. The refusal to pay on a wholly different ground, made within the time that the policy-holder may take steps to make good his right under the contract, is treated in this state as a waiver per se; but we perceive no reason, after ³²⁴ the right is gone, for permitting the policy-holder to go to the jury on that question of waiver under proof of the solitary fact that the company had afterward declined for another reason to recognize the validity of the policy. The authorities support us in this view of the law: *Fidelity & Casualty Co. v. Sanders* (1904), 32 Ind. App. 448, 70 N. E. 167, and cases cited; *Patrick v. Farmers' Ins. Co.* (1862), 43 N. H. 621, 80 Am. Dec. 197; *Beatty v. Lycoming County Mut. Ins. Co.* (1870), 66 Pa. St. 9, 5 Am. Rep. 318; *Hart v. Fraternal Alliance* (1901), 108 Wis. 490, 84 N. W. 851; *State Ins. Co. v. School Dist. etc.* (1903), 66 Kan. 77, 71 Pac. 272; *Employers' etc. Corp. v. Rochelle* (1896), 13 Tex. Civ. App. 232, 35 S. W. 869; 2 May on Insurance, 4th ed., sec. 464. In fact, we have not been able to find a case which seems to support appellee upon this point, unless it be *Brink v. Hanover Fire Ins. Co.* (1880), 80 N. Y. 108, which is cited in the brief filed on his behalf. The value of that case as a precedent in appellee's favor was destroyed by *Devens v. Mechanics' etc. Ins. Co.* (1880), 83 N. Y. 168, where the court referring to the case of *Brink v. Hanover Fire Ins. Co.*, 80 N. Y. 108, said: "The doctrine of waiver was, we think, properly applied in that case, but it should not be extended so as to deprive a party of his defense, merely because he negligently, or incautiously, when a claim is first presented, while denying his liability, omits to disclose the ground of his defense, or states another ground than that upon which he finally relies. There must, in addition, be evidence from which the jury would be justified in finding that with full knowledge of the facts there was an intention to abandon, or not to insist upon the particular defense afterward relied upon, or that it was purposely concealed under circumstances calculated to, and which actually did, mislead the other party to his injury."

Appellee's counsel contend that under the evidence it appears that notice was given within a reasonable time.

³²⁵ We have read the evidence as set out in the bill of exceptions, and while we are of the opinion that the question

of reasonable time was for the jury, in view of the evidence as to appellee's condition, yet the case which he seeks to make out was not so convincing upon that point as to render harmless the giving of the above instructions.

Judgments reversed, and a new trial ordered.

What is Death by Accidental Means within the meaning of the law of accident insurance is discussed in the monographic notes to *Paul v. Travelers' Ins. Co.*, 8 Am. St. Rep. 763-766; *Gibson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 859, 860. Death by accident is death by any unexpected event which happens as by chance, or which does not take place according to the usual course of things. Thus, death due to dilation of the heart, caused by lifting a heavy weight in the usual course of one's employment, is death by accident: *Horsfall v. Pacific Mutual Life Ins. Co.*, 32 Wash. 132, 98 Am. St. Rep. 846.

Immediate Notice in a Policy of Insurance against death by accident means notice within a reasonable time with due diligence under the circumstances of the case: *Horsfall v. Pacific Mutual Life Ins. Co.*, 32 Wash. 132, 98 Am. St. Rep. 846; *Ward v. Maryland Casualty Co.*, 71 N. H. 262, 93 Am. St. Rep. 514; *Woodmen Accident Assn. v. Pratt*, 62 Neb. 673, 88 Am. St. Rep. 777.

GIPE v. STATE.

[165 Ind. 433, 75 N. E. 881.]

EVIDENCE—Dying Declarations.—The Character of a Wound May of Itself Warrant the Inference that the declarant was under a sense of certain and speedy death. (p. 240.)

EVIDENCE—Dying Declarations.—The Conclusion of the Trial Court that Declarations were Admissible as Dying Declarations is one which will not be disturbed on appeal, unless it is manifest that the facts did not warrant the conclusion. (pp. 240, 241.)

EVIDENCE—Dying Declarations.—If the decedent expresses a belief that he will not get well, and gradually grows worse until a physician on the next day abandons all hope of recovery, the trial court is justified in finding that the declarations subsequently made by such decedent were made under the sense of impending death and without hope of recovery. (p. 241.)

HOMICIDE.—An Indictment Charging that the Killing was by Ways and Means Unknown to the jury is sufficient. (p. 242.)

HOMICIDE.—An Indictment Charging a Killing in One Manner Will not Support a Conviction for Killing in a Different Manner. (p. 242.)

HOMICIDE.—An Indictment for Murder by Throwing the Decedent into a Well will not Support a conviction for murder by putting her in such fear and agitation that she lost her reason, became insane, jumped into the well, and therefrom died, and it is prejudicial error for the court to instruct the jury that they may convict on the latter facts. (p. 243.)

HOMICIDE—Erroneous Instruction as to Murder Where the Jury Found Defendant Guilty of Manslaughter Only.—Where the court erroneously instructs the jury that the defendant is guilty of murder in the first degree if he committed certain acts not admissible in evidence under the indictment, the defendant is entitled to a new trial, though he was convicted of involuntary manslaughter only. (p. 243.)

HOMICIDE.—A Conviction of Involuntary Manslaughter cannot be Disturbed on appeal because the evidence shows the defendant was guilty of murder. (p. 243.)

APPEAL AND ERROR—Criminal Trials, Error, When Must be Presumed to Have Been Prejudicial.—If an error is in itself radical and affects substantial rights in a material degree, or may probably affect such rights, it cannot be regarded as unimportant, unless the record, with decisive clearness and strength, affirmatively shows that it did not influence the final decision in the cause to the prejudice of the party complaining. (p. 243.)

William A. Brown and Fred. C. Gause, for the appellant.

Charles W. Miller, attorney general, C. C. Hadley, L. G. Rothschild and W. C. Geake, for the state.

434 GILLETT, J. Appellant was charged by indictment with the murder of one Molly Starbuck and her infant child. There was a verdict of involuntary manslaughter on which judgment was pronounced.

The first question which this appeal presents is whether the trial court erred in admitting as dying declarations certain statements of said Mollie Starbuck. On Saturday night, between the hours of 9 and 10 o'clock, said decedent ⁴³⁵ was found in a frenzied condition, with said infant, in a shallow well, situate about one thousand feet to the rear of her house. She and her child were the only members of her family who were at home during the evening, and there was evidence to show that the house had been broken into that night, at some hour previous to the time that they were found in the well. Said declarant died about 4 A. M. the next Monday. One of the attending physicians testified that the cause of death was acute pulmonary congestion, while another physician, in testifying, ascribed her death to shock, fright and exhaustion. The evidence warranted the conclusion that her condition and death were due to her experience of the preceding Saturday night. She continued very sick from the time she was found. She was in a highly nervous condition, and was suffering from pulmonary hemorrhage. She was better Sunday morning, but during that time, and up to her death, her breathing was heavy and labored. Between

2 and 3 o'clock P. M. of said day she asked one of the attending physicians whether he thought she could get well. He told her he had hopes of her recovery, that she had improved nicely, and he saw no reason why she should not get well. She replied that she did not believe she would. Between that time and midnight Sunday, when the declarations were made, there was a gradual decline in her condition, and said physician testified that at the latter hour he had no hope of her recovery. The declarations in question and the circumstances in which they were made are thus stated by said witness: "At one of her waking spells I said to her: 'Mollie,' I says, 'do you know me?' And she made no answer, and she looked at me, and I said: 'If you cannot answer me, Mollie [she was getting weak], raise your hand if you know me,' and she raised her hand or finger. And I said: 'There are some things we want to know, and very badly, and if you can possibly let us know any way whatever, do so.' I said: 'Was it some bad man carried you off?' And she summoned a ⁴³⁶ great effort and said: 'Yes.' The nurse asked her then: 'Did they come in at the window?' And she said: 'Yes,' and looked toward the window where the screen had been torn away. And then the nurse asked her if there were more than one, and she said: 'I don't know.' And then I asked her if she recognized anyone, and she made some answer, but we could not understand her—she was getting very weak."

With this statement of facts we proceed to the discussion of the admissibility of said declarations. In *John's Case* (1790), 1 East, 357, from the MSS. of Buller, J., it appears that it was the unanimous opinion of the judges that: "If a dying person either declare that he knows his danger or it is reasonably to be inferred from the wound or state of illness that he was sensible of his danger, the declarations are good evidence." That the character of the wound may of itself warrant the inference that the declarant was under a sense of certain and speedy death is settled upon the authorities: *Woodcock's Case* (1789), 2 Leach, 563; *Anthony v. State* (1838), 19 Tenn. *265, 33 Am. Dec. 143; *McLean v. State* (1849), 16 Ala. 672; *Hill's Case* (1845), 2 Gratt. 594, 608; 3 Russell on Crimes, 9th Am. from 4th London ed., *250. And see *Green v. State* (1900), 154 Ind. 655, 57 N. E. 637.

The question as to the competency of the declarations was one which the trial court was called on to decide before ad-

mitting the testimony: *John's Case*, 1 East, 357; *Donnelly v. State* (1857), 26 N. J. L. 463; *Starkey v. People* (1855), 17 Ill. 17; 1 *Roscoe on Criminal Evidence*, 8th ed., *37; 1 *Bishop's Criminal Procedure*, 4th ed., sec. 1212; 1 *Elliott on Evidence*, sec. 355. Its conclusion that the declarations were admissible is one which will not be disturbed on appeal, unless it is manifest that the facts did not warrant the conclusion: *Swisher's Case* (1875), 26 Gratt. 963, 21 Am. Rep. 330. Professor Wigmore, who discusses the propositions above laid down, says: "In ascertaining the consciousness ⁴³⁷ of approaching death, recourse should naturally be had to all the attending circumstances. It has been contended that only the statements of the declarant could be considered for this purpose; or, less broadly, that the nature of the injury alone could not be sufficient—i. e., in effect, that the declarant must have shown in some way by conduct or language that he knew he was going to die. This, however, is without good reason. We may avail ourselves of any means of inferring the existence of such knowledge; and if in a given case the nature of the wound is such that the declarant must have realized his situation, our object is sufficiently attained. Such is the settled judicial attitude. . . . No rule can here be laid down. The circumstances of each case will show whether the requisite consciousness existed; and it is poor policy to disturb the ruling of the trial judge upon the meaning of these circumstances": 2 *Wigmore on Evidence*, sec. 1442.

In this case it appears that on Sunday afternoon said decedent expressed the belief that she would not get well. Assuming that to have been her opinion then, and considering that she gradually grew worse until the physician had abandoned hope of her recovery, and bearing in mind her extreme weakness, as evidenced by the physician's testimony as to the circumstances in which her statements were made, we can but regard the deduction of the trial court as authorized that the declarations were made under a sense of impending death, without hope of recovery. The remarks of *Eyre, C. B.*, in *Woodcock's Case*, 2 Leach, 563, seem quite apropos in this connection, but we need not pause to quote them.

The indictment charged that appellant "did then and there unlawfully, feloniously, purposely and with premeditated malice kill and murder Mollie Starbuck and Beulah

May Starbuck, by then and there feloniously, purposely and with premeditated malice unlawfully striking and wounding and forcibly throwing said Mollie Starbuck and Beulah May ⁴³⁸ Starbuck into a well, then and there being." Appellant contends that, in view of the charge in the indictment as to the means by which the deaths alleged were caused, the court erred in giving to the jury instruction numbered 3. By that instruction the court, after calling the attention of the jury to the provisions of statute relative to the killing of a human being in the perpetration of, or attempt to perpetrate, the crime of robbery or burglary, charged that if the jury found that appellant, either by himself or with others confederating with him, broke and entered the Starbuck house under certain circumstances set forth in the instruction (amounting in law to a burglary), and that by reason of said acts said Mollie Starbuck was put in great fear and agitation, to such an extent that she lost her reason and became insane, and that by reason thereof, while in such a state of insanity, she left the house and jumped into the well, carrying with her the infant child, and that by reason of her exposure therein, and her extreme fright and agitation, brought upon her by the facts aforesaid, she afterward died, appellant would be guilty of murder in the first degree. In this case, as will be observed, the charge was a killing by "striking and wounding and forcibly throwing" said Mollie Starbuck and Beulah May Starbuck into a well. This clearly means that the killing was accomplished by physical violence. In an English *nisi prius* case involving a state of facts somewhat similar to that involved in the hypothesis embodied in said instruction, we find that the facts as to the manner in which death occurred were pleaded: *Regina v. Pitts* (1842), 1 Car. & M. 284. It is settled in this jurisdiction that a charge that the killing was by ways and means unknown to the grand jury is sufficient, and then it is a question whether the proof supports the averment: *Waggoner v. State* (1900), 155 Ind. 341, 80 Am. St. Rep. 237, 58 N. E. 190; *Donahue v. State* (1905), 165 Ind. 148, 74 N. E. 996. We have here, however, a case in which it is alleged ⁴³⁹ that the killing was accomplished by an act of physical violence. The averment is descriptive of the crime charged, and it was therefore necessary to prove the allegation substantially as laid: *Taylor v. State* (1891), 130 Ind. 66, 29 N. E. 415. As respects the allegation and proof as to the manner of death, it is sufficient

if the proof agree with the allegation in its substance and generic character; precise conformity is not required. But, to quote from one of the older writers: "If a person be indicted or appealed for one species of killing, as by poisoning, he cannot be convicted by evidence of a totally different species of death, as by shooting, starving or strangling": 1 East's Pleas of the Crown, 341. See, also, Mackalley's Case, 9 Coke, 66; Rex v. Waters (1835), 7 Car. & P. 597; State v. Dame (1840), 11 N. H. 271, 35 Am. Dec. 495; State v. Smith (1851), 32 Me. 369, 54 Am. Dec. 578; State v. Fox (1856), 25 N. J. L. 566; State v. Hoyt (1868), 13 Minn. 132; State v. Jenkins (1867), 14 Rich. (S. C.) 215, 94 Am. Dec. 132; 10 Ency. of Pl. & Pr. 128.

It is contended that the above instruction is shown to have been harmless, because the jury did not find appellant guilty of murder, but of involuntary manslaughter. There is no merit in this contention. The instruction, in view of the evidence, was strongly calculated to be influential, because of its indication to the jury that there might be a conviction for the homicide, if such it was, although the conclusion of the jury as to the manner of killing might be that death was caused by a means totally different from that which was charged.

It must not be forgotten that a charge of murder in the first degree comprehends every grade of felonious homicide, and that a finding of involuntary manslaughter cannot be disturbed on appeal because the evidence shows that the defendant was guilty of murder: Hasenfuss v. State (1901), 156 Ind. 246, 59 N. E. 463. It has been declared, and properly so, that if an "error is in itself ⁴⁴⁰ radical and affects substantial rights in a material degree, or may probably so affect such rights, then the error cannot be regarded as unimportant unless the record, with decisive clearness and strength, affirmatively shows that it did not influence the final decision in the case to the prejudice of the party who complains": Elliott on Appellate Procedure, sec. 643, note. After a careful consideration of the question which the giving of said instruction presents, viewed, not in the abstract, but in the concrete, as applied to the testimony in the record, it is our conclusion that it does not clearly appear that appellant was not prejudiced. A reversal must therefore follow.

Judgment reversed, and a new trial ordered.

On what Declarations are admissible as dying declarations and in what cases, see the monographic note to *State v. Meyer*, 86 Am. St. Rep. 637-668.

TERRELL v. STATE.

[165 Ind. 443, 75 N. E. 884.]

INDICTMENT—Time of Committing Offense.—The time of the commission of an offense as stated in an indictment or information must appear to be anterior to its return or filing, but not so long prior thereto as to bring the case within the statute of limitations. (p. 245.)

APPEAL AND ERROR—Criminal Law, Conclusiveness of the Record.—The original indictment cannot be examined by the appellate court. The copy of the indictment as it appears in the record imports absolute verity, and if it shows that the date on which the offense is alleged to have been committed is a future and impossible date, the error cannot be set right by looking at the original indictment. (p. 246.)

INDICTMENT—Future or Impossible Date.—An indictment charging the crime to have been committed on the "12th day of July, 18903," should be quashed on motion. (p. 250.)

INDICTMENT—Time of Offense, When not Imperfectly Stated. An indictment charging the offense to have been committed on the "12th day of July, 18903," does not state the time of such offense imperfectly, and therefore does not fall within the provisions of a statute respecting indictments in which the time of the offense is imperfectly stated. (p. 251.)

A. L. Sharpe, Charles E. Sturgis, Robert W. Stine, Charles H. De Lacour, Ralph S. Gregory, and Robert Landfair, for the appellant.

Charles W. Miller, attorney general, C. C. Hadley, L. G. Rothschild and W. G. Geake, for the state.

⁴⁴⁴ JORDAN, J. On the twelfth day of September, 1903, a grand jury of the Wells circuit court returned an indictment against appellant, John W. Terrell, charging him with the crime of murder in the first degree. He unsuccessfully moved to quash the indictment, and then entered a plea of not guilty, and also filed a special answer, wherein he averred that at the time the alleged offense was committed he was a person of unsound mind. The state's reply to the special answer was a general denial. The case was tried by a jury, and a verdict returned convicting him of murder in the first degree and assessing his punishment at imprisonment in the

state prison during life. Upon this verdict the court, over appellant's motion for a new trial, pronounced judgment.

The errors assigned and relied upon for a reversal are: 1. Overruling the motion of appellant to quash the indictment; 2. Denying him motion in arrest of judgment; 3. ⁴⁴⁵ Overruling the motion for a new trial; 4. Error of the trial court in pronouncing judgment on the verdict, for the reason that at the time of the rendition of the judgment appellant was a person of unsound mind, incapable of understanding and comprehending what was being done; and 5. Error of the court in refusing to permit appellant to file a supplemental motion for a new trial.

The indictment in this case consists of one count, and it is therein alleged that John W. Terrell, on the twelfth day of July, in the year 18903, at the county of Wells, and state of Indiana, then and there unlawfully, feloniously, etc., did kill and murder Melvin Wolfe by shooting, etc. Appellant's counsel contend that the court erred in overruling the motion to quash, for the reason that it is apparent on the face of the pleading that the commission of the alleged offense was on an impossible date, or, in other words, for the reason that it is disclosed upon the face of the indictment that the crime was committed after the return of the indictment and therefore the latter is fatally defective on a motion to quash.

The general rule applicable to criminal procedure is that the time of the alleged commission of an offense, as stated in the indictment or information, must not be shown on the face of such pleading to be subsequent to the return of the indictment or the filing of the information, but must appear to be anterior or prior thereto. If the time of the commission of the crime is disclosed to antecede the return of the indictment, then the time stated must not appear to be so long prior to the return as to bring the case beyond the statute of limitations, provided it is one to which the latter statute applies. The general rule above asserted is one well settled by our own decisions and other authorities, except so far as it can be said to be abrogated by statute: See *State v. Noland* (1897), 29 Ind. 212; *State v. Windell* (1878), 60 Ind. 300; *Hutchinson v. State* (1878), 62 Ind. 556; *Murphy v. State* (1886), 106 Ind. ⁴⁴⁶ 96, 55 Am. Rep. 722, 5 N. E. 767; *Trout v. State* (1886), 107 Ind. 578, 8 N. E. 618; *Gillett on Criminal Law*, 2d ed., sec. 131. See, also, *Commonwealth v.*

Doyle (1872), 110 Mass. 103; State v. Sexton (1824), 10 N. C. 184, 14 Am. Dec. 584; State v. O'Donnell (1889), 81 Me. 271, 17 Atl. 66; Markley v. State (1847), 10 Mo. 291; State v. Smith (1893), 88 Iowa, 178, 55 N. W. 198; McJunkins v. State (1897), 37 Tex. Cr. Rep. 117, 38 S. W. 994; Dickson v. State (1884), 20 Fla. 800; Serpentine v. State (1835), 1 How. (Miss.) 256; Wharton on Criminal Law, 7th ed., sec. 274; Wharton on Homicide, 2d ed., sec. 788; 1 Chitty on Criminal Law, *255.

The attorney general, in his answer to the contention of appellant's counsel in respect to the insufficiency of the indictment in controversy, says: 1. "The court will observe that the copy of the indictment in the record shows the figures 8 and 9 without any space between them. To get at the real cause of this alleged error it is necessary to examine the original indictment where the trouble concerning the statement of the date will readily be observed." 2. It may be said that the statement of time is so far imperfect as to fall within the provisions of section 1825 of Burns' Revised Statutes of 1901, section 1756 of the Revised Statutes of 1881, which provides: "No indictment or information shall be deemed invalid, nor shall the same be set aside or quashed. . . . for any of the following defects: . . . Eighth. For omitting to state the time at which the offense was committed in any case in which time is not the essence of the offense; nor for stating the time imperfectly, unless time is of the essence of the offense." It must be held that the copy of the indictment as it appears in the record imports absolute verity, and we cannot resort to anything dehors the record for the purpose of contradicting it. In Buckner v. State (1877), 56 Ind. 210, the record stated that the grand jury had returned into court an "indictment burned." This court in that case, in considering the question in respect to the truth of the record, said: "The record of this cause, filed in this ⁴⁴⁷ court, imports to us 'absolute verity,' and from this record we are bound to conclude that, at the time of the trial of this case, nothing but ashes remained of the indictment against the appellant in the court below."

It is a well-settled rule of appellate procedure that all questions presented in the appeal must be tried and determined by the record as certified to the appellate tribunal. This rule is one universally affirmed and enforced by our decisions. Whether the statement of the time in question is a

mistake which occurred in drafting the indictment or was made by transcribing it is, under the circumstances, not a material factor, so far as it can be said to exert any influence over the point as presented upon the face of the indictment. If the copy of the indictment in the record did not correspond to the original, the state should have secured a correction through the means of a certiorari. An examination and quotation from some of the authorities above cited will fully serve to sustain the conclusion at which we have arrived upon the question involved.

In *State v. Noland*, 29 Ind. 212, the offense was charged to have been committed some nine months after the indictment was found. The court held that under the circumstances the indictment was bad. Judge Frazer, in a separate opinion in that case, said: "I was first inclined to hold that this was merely a repugnant allegation, and therefore not affecting the sufficiency of the pleading, but, on reflection, I am not able to adopt that conclusion. No other time is alleged elsewhere, and this cannot therefore be rejected. It follows that the indictment charges what is impossible, and cannot therefore legally be regarded as charging anything whatever."

State v. Windell, 60 Ind. 300, was an accusation for betting on the result of an election. The indictment alleged that the defendant, on the fourteenth day of September, 1876, did unlawfully win five dollars of and from the person named, by unlawfully betting on the result of an election then and there held on ⁴⁴⁸ the seventh day of November, 1876. The court held the indictment bad because it disclosed that the money was won on September 14, 1876, by betting on the result of an election which did not actually take place until nearly two months thereafter. The court in its opinion affirmed that under the circumstances "Where the time laid [in an indictment] is an impossible time, or is beyond the statute of limitations, or at a time when the offense was not punishable by statute, the indictment is bad."

In *Murphy v. State*, 106 Ind. 96, 55 Am. Rep. 722, 5 N. E. 767, the indictment charged that the defendant, an unlicensed retailer of intoxicating liquors, at the county of Owen, state of Indiana, "on the sixteenth day of August, 18184, . . . did then and there unlawfully sell . . . one gill of whisky." The contention in that appeal was that the trial court erred in overruling the motion to quash, for the reason

that the indictment was fatally defective in alleging that the offense was committed at a time subsequent to the return. In this contention the court concurred. The state in that case insisted that inasmuch as section 1825 of Burns' Revised Statutes of 1901, section 1756 of the Revised Statutes of 1881, provides that no indictment shall be quashed or set aside for omitting to state the time at which the alleged offense was committed, or for stating the time imperfectly, therefore the fixing of an impossible date is no longer a cause for quashing an indictment; citing *State v. Sammons* (1884), 95 Ind. 22. This contention the court denied: affirming, in the course of its opinion, that there was nothing in *State v. Sammons*, 95 Ind. 22, either changing or intimating a change in the rule which declares that the fixing of an impossible date vitiates an indictment. The court further affirmed that the above section of the Criminal Code of 1881 did not work any change in the rule in controversy. The court also declared in the case of *Murphy v. State*, 106 Ind. 96, 55 Am. Rep. 722, 5 N. E. 767, that in *State v. Sammons*, 95 Ind. 22, it was inferable "that an indictment is bad which either distinctly states an impossible date or fixes the date of the offense at a time beyond that limited by the statute of limitations. 449 As has been seen, section 1756 of the Revised Statutes of 1881, the only section bearing directly on the subject, only renders immaterial the omission to state any time, and an imperfect statement of time, and hence only to that extent changes the common-law rule."

Murphy v. State (1886), 106 Ind. 96, 55 Am. Rep. 722, 5 N. E. 767, is certainly influential and controlling upon the question as presented in the case at bar. That decision was followed and adhered to in *Murphy v. State* (1886), 107 Ind. 598, 600, 8 N. E. 158, 176.

In *Trout v. State* (1886), 107 Ind. 578, the prosecution was based on affidavit and information. The latter pleading was filed on the sixteenth day of January, 1886, and alleged that the offense in question was committed on the twenty-first day of October, 1886. The court in that case said that if appellant had moved to quash the information, it would have been error, under our decisions, to overrule such motion: citing *Murphy v. State* (1886), 106 Ind. 96, 55 Am. Rep. 722, 5 N. E. 767, and *Dyer v. State* (1882), 85 Ind. 525. In this latter case the prosecution was also by affidavit and information. The affidavit charged that the crime of which the de-

fendant was convicted was committed on December 24, 1881, while the information alleged that it was committed on January 24, 1881. The court held that the motion to quash should have been sustained. Elliott, J., speaking for the court in that appeal, said: "Informations must be supported by an affidavit and must charge the same offense as that described in the affidavit. An information charging a distinct and different offense from that stated in the affidavit cannot be upheld. It is difficult, if not impossible, to discover any ground upon which it can be held that an offense committed in January is the same as one committed in the following December. It would be a wide stretch of construction which would declare a misdemeanor perpetrated in December to be the same as one committed in the preceding January. The offense described in the information was committed, taking as true, as it is our duty to do, the statements of the information, ⁴⁵⁰ eleven months prior to the one described in the affidavit. We are unable to perceive any reason which will justify us in treating the two offenses as one. The question is not, however, barren of authority"; citing authorities.

In *State v. Patterson* (1888), 116 Ind. 45, 10 N. E. 289, 18 N. E. 270, the decision in the case of *Murphy v. State* (1886), 106 Ind. 96, 55 Am. Rep. 722, 5 N. E. 767, was cited in support of the point that an impossible date is fatal to an indictment.

In *Commonwealth v. Doyle* (1872), 110 Mass. 103, the court held that a complaint which charges a crime to have been committed on a future day alleges no offense and is properly quashed.

In *State v. Smith* (1893), 88 Iowa, 178, 55 N. W. 198, the defendant was charged with obtaining money by means of false pretenses. The indictment was found in February, 1891, and alleged that the crime in question was committed on the seventeenth day of December, 1891. The accused was put upon trial on this indictment before a jury. At the close of the state's evidence he unsuccessfully moved for an acquittal, on the ground that the indictment charged the offense to have been committed at an impossible date, it being apparent, however, upon the face of the indictment that the commission of the alleged offense was fixed at a date subsequent to the return of the indictment. The court, on its own motion, discharged the jury, and resubmitted the cause to another grand jury, which, on March 3, 1891, found

an indictment against the defendant for the same offense, alleging the commission thereof on the seventeenth day of December, 1890. To this latter indictment the accused pleaded once in jeopardy on the same charge and former acquittal thereof. A demurrer to his plea was sustained, and upon the issue of not guilty he was convicted, and judgment rendered against him. This judgment on appeal was affirmed. The court held that the indictment in the former case was not sufficient, because it laid the commission of the offense on a future day. The court further held that the indictment ⁴⁵¹ being insufficient, the defendant, in contemplation of law, had not been placed in jeopardy at the trial had thereon. The court in its opinion affirmed that where an indictment "states an impossible time it fails to charge an offense."

The proposition with which we have to deal in this appeal is one relating to pleading; hence we cannot indulge in presumptions where there is nothing in the pleading legitimately to sustain them. The indictment in the case at bar fixes a specific date, one not anterior to but subsequent to its return. Certainly, under the circumstances, the court would not be warranted in presuming that the commission of the offense was at some time prior to the finding of the indictment. A precise time upon which the crime in question was committed is stated; no other is alleged or given. A motion to quash an indictment is recognized as the proper procedure to raise an issue of law on material facts therein alleged. On appellant's motion to quash, it is, for the purpose of the motion, conceded or admitted by both parties to the cause that the time at which the offense is charged to have been committed is correctly stated: *Murphy v. State* (1886), 106 Ind. 96, 55 Am. Rep. 722, 5 N. E. 767; *Gillett on Criminal Law*, 2d ed., secs. 131, 767.

It would be a great stretch of construction to hold upon the face of the indictment in this case on the motion to quash that the offense in controversy must be treated or considered as though it was one charged to have been committed at a time anterior or antecedent to the finding of the indictment against appellant.

The interpretation placed upon section 1825 of Burns' Revised Statutes of 1901, section 1756 of the Revised Statutes of 1881, by this court in *Murphy v. State*, 106 Ind. 96, 55 Am. Rep. 722, 5 N. E. 767, is sufficient to show that the sec-

and contention of counsel for the state, to the effect that the statement of the time of the commission of the offense is so imperfect as to bring the indictment within the scope of the above section, is not tenable. We may assume that had the legislature intended to cure a statement of an impossible time in ⁴⁵² an indictment or information it would have declared its purpose in this respect in express and positive language. In considering the meaning of this section of our Criminal Code, Gillett on Criminal Law, second edition, section 131, says: "It is evident that it does not have any application except where no time is stated, or where the statement of time is so imperfect as not to amount to any statement at all. As a consequence, if a time is laid beyond the period of limitation the indictment is vulnerable on a motion to quash; for the court, in looking at the indictment to determine its sufficiency, will, in all cases, assume the time stated therein to be the true time." Accepting, as we must under the authorities cited herein, the time upon which the offense in question is alleged to have been committed as the true or correct time, therefore the only reasonable inference to be deducted is that the offense was not committed, and the indictment should have been quashed under the second clause of section 1828 of Burns' Revised Statutes of 1901, section 1759 of the Revised Statutes of 1881, on the ground that the facts as therein stated do not constitute a public offense.

We do not consider the alleged error of the court in rendering judgment against appellant at a time when, as it is asserted, he was a person of unsound mind, because as the judgment must be reversed, that proposition has become a moot question by reason of the statute of 1905, which provides what the procedure shall be under such circumstances: See Acts 1905, p. 174; Burns' Rev. Stats. 1905, sec. 1936a.

It follows, for the reasons stated, that the court erred in overruling appellant's motion to quash the indictment. The judgment is therefore reversed and the cause remanded to the lower court, with instructions to quash the indictment.

An Indictment charging an offense on an impossible day is not, according to Conner v. State, 25 Ga. 515, 71 Am. Dec. 184, for that reason fatally defective. Other authorities, however, take a different and narrower view of this question, and hold such an indictment bad: State v. Sexton, 3 Hawks, 184, 14 Am. Dec. 584; State v. Ray, Rice, 1, 33 Am. Dec. 90. In Murphy v. State, 106 Ind. 96, 55 Am. Rep. 722, it is held that an indictment charging an offense "on the sixteenth day of August, 1884," is bad on motion to quash.

BARTON v. KIMMERLEY.

[165 Ind. 609, 76 N. E. 250.]

CONSTITUTIONAL LAW.—The Fifth Amendment to the Constitution of the United States Applies Only to Legislation by Congress and cannot be invoked to effect that legislation. (pp. 252, 253.)

CONSTITUTIONAL LAW—Statutes Authorizing Administration Upon the Estates of Living Absentees.—The fourteenth amendment to the constitution of the United States does not deprive the legislature of a state of a power to provide for administration upon and settlement of estates of absentees. (pp. 253, 254.)

LIMITATION OF ACTIONS—Void Judicial Sales.—The fact that the property sold by an administrator was not described in the proceedings antedating the sale, nor in his deed, does not prevent the operation in favor of the purchaser of the statute requiring actions to be brought within five years from the confirmation of a sale. (p. 255.)

David N. Taylor and George I. Kisner, for the appellants.

George W. Kleiser and James H. Kleiser, for the appellee.

609 MONKS, J. This suit was brought by appellants against appellee to quiet title to certain real estate in Vigo county, Indiana, sold under the provisions of an act for the administration of the estates of absentees, being sections 2385, 2387-2390 of Burns' Revised Statutes of 1901, sections 2232-2236 of the Revised Statutes of 1881 and Horner's edition of 1901, and section 2386 of Burns' Revised Statutes of 1901, Acts of 1883, page 209. Appellee filed an answer and cross-complaint to quiet title to said real estate, claiming title thereto by virtue of an administrator's sale under said act. A trial of said cause resulted in a finding and decree in favor of appellee, quieting her title to said real estate.

610 Appellants insist that the fifth and fourteenth amendments of the constitution of the United States deprive the legislature of this state of the power to enact any law for the administration of the estates of absentees; that any such law authorizes the administration of the estates of living persons which is a violation of said amendments, because it deprives persons whose estates are so administered of their property without due process of law; citing *Scott v. McNeal* (1894), 154 U. S. 34, 14 Sup. Ct. Rep. 1108, 38 L. ed. 896. The fifth amendment of the constitution of the United States applies only to legislation by Congress, and not to state leg-

isolation: *Cass Farm Co. v. City of Detroit* (1901), 181 U. S. 396, 21 Sup. Ct. Rep. 644, 45 L. ed. 914; *French v. Barber Asphalt Pav. Co.* (1901), 181 U. S. 324, 21 Sup. Ct. Rep. 625, 45 L. ed. 879; *City of Detroit v. Parker* (1901), 181 U. S. 399, 401, 21 Sup. Ct. Rep. 624, 45 L. ed. 916. Said fifth amendment cannot, therefore, be invoked to affect state legislation.

In the case of *Scott v. McNeal*, 154 U. S. 34, 14 Sup. Ct. Rep. 1108, 38 L. ed. 896, the probate court in the state of Washington had, under an act for the settlement of decedents' estates, issued letters of administration upon the estate of a person who had disappeared, and proceeded to administer his estate as that of a dead person, upon the presumption of death which said court assumed had arisen from his absence. There was no law in that state providing for the administration of the estate of an absentee as such. It was held in said case that, under a law giving jurisdiction to a court to administer estates of deceased persons, the issuance of letters of administration upon the estate of a person who is in fact alive was void and of no effect as against him. It is evident that said case and all cases to the same effect, under laws for the settlement of the estates of deceased persons are inapplicable here. In the case of *Cunnius v. Reading School Dist.* (1903), 206 Pa. St. 469, 98 Am. St. Rep. 790, 56 Atl. 16, the supreme court of Pennsylvania ⁶¹¹ held that the fourteenth amendment of the constitution of the United States did not deprive that state of the power to provide by law for the administration of the estates of absentees. Said cause was appealed to the supreme court of the United States, where it was held in *Cunnius v. Reading School Dist.* (1905), 198 U. S. 458, 25 Sup. Ct. Rep. 721, 49 L. ed. 1125, that the right to regulate concerning the estate or property of absentees is an attribute which in its essence belongs to all governments, to the end that they may be able to perform the purposes for which government exists, and is within the scope of a state government in the absence of restrictions in its own constitution, and that the exercise of this power by the state does not necessarily violate the fourteenth amendment of the constitution of the United States, by depriving the absentee of his property without due process of law in case he be alive when the proceedings are initiated. It follows that said fourteenth amendment of the constitution of the United States does not deprive the

legislature of this state of the power to provide by law for the settlement of the estates of absentees, and it is not claimed by appellants that such a law is in violation of any provision of the constitution of this state. As it is not claimed by appellants that said act for the administration of the estates of absentees is unconstitutional if the legislature has the power under said fourteenth amendment to enact any law for that purpose, we pass to the consideration of the other question presented by the record.

It appears from the record that the real estate in controversy was sold and conveyed by order of court, under said act for the administration of the estates of absentees to pay debts; that appellee bought the same at administrator's sale under said act and paid the purchase money in full, and was put in possession of said real estate under said purchase, and has held the uninterrupted, exclusive and adverse possession thereof from date of confirmation of said sale till the commencement ⁶¹² of this action—a period of more than five years; that said real estate so sold and conveyed to appellants was, by mistake and inadvertence, erroneously described in the petition to sell the same, and in all subsequent proceedings, including the deed conveying the same to appellee; that said absentees never owned or had any title to the land actually described in said petition, proceedings and deed; that neither the administrator nor appellee, the purchaser, had any knowledge of said mistake in the description of said real estate, but believed that the real estate in controversy was correctly described in said petition and proceedings and deed. Appellants insist that said misdescription rendered said judicial sale void, and that no title was conveyed to appellee. Appellee insists that, even if said sale was void on account of said misdescription, she has title to the real estate in controversy after the expiration of five years from the confirmation of said sale to her, under clause 4 of section 294 of Burns' Revised Statutes of 1901, section 293 of Revised Statutes of 1881, and Horner's edition of 1901. It has been uniformly held by this court that actions to recover real estate or to quiet title thereto, as in this case, are barred in five years from the confirmation of the sale, even if the sales are void: *Armstrong v. Hufty* (1901), 156 Ind. 606, 55 N. E. 443, 60 N. E. 1080, and cases cited; *Fisher v. Bush* (1892), 133 Ind. 315, 32 N. E. 924; *Hawley v. Zigerly* (1893), 135 Ind. 248, 34 N. E. 219, and cases cited; *David-*

son v. Bates (1887), 111 Ind. 391; White v. Clawson (1881), 79 Ind. 188, 12 N. E. 687, and cases cited; Vail v. Halton (1860), 14 Ind. 344; Vancleave v. Milliken (1859), 13 Ind. 105. The statute is one of repose, and it is not necessary that one should have a good title to invoke its aid. It is only those whose titles are not good that need the protection of the statute. It was said in Fisher v. Bush, 133 Ind. 315, 32 N. E. 924. "The action is to recover real estate sold by an administrator under an order of court, specially directing the sale, and the time for the bringing of the action is limited by the fourth subdivision of section 293 of Revised Statutes of 1881 ⁶¹³ (Burns' Revised Statutes of 1901, sec. 294). It has been held that such actions are barred in five years, though the sale be absolutely void: Davidson v. Bates (1887), 111 Ind. 391, 12 N. E. 687. Valid sales require no protection by statutes of limitation. . . . It is to the illegal and void sales that statutes of limitation are intended to apply."

It is evident that the court below committed no error in holding that appellee was entitled to the benefit of said statute of limitation of five years. Finding no error in the record, the judgment is affirmed.

The Constitutionality of a Statute providing for administration upon the estates of persons presumed to be dead is upheld in Cummins v. Reading School Dist., 206 Pa. St. 469, 98 Am. St. Rep. 790, but is denied in Clapp v. Hong, 12 N. Dak. 600, 102 Am. St. Rep. 589; Carr v. Brown, 20 R. I. 215, 78 Am. St. Rep. 855.

GLENN v. LAKE ERIE AND WESTERN RAILROAD COMPANY.

[165 Ind. 659, 75 N. E. 282.]

CARRIERS.—The Relation of Carrier and Passenger does not Terminate Until the Passenger has reached his destination, alighted from the train, and had reasonable time in which to leave the place where passengers are discharged. (p. 256.)

CARRIERS—Passenger, Relation of, When Terminates.—If a passenger alights from his train and his journey is terminated, but he lingers about the station ten or fifteen minutes, not being detained by any business, he ceases to be a passenger, and cannot recover as such for injuries subsequently suffered in passing over the station grounds. (p. 257.)

Thompson & Storms and Charles V. McAdams, for the appellant.

John B. Cockrum and Stuart, Hammond & Simms, for the appellees.

659 MONTGOMERY, J. This action was brought by appellant to recover for a personal injury caused by falling over a railroad tie upon appellee's station grounds. The cause was **660** tried by a jury, and, after hearing the evidence and argument of counsel, the court by a peremptory instruction directed the jury to return a verdict in favor of appellee. Appellant's motion for a new trial was overruled and an exception duly saved, and that ruling is assigned as error on appeal.

Appellant resided at the town of Dayton, and at the time of receiving his injury was returning from a trip to the city of LaFayette. The complaint is in a single paragraph, and alleges that appellant was a passenger over appellee's road from LaFayette to Dayton and arrived at his destination after night, and, in going from the depot toward the business part of town, in the darkness, fell over the obstruction and broke his leg. Appellant's right of action is manifestly founded upon the relation of passenger and carrier, and if that relation did not exist between him and the appellee at the time of the accident there can be no recovery upon the complaint.

The rule is that the relation of passenger and carrier, when established, does not terminate until the passenger has reached his destination, alighted from the train, and had a reasonable time in which to leave the place where passengers are discharged: 4 Elliott on Railroads, sec. 1592; McKimble v. Boston etc. R. R. (1885), 139 Mass. 542, 2 N. E. 97; Houston etc. R. Co. v. Batchler (1904) (Tex. Civ. App.), 83 S. W. 902; Chicago etc. R. Co. v. Tracey (1903), 109 Ill. App. 563; Chicago etc. R. Co. v. Wood (1900), 104 Fed. 663, 44 C. C. A. 118.

In case of an accident involving a passenger who on alighting from the train intended and desired to depart from the place at once, but was hindered and delayed, the question as to what is a reasonable time should be determined from the attendant facts and circumstances given in explanation or excuse for such delay. **661** In this case appellant, on arriving at Dayton and leaving the train, had no apparent

desire to proceed on his journey, and offered no legitimate excuse for lingering about the station; but it appears from his own statement that he voluntarily went into the waiting-room of the station with six or seven acquaintances, sat down, talked, joked, sang a song, and had a jolly time for ten or fifteen minutes. He was not detained after leaving the car by any business with the company or connected with his journey, or by any circumstance which made delay either necessary or expedient, but to secure amusement for himself and to furnish entertainment for his companions, he abstained from proceeding homeward. After ten or fifteen minutes thus jovially spent, appellant left the depot, and in passing over the station grounds fell and was injured. The admissions of appellant, as well as the other evidence, make it clear that he merely loitered for an unreasonable time about the station for his own pleasure, and it was wholly unnecessary to ask the jury to determine as a question of fact whether ten or fifteen minutes was an unreasonable time for him to remain at the place where he was discharged as a passenger from appellee's train. The court, upon the undisputed facts, could say as a matter of law that, upon his arrival at the station, appellant of his own volition, in quest of pleasure, broke the continuity of his journey, and thereby terminated at once his relation as appellee's passenger. Appellant's right of recovery, as pleaded, depended upon proof of a breach of duty owing by appellee to him as its passenger, and that relation having terminated before the accident occurred resulting in his injury, his suit must fail. The court did not err in directing a verdict for appellee: *Heinlein v. Boston etc. R. Co.* (1888), 147 Mass. 136, 9 Am. St. Rep. 676, 16 N. E. 698; *Quantz v. Southern R. Co.* (1904), 137 N. C. 136, 49 S. E. 79; *Ratteree v. Galveston etc. R. Co.* (1904), 36 Tex. Civ. App. 197, 81 S. W. 566.

⁶⁶² The conclusion reached makes it unnecessary to consider any other questions discussed by counsel. There was no error in overruling appellant's motion for a new trial.

The judgment is affirmed.

A Passenger on a Railroad who, before reaching his destination, alights at a station from motives of business or curiosity and with the intention of returning to the cars and resuming his journey, does not thereby lose his character as passenger: *Parsons v. New York Cent. etc. R. R. Co.*, 113 N. Y. 355, 10 Am. St. Rep. 450. But one who leaves a street-car without advising the person in charge that he has left temporarily and intends to return, ceases to be a passenger: *Central*

Ry. Co. v. Peacock, 69 Md. 257, 9 Am. St. Rep. 425. So, one who leaves a street-car for the purpose of entering her dwelling-house on the opposite side of the street is no longer a passenger: Gargan v. West End St. Ry. Co., 176 Mass. 106, 79 Am. St. Rep. 298. See, too, the note to Duchemin v. Boston etc. Ry. Co., 104 Am. St. Rep. 589. And one who remains at a railroad station three or four minutes after he knows that the train he wished to take has already gone, there being nothing to detain him except his wish to take a street-car which will soon arrive, ceases to have the rights of an intending passenger: Heinlein v. Boston etc. R. R. Co., 147 Mass. 136, 9 Am. St. Rep. 676.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

LEHMAN, STERN & COMPANY v. MORGAN'S LOUISIANA AND TEXAS RAILROAD AND STEAMSHIP COMPANY.

[115 La. 1, 38 South. 873.]

CARRIERS—Liability for Loss of Goods.—A common carrier is liable for the loss of goods intrusted to it, though not chargeable with negligence, unless it shows that such loss was caused by inevitable accident or uncontrollable event. (p. 261.)

CARRIERS—Liability for Loss of Goods.—A carrier cannot escape liability for the loss of goods by merely proving that they, after being intrusted to him, have been lost or destroyed, but he must prove further that the loss was caused by an event purely accidental, impossible to prevent, and that he is not chargeable with any act of imprudence or negligence. (p. 264.)

CARRIERS—Loss of Goods by Fire.—If goods in the hands of a carrier on a railroad platform in course of delivery are damaged or lost by fire, the cause of which is not shown, proof of usual and customary diligence to safeguard the goods will not avail the carrier as a defense, without further proof that the fire was purely accidental and impossible to prevent. (p. 265.)

S. Wolff, for the appellant.

Denegre & Blair and V. Leovy, for the respondent.

² LAND, J. Plaintiff sued to recover the sum of one hundred and forty dollars and twenty-four cents damages by fire and water on thirty-three bales of cotton when delivered by defendant company to plaintiff, as consignee, under bills of lading, attached to the petition. The plaintiff did not allege that the damage was occasioned by negligence on ³ the part of the carrier, and the cause of action set forth was therefore the failure of the defendant company to deliver the cotton in good condition.

Defendant filed an exception of no cause of action, predicated on the absence of allegations of negligence. This exception was tried and overruled, and thereupon the defendant answered, and the cause was tried on the merits. The district judge rendered judgment in favor of the defendant, and on appeal the judgment was affirmed by the court of appeal, one of the judges dissenting. The cause was brought before this court by writ of review. The district judge found that there was no negligence on the part of the defendant.

We make the following excerpt from his opinion, to wit: "The presumptive negligence on the part of the defendant has been destroyed by the positive evidence given by it that ordinary care and attention usually given by diligent men on like occasions were exercised by it on this occasion. The cotton was placed in the usual safe place for freight; it was covered by tarpaulins, and a watchman was placed in charge of it.

"The cotton could not have been ignited by sparks from passing locomotives belonging to defendant, for none passed the cotton except those which were equipped with spark-arresters; and no one except employés of plaintiff and defendant were near, or had been near, the cotton when the fire occurred."

The case is thus stated by the court of appeal: "The plaintiff claims damages for certain cotton destroyed by fire, which was transported hither from Shreveport by the defendant, and which was in course of delivery when the accident occurred.

"It is conceded that the amount claimed correctly represented the loss, but liability is denied on the ground that the railroad company used due diligence in protecting the cotton, and is therefore not responsible for loss. . . . The question now tendered is whether the carrier must show, under the jurisprudence, exactly how the damage occurred, and specifically trace it to some particular accident or uncontrollable event, or whether he is exonerated by proof of due diligence on his part."

⁴ After reviewing the jurisprudence of this state, the court of appeal held that a carrier is not an insurer as at common law, but his responsibility must be considered as that of a bailee for hire, answerable for ordinary neglect.

The court cited *Hunt v. Morris*, 6 Mart. (O. S.) 676, 12 Am. Dec. 489, and *Maxwell v. Southern Pac. R. R. Co.*, 48 La. Ann. 385, 19 South. 287, as supporting its ruling, and the latter as, in effect, overruling *Brousseau v. Ship Hudson*, 11 La. Ann. 427. Moore, J., dissented, holding that the responsibility of the common carrier for loss or damage of the thing intrusted to him is the same under the civil law as it is at common law.

Article 2754 of the Revised Civil Code of 1870 reads as follows: "Carriers and watermen are liable for loss or damage of the things intrusted to their care, unless they can prove that such loss or damage has been occasioned by accidental and uncontrollable events."

Article 2725 of the Civil Code of 1825 reads "may be liable," and it appears that the words "accidental or uncontrollable events," were used as the equivalents of "cas fortuit ou force majeure" of the French text of the same article.

The Civil Code of 1808, page 384, article 63, reads "accidental or uncontrollable events," while the codes of 1825 and 1870 read "accidental and uncontrollable events."

The "cas fortuit" or "fortuitous event," as defined by the code of 1825, is that which happens by a cause or force which we cannot resist; and "force majeure," or "superior force," is an accident which human prudence can neither foresee nor prevent.

The case of *Hunt v. Morris*, 6 Mart. (O. S.) 676, 12 Am. Dec. 489, was decided in 1819, under the code of 1808. In that case a steamboat was destroyed by fire while under way, and the evidence showed that no negligence could be attributed to those who were concerned in the navigation of the boat. The court said, speaking of carriers: ⁵ "They are excused by accident or overpowering force—cas fortuit ou force majeure—wherever the first does not occur by their negligence, and they do not unnecessarily go in the way of the latter"; and that in case of accidents "the carrier is bound to show that they happened without any fault or negligence on his part, which, being a negative proposition, can only be established by evidence of the ordinary care and attention usually given by diligent men on like occasions."

In *Brousseau & Co. v. Ship Hudson*, 11 La. Ann. 427, decided in 1856, goods shipped at New York for New Orleans were damaged in transit by the bursting of four casks of chloride of lime in the hold of the vessel. The court held

that the defendant was responsible for the loss, though not chargeable with negligence, and said: "Under our code common carriers are liable for the loss or damage of the things intrusted to their care, unless it be shown by them that such loss or damage was occasioned by accidental and uncontrollable events (*Par cas fortuit, ou force majeure*): Article 2725; I. R. R. 410. The term '*vis major*' (superior force) is used in the civil law in the same way that the words 'act of God' are used in the common law, and so also is the term '*casus fortuitus*.'

"By the act of God is meant inevitable accident or casualty."

The court quoted the following extract from Story on Bailments, to wit: "By '*inevitable accident*' is meant any accident produced by any physical cause which is irresistible, such as loss by lightning or storms, by perils of the seas, by an inundation or earthquake, or by sudden death or illness. By '*irresistible force*' is meant such an interposition of human agency as is, from its nature and power, absolutely uncontrollable."

The court further said: "Hemp taking fire in a state of effervescence may be mentioned as an instance of loss which is not attributable to a *cas fortuit*."

This case was cited with approval in *Cranwell v. Ship F. Fosdick*, 15 La. Ann. 436, 77 Am. Dec. 190, and in *Pitre v. Offutt*, 21 La. Ann. 679, 99 Am. Dec. 749, which, however, did not involve the same issue.

In article 1927 (article 1933 of the code of 1870) it is provided that the debtor will be excused from delivering the object of the contract if it be lost "by some fortuitous event or irresistible force"—"*par quelque cas fortuit ou de force majeure*" in the French Code of 1825.

In *Eugster v. West*, 35 La. Ann. 119, 48 Am. Rep. 232, the court said: "The *pandectes Francaises* teach that '*on entend par cas fortuit les accidens qu'on n'a pu ni prévoir ni empêcher*.' So Emerigon on Insurance, 285, by '*accident*' (*cas fortuit*) is meant a superior force which cannot be foreseen nor resisted. In its legal sense, '*fortuitous event*' is synonymous with '*act of God*' of the common law."

In the case of *Darrall v. Southern Pac. Co.*, 47 La. Ann. 1455, 17 South. 884, the defendant used barges to convey sugar from plantations to its railroad, and one of these barges laden with sugar sank by coming in collision with

piles or fenders placed by defendant in Berwick's bay to protect its railroad bridge. Plaintiff sought to make the company liable for the value of his sugar lost by reason of the sinking of the barge. The court rendered judgment in favor of the plaintiff on account of defendant's want of due care in the location and construction of the protection for its bridge. In the opinion it is stated *arguendo* "that our code does not impose on carriers the responsibility incident to the relation under the common law": Rev. Civ. Code 1870, arts. 2751, 2754. The case went off, however, on a question of negligence not involving a fortuitous event.

The decision of the district court and its affirmance by the court of appeal were based on *Maxwell v. Southern Pac. R. R. Co.*, 48 La. Ann. 385, 19 South. 287. In that case one hundred and ten bales of cotton were destroyed by fire while in possession of defendant at its depot awaiting transportation, and it was alleged that the loss happened through the fault, negligence, carelessness, and unlawful acts of defendant. One of the stipulations of the bills of lading was that the carrier should not be responsible for loss or damage caused by fire not due to the company's negligence. The court recognized the validity of such a ⁷ limitation of liability by contract, but decided the case against the defendant on the ground that the loss was occasioned through the fault or ordinary negligence of the servants of the company.

In that case the organ of the court cited *Hunt v. Morris*, 6 Mart. (O. S.) 676, 12 Am. Dec. 489, where the loss was charged to the "negligence and misconduct of the master and those employed under him"; also the *Darrall Case*, 47 La. Ann. 1455, 17 South. 884, and a number of common-law authorities. But no reference was made to *Brousseau v. Ship Hudson*, 11 La. Ann. 427, nor was the question of the liability of the company under Civil Code, article 2754, discussed.

The only two cases which really passed on the question before us are the *Brousseau* case, decided under the code of 1825, and the case of *Hunt v. Morris*, 6 Mart. (O. S.) 676, 12 Am. Dec. 489, decided under the code of 1808.

We have already noticed the difference between the provisions of the two codes relative to the liability of carriers. The code of 1808 excused the carrier on proof that the loss or damage was occasioned by "accidental or uncontrollable

events." In the code of 1825, "and" was substituted for "or," so as to read "accidental and uncontrollable events."

Article 2722 of the code of 1825 provided that carriers should be subject, "with respect to the safekeeping and preservation of things intrusted to them," to the same duties and obligations of innkeepers, who were made responsible for the effects of travelers damaged or stolen, except when stolen by force and arms, or with exterior breaking open of doors, or by any other extraordinary violence. Having thus provided for loss or damage that might be occasioned by violence or human agency, the authors of the code further provided that carriers should be liable for loss or damage of the things intrusted to their care unless they can prove that such loss or damage has been occasioned by ⁸ "accidental and uncontrollable events." The French text reads, "Par cas fortuit ou force majeure." In the code of 1825 "cas fortuit" is translated "fortuitous event," and "force majeure" is the equivalent of "irresistible force": Art. 1927. Both terms indicate events caused by a force which cannot be resisted: Art. 3522, Nos. 7, 19. The word "accident" per se means an unforeseen and unexpected event, and the word "uncontrollable" further qualifies the event as one which cannot be restrained or prevented. Article 2725 of the code of 1825 corresponds with article 1784 of the Code Napoleon. Under the latter article it is held uniformly in France that destruction by fire (incendie) is not in itself a fortuitous event (cas fortuit): Laurent, Droit Civil Francais, Tome 25, No. 523. The court of cassation in such cases has formulated the following principles: "Il ne suffit pas au voiturier, pour dégager sa responsabilité, d'établir que la marchandise à lui confiée a péri; il doit prouver encore qu'elle a péri par un cas purement fortuit, impossible à prévenir, et qu'il n'a à se reprocher aucun fait d'imprudence ou de négligence": Laurent, Droit Civil Francais, Tome 25, No. 523.

The above quotation may be freely translated as follows: "The carrier cannot escape liability by merely proving that the merchandise intrusted to him has been lost or destroyed, but he must prove further that it has been lost or destroyed by an event purely accidental, impossible to prevent, and that he is not chargeable with any act of imprudence or of negligence."

The carrier must prove the precise cause of the loss. It will not suffice to prove merely due diligence, but the carrier must prove, moreover, that the accident was occasioned by a fortuitous event, or by irresistible force, or by a defect of the thing itself, or by a fault of the shipper: Fuzier-Herman, Code Civil, vol. 4, p. 419, No. 1.

We are of opinion that the term "accidental and uncontrollable events," as used in article 2754 of our present Civil Code, is the equivalent of "*cas fortuit ou force majeure*" of the French text of article 2725 of ⁹ the code of 1825. In the civil law loss by fire is not considered a fortuitous event, as it arises almost invariably from some act of man. At common law the carrier is considered as in the nature of an insurer against loss by fire, unless it be caused by lightning: Hutchinson on Carriers, 182. The civil law does not go to this extent, but it does require the carrier to prove the precise cause of the fire, that it was impossible for human prudence to foresee or prevent the loss, and that no act of imprudence or negligence is chargeable to the carrier.

In the case at bar the origin or cause of the fire was not shown. While on the platform in course of delivery fire suddenly broke out in the cotton. The cause of the fire was either unknown or unexplained. Evidence that the defendant company had a watchman present, that the cotton was covered with tarpaulins, and that its locomotives had spark-arresters, will not suffice to prove that the loss was the result of "an accidental and uncontrollable event." Unless the court is informed as to the particular cause or origin of the fire, it cannot determine the nature and character of the event. Where the cause of the fire is unknown or unexplained, there is no proof of loss by an event which could not be prevented or resisted.

Both courts decided the case on the theory that loss by fire was not within the limitations and exceptions of the bills of lading. This must be so, as "fire" was stricken out, both as an excepted risk and cause of loss or damage, before the bills were issued.

It is therefore ordered, adjudged, and decreed that the judgment of the court of appeal and of the district court herein rendered be annulled, avoided and reversed, and it is now ordered and decreed that plaintiffs do have and recover of the defendant company the sum of one hundred and forty

dollars and twenty-four cents, with legal interest thereon from judicial demand, and costs of suit in all courts.

Breaux, C. J., dissented.

ON REHEARING.

Per CURIAM. Rehearing denied.

Where a Fire Originated from Sparks from a railroad engine, it is presumed, according to most of the authorities, that the sparks were negligently emitted; and if this presumption is not rebutted, a person suffering loss from the fire is entitled to recover from the railroad company: Fireman's Ins. Co. v. Seaboard Air Line Ry., 138 N. C. 42, 107 Am. St. Rep. 517; Norfolk etc. Ry. Co. v. Fritts, 103 Va. 687, 106 Am. St. Rep. 911, and cases cited in the cross-reference note thereto.

WILCOX v. NIXON.

[115 La. 47, 38 South. 890.]

HUSBAND AND WIFE—Domicile.—The domicile of the husband is that of his wife only when he provides a domicile where she may go and stay at her will. (p. 267.)

HUSBAND AND WIFE—Domicile—Divorce.—If a husband fails to provide a domicile for his wife, takes her to the home of her parents, and without further notice to her, leaves the state for an indefinite period of time, she is entitled to a divorce on the ground of abandonment. (p. 287.)

P. F. and W. J. Hennessey, for the appellant.

R. H. Marr, for the appellee.

⁴⁸ PROVOSTY, J. Plaintiff and defendant, being minors, living with their parents in New Orleans, were secretly married. Two weeks thereafter the marriage became known to their parents and plaintiff went to live with defendant at the house of his parents. Three weeks thereafter defendant took plaintiff back to the house of her parents, and left her there. A few days afterward defendant called and demanded that plaintiff return to him the engagement ring and some other jewelry he had given her. He then, without further notice to plaintiff, went to California, and is now supposed to be enlisted in the navy. Plaintiff, alleging and proving her own conduct to have been irreproachable, sues for a separation from bed and board on the ground of aban-

donment, the proceedings being conducted contradictorily with a curator ad hoc.

The house of defendant's parents was the matrimonial domicile of plaintiff and defendant only so long as defendant lived there and invited plaintiff to remain there with him. It ceased to be such when he took plaintiff to the house of her parents with a view to her staying there, and without further notice to her left the country for an indefinite period.

The case cannot be distinguished from that of *McLean v. Janin*, 45 La. Ann. 664, 12 South. 747, where the court held that the ⁴⁰ domicile of the husband is that of the wife only when the husband provides a domicile where the wife may go and stay at her will.

It is therefore ordered, adjudged, and decreed that, except in so far as it fixes the fee of the curator ad hoc and orders same to be paid as part of the costs, the judgment appealed from be set aside, and that plaintiff, Marie Louise Nixon, have judgment decreeing a separation from bed and board between her and her husband, John Herbert Nixon, and that defendant pay costs.

Exceptions to the Rule that the Domicile of a husband is the domicile of his wife are discussed in the monographic note to McGrew v. Mutual Life Ins. Co., 84 Am. St. Rep. 27-37.

SOUTHERN SAWMILL COMPANY v. AMERICAN HARD WOOD LUMBER COMPANY.

[115 La. 237, 38 South. 977.]

CORPORATIONS, FOREIGN—Service of Process.—In an action by a creditor seeking to obtain a personal judgment against a nonresident corporation not doing business within the state, the service of process upon its secretary while temporarily within the state will not support a judgment against the corporation. (p. 271.)

L. E. Walther and S. S. Prentiss, for the appellant.

Pierson, Walton & Pierson and B. K. Miller, for the appellee.

237 BREAU, C. J. Plaintiff sues to recover a personal judgment for commissions claimed of the defendant, amounting in all to two thousand five hundred dollars.

Plaintiff is a home company. Defendant is a corporation organized under the laws of the state of Missouri, and domiciled in that state. Plaintiff became party to a written contract with F. C. Waller, of Calvert, Alabama, ²³⁸ whereby the latter bound himself to buy for plaintiff's account not less than one million five hundred thousand feet of white ash, and not less than one million feet of poplar logs, to be delivered at Mobile, Alabama. The price of the logs was fixed, and the terms and conditions expressed.

Plaintiff transferred this contract to the defendant, the American Hard Wood Lumber Company, a dealer in hard wood, of St. Louis, Missouri. The stipulated commission was to be paid on delivery of the logs.

Plaintiff, the Southern Sawmill Company, charges that the defendant, the said hard wood company, violated the terms and conditions of the contract entered into by it with the defendant, the hard wood company, by releasing the said Waller upon Waller's binding himself to deliver to it (the hard wood company), in the place of the logs in question, some lumber; that thereupon it (the hard wood company) released Waller.

To state the proposition in another way, plaintiff had obtained a favorable contract from Waller, as vendor, and it (the Southern Sawmill Company), afterward sold it to defendant, the hard wood company, for the commission of one dollar per thousand feet, which would have proven a handsome profit if defendant, the hard wood company, had not gone over to its vendor, Waller, and made terms to the plaintiff's prejudice, as before mentioned.

Plaintiff avers, in substance, that the hard wood company, by thus agreeing with Waller, rendered itself liable to the extent of one dollar per thousand, commissions on logs which Waller was to deliver for its (plaintiff's) account, and which plaintiff was to receive on the logs thus sold, the commissions claimed amounting to the sum of two thousand five hundred dollars, first before mentioned.

Plaintiff further averred that defendant hard wood company is engaged in business in this state, and is at present "in this state by local agent, acting for it," and that said defendant, the hard wood company, is represented ²³⁹ by George H. Cottrell, its secretary, agent, and business manager, "who is now present in this state, representing and acting for defendant in its business in this state."

Plaintiff asked for service on defendant through "Cottrell, its secretary, agent, and business manager, or other agent acting for the defendant in this state."

The return of the service of process shows that the personal service was made on the secretary.

Defendant filed an exception to plaintiff's suit on the ground: "That the citation herein issued and the return thereon are illegal, defective, invalid, null, and void, and do not constitute such citation or return as are required by law, or as are necessary and sufficient to bring exceptor before this court, and on the further ground that the court is without jurisdiction in the premises, either *ratione materiæ* or *ratione personæ*."

In the alternative in this exception plaintiff pleaded the prematurity of the action and "no cause of action."

The articles of the constitution relating to corporations are invoked by plaintiff in support of the service of process made on the secretary of defendant company while he was in this state; that is, article 264 of the constitution of 1879, and others in the constitution of 1898 in *pari materiæ*.

Plaintiff also invokes Act No. 149, page 188, of 1890, to "carry article 236 of the constitution into effect," which provides, as relates to said article of the constitution, that a corporation may be sued in the parish in which the cause arose, and service may be made upon those who transacted such business for such corporation. Reference in argument is also made to Act No. 23, page 29, of 1900, also relating to service of process.

Plaintiff's contention also is that defendant is carrying on business in this state—not only the business out of which this suit arose, but other business, notably "at Lake Providence, St. Martinville, Zachary, and other places," to quote from plaintiff's brief.

²⁴⁰ It is proper to state—for it has some bearing upon the issues—that the record does not disclose that defendant owns property in this state, real or personal.

The court overruled the exception. The defendant reserved its grounds as set forth in the exception, and then pleaded the general issue.

The foregoing statement of facts will suffice to consider the issues urged by defendant on its exception. The exception substantially sets up that it (defendant), upon the service made, cannot be made to stand in judgment. Plaintiff

urges that the exception is not specific enough to raise the question of want of service of process. We think the exception is direct and specific enough to compel the plaintiff to sustain by proof the right it claims of suing defendant.

The question is one of jurisdiction. The purpose of the action is to obtain a personal judgment. The exception renders it necessary to decide whether or not the defendant was brought into court, for citation is the foundation of the court's jurisdiction.

It remains for us to decide whether a nonresident corporation can be brought into court by citing its secretary while he is in this state, although he did not transact "such business for such corporation"; quoting from Act No. 149, page 188, of 1890.

Not having transacted the business which gave rise to the suit, it is evident, in our view, that plaintiff's cause, as relates to service of citation, does not fall within the terms of the act just cited.

Whatever may be plaintiff's right of action, it is not contended that this secretary was the intermediary through which the transaction was entered into. Before proof is admitted connecting an employé with the transaction of the business which gave rise to disagreement, he cannot be cited. It is the business he has transacted, and the cause ²⁴¹ of complaint in that connection, which gives rise to the possibility of citing "each person or persons, company or firm, thus transacting business for the corporation": Act No. 149, p. 188, of 1890.

This is, we think, the interpretation of which the act in question is susceptible. We have not found that it admits of another. We cannot conceive it possible to hold that the secretary, who has not transacted the business, is within the intendment of an act specifying the business attended to, and the cause of complaint to which it has given rise, and that "service of process may be made upon the person or persons, firm or company other than those acting or transacting such business for such corporation": Act No. 149, p. 188, of 1890.

A designated agent for service cannot possibly include within its terms a secretary attending to the business of the company at St. Louis, Missouri, and not in the parish "where the right or cause of action arose."

Some reference was made in argument to Act No. 90, page 147, of 1900—another act relating to service of process. This act provides a mode of service by defendant “by any male person over the age of twenty-one years,” and bears no application to the issues here, which relate exclusively to nonresident corporations and service of persons on a statutory agent within the limits of this state.

Reverting to the articles of the constitution cited supra, whilst it is true that they are imperative, and foreign corporations should not be permitted to carry on business without precedent compliance with their requirement about appointing an agent, the act before cited has provided the remedy, which we do not think we should enlarge.

In our view of the law, we must decline to hold that service may be made upon the secretary of the foreign corporation while present in the state.

A domestic corporation could not legally be brought into court and made to answer on ²⁴² the service as made: neither may a foreign corporation, in the absence of special legislation to that end.

Decisions of the courts of other states are cited by plaintiff in support of the proposition that corporations can be cited as was done in this case. We, in the main, agree with those decisions that corporations “must submit to such conditions and restrictions as the legislature may see fit to impose”; quoting from *State v. United States Mut. Accident Assn.*, 67 Wis. 624, 31 N. W. 229, one of the most pronounced decisions upon the subject. Here the legislature has spoken, and has laid down “conditions” and “restrictions” beyond which we do not think we should go.

We cannot conceive that a corporation is within our jurisdiction because its secretary or other subordinate officer may choose to come within the territory of the state.

For reasons assigned, the judgment appealed from is reversed, avoided and annulled, and plaintiff's action is dismissed as in case of nonsuit.

A State Court cannot, in an Action in Personam, acquire jurisdiction of a foreign corporation simply by personal service of summons on its officer or agent while he is casually within the state, and not there for the purpose of attending to any business of the company: Abbeville Elec. Light etc. Co. v. Western Elec. etc. Co., 61 S. C. 361, 85 Am. St. Rep. 890, and see the monographic note thereto on jurisdiction of foreign corporations.

ITZKOVITCH v. WHITAKER.

[115 La. 479, 39 South. 499.]

INJUNCTION—Publication of Photograph.—An honest and innocent person is entitled to an injunction to prevent his photograph from being sent to, published or exhibited in a rogues' gallery. (p. 273.)

S. L. Gilmore, city attorney, and B. R. Foreman, for the relators.

S. Wolff and G. Lemle, for the respondent.

480 BREAU, C. J. Plaintiff complained of the inspector of police, who had his (plaintiff's) photograph taken, and who was about, he said, to have it placed in the rogues' gallery. He prayed to enjoin the defendant, inspector of police, and he averred damages in a sum over two thousand dollars. He averred substantially that he is an old resident of the city, has a family, is engaged in legitimate business, pays his taxes, and leads an honest life. The judge of the district court issued a rule nisi and directed the defendant to show cause why he should not be enjoined.

An exception was filed to the rule nisi, in which he (defendant) stated that he had placed the picture in the rogues' gallery before plaintiff's petition had been filed and that he had forwarded copies to galleries in other states; that he was acting in the discharge of his duty as inspector of police; and that the civil district court had no jurisdiction to enjoin him while he was enforcing the criminal laws. In case this was overruled, he alleged, in substance, that defendant had been convicted of felony and that his character was notoriously bad.

The question of jurisdiction *vel non* is the first which presents itself for decision. The exception as relates to jurisdiction was properly overruled. For the purpose of the hearing of this exception, the allegations of plaintiff's petition for an injunction must be taken as true. They were not traversed in the original exception, and we conclude that the issues tendered in the original exception are those which the court passed upon in sustaining its jurisdiction.

The plaintiff, for the said hearing, must be considered an honest man. We think that the publication of an innocent

man's photograph in the rogues' gallery gives rise to sufficient grounds to sustain an injunction.

There is a right in equity to protect a ⁴⁸¹ person from such an invasion of private rights. Everyone who does not violate the law can insist upon being let alone (the right of privacy). In such a case the right of privacy is absolute. It must be said that there is some limit to this right, which it is not necessary to discuss in this case. A person may be arrested, imprisoned, and acquitted, without right to damages. All of this is true, but it bears no application to the issue in hand.

Where a person is not guilty, is honest (and that is the only light upon which to consider this case with the issues before us), he may obtain an injunction to prevent his photograph from being sent to the rogues' gallery. He has the personal right to the restraining order, at least for the time being.

The theory in opposition to this view is substantially that the picture should be taken and exhibited for the public good. There can be no public good subserved by taking the photograph of an honest man for the purpose before mentioned.

The court had jurisdiction to issue the preliminary injunction, and to make it perpetual if the evidence justifies the decree.

The difficulty consists in the fact that there is no evidence before the court. None was offered. We have only the bare allegations before us, and not a scintilla of evidence to sustain them. It follows that all the district court did was to assume that the allegations were true and that they set forth sufficient to warrant the issuance of an injunction. There has been no final decision. The injunction is merely provisional.

It having been finally decided that the court has jurisdiction, under the present state of the case it will be tried on all the issues presented, and a decision arrived at that will permanently decide all the issues. This cannot be done at this time.

⁴⁸² The injunction is not strictly mandatory. If it were, under the jurisprudence of this state there are injunctions that have been sustained in exceptional cases, although slightly mandatory. The last utterance of this court was in *State v. Judge*, 41 La. Ann. 516, 6 South. 512, in which the

court held that under the exceptional circumstances injunction had properly gone forth to slightly undo that which had been done. We insert a list of decisions, the weight of which sustain the injunction in hand, even if considered in the light of being slightly mandatory. We do not, we must say, concede that the injunction here is mandatory: *McDonogh v. Calloway*, 7 Rob. 442; *Pierce v. City of New Orleans*, 18 La. Ann. 242; *Black v. Good Intent Towboat Co.*, 31 La. Ann. 497; *State v. Judge Sixth Dist. Court*, 32 La. Ann. 1276; *City of New Orleans v. Great Southern Tel. etc. Co.*, 37 La. Ann. 571; *Beebe v. Guinault*, 29 La. Ann. 795; *State v. Young*, 38 La. Ann. 923; *State v. Judge of Eleventh Dist. Court*, 40 La. Ann. 206, 3 South. 561.

Although mandamus may be the better practice from any point of view, we do not think that we should set aside the injunction on the ground urged on this particular point.

The purpose is so far as possible to restore the status quo ante litem (temporarily it may be).

The direction has gone to the defendant not to permit the photograph to be exhibited, for the time being at least. It must not be considered as part of the collection. The gallery will have a small space covered in some way in order to screen this photograph from view. The exhibition will be suspended and the distribution of copies stopped.

The provisional injunction is not an interruption to the administration of the criminal law. The defendant can certainly enforce all laws needful, without let or hindrance. There is on that score no ground for complaint. ⁴⁸³ There are decisions of recent date on the subject of the "law of privacy," especially *Robertson v. Rochester Folding Bed*, 171 N. Y. 538, 89 Am. St. Rep. 828, 64 N. E. 442, 59 L. R. A. 478.

Gentle young persons of the opposite sex have objected to the free use made of their pictures, and, objecting, have appealed to the courts. The decisions to which it has given rise are lengthy and interesting. We have read them only to arrive at the conclusion that they are not germane to the subject to which we have here given attention.

The rule which issued in this case is recalled and discharged. The remedy asked for at this time is not granted. The questions go to the hearing of the issues hereafter.

The Rule of the Principal Case was affirmed and adopted in the subsequent case of *Schulman v. Whitaker*, 115 La. 625, 39 South. 737. In the latter case the court said that "the issues made are substantially

the same as those submitted and recently decided by this court in the matter of Jacob Itzkovitch v. Edward Stanley Whitaker, . . . and the decision in that case governs and controls the one now before us."

A Court of Equity will not Enjoin the unauthorized publication of the portrait of a person, it has been held, on the ground that his right of privacy has been invaded, in the absence of injury to one's person, property or reputation: *Roberson v. Rochester Folding Box Co.*, 171 N. Y. 538, 89 Am. St. Rep. 828, and see the monographic note thereto on the right of privacy and its protection.

MONONGAHELA RIVER CONSOLIDATED COAL AND COKE COMPANY v. BOARD OF ASSESSORS.

[115 La. 564, 39 South. 601.]

CORPORATIONS, FOREIGN—**Taxation of Credits**.—If a non-resident corporation is located within the state and conducts business therein, through its local agent, duebills, notes and other papers taken by it in the course of its business and collectible within the state are subject to taxation therein. (pp. 276, 277.)

TAXATION of Credits.—It is within the power of the law-making authority of the state to tax any indebtedness which has taken a concrete form. (p. 277.)

Rice & Montgomery, for the appellant.

F. C. Zacharie, G. H. Terriberry and H. G. Dupre, assistant city attorney, for the appellees.

566 BREAUX, J. The plaintiff corporation is domiciled in the state of Pennsylvania, where its president resides and where it conducts its business of mining Pittsburg coal and transships it to different parts of the country, including New Orleans.

The W. G. Wilmot Company, of New Orleans, are selling agents of its coal and receive the price therefor.

Plaintiff's complaint is that it has been assessed by the board of assessors for the parish of Orleans for taxation "upon money loaned on interest, all credits, and all bills receivable for money loaned for the year 1904, in the sum of two thousand five hundred dollars," and that this is illegal, because, it contends, its credits have not been reduced to a definite or concrete form, and that, in consequence, they have no situs in this state. The facts in this respect are: The company, through its agent here, accepts duebills payable on demand. These duebills are signed by the clerk of the steam-

boat to which coal is sold or by the chief engineer of the steamship. They are collected here by the agent. The intention of the assessing department was to carry on the assessment-rolls the amount thus represented after the sale of coal by the company.

The duebills are received from steamboats. As relates to steamships, the coal is delivered on receipts, and after its delivery sometimes plaintiff, through its agents, waits three or four weeks for payment.

Judgment: Unquestionably the purpose of the statute is to tax all property not exempt from taxation, whether property of taxpayers domiciled here or that of taxpayers who are non-residents: Tax Law 1898, p. 346, No. 170.

⁵⁶⁷ The only question is, as to the property of the latter, whether it is property which can possibly be assessed within the limits of the state; that is, whether it is situs sufficient to warrant its assessment for taxation.

Plaintiff has a business located in the city of New Orleans. That business is conducted through an agent, who converts the price due for property sold in form sufficiently concrete to represent the debt and to sue thereon, should he choose so to do. The agent puts the evidence of the credit into definite shape and holds it until it is collected. He deposits the cash therefrom in bank, and it is forwarded through the bank to the home company.

In other words, the coal of plaintiff is sent here to be sold; it is retained to be sold; it is sold, and evidence satisfactory to the agent is taken as the representative of the price; and when payment of this promise to pay is made the amount thereof is deposited in bank, to be forwarded as before mentioned. The business, while here, is under the direction and control of the agent domiciled here. The promises to pay in question are taxable in the hands of and owned by residents as tangible property. The rule has been made to include non-residents. Section 7, page 350 of the act of 1898 provides that all property subject to taxation shall be placed on the tax-roll, and if persons represent business that may claim a domicile elsewhere, the intent and purpose is that it shall pay all such taxes assessable here as may be collected from residents.

We think that these promises to pay, taken in connection with plaintiff's business, were not to be considered as abstract right not at all removed from the domicile of plaintiff.

Whilst the cash in question was in bank, it was liable to assessment. It was equally as liable prior to its deposit whilst represented by paper due to the local business. Receiving paper which the statute orders to be taxed brings it within the tax power.

⁵⁶⁸ It was within the power of the law-making authority of the state to tax an indebtedness which has taken a concrete form. The written instrument evidencing the indebtedness is "left within the state in the hands of an agent of the nonresident owner." So held in *New Orleans v. Stemple*, 175 U. S. 309, 20 Sup. Ct. Rep. 110, 44 L. ed. 174, as in the case before us for decision.

The case just cited was referred to in Board of Assessors Case, 191 U. S. 388, 24 Sup. Ct. Rep. 109, 48 L. ed. 232, and the principles therein were reaffirmed.

Our learned brother of the district court said in his written opinion that which is evident enough, that the plaintiff could sue on the duebills; that the bills "themselves" would furnish the concrete evidence of the debt and authorize judgment. "Any creditor of the plaintiff could attach these evidences of indebtedness."

Having concluded that the written acknowledgments were tangible and seizable, we are led to the further conclusion that as such they must bear their just proportion of taxes, as directed in the statute cited *ubi supra*.

The law and the evidence being in favor of defendant, the judgment is affirmed.

The Situs of Personal Property for the purpose of taxation is the subject of a monographic note to *Buck v. Miller*, 62 Am. St. Rep. 448-477. A state has power to treat promissory notes of a nonresident, which are permanently kept in the hands of an agent within the state, as personal property within the state for the purpose of taxation: *Buck v. Beach*, 164 Ind. 37, 108 Am. St. Rep. 272, and see the cases cited in the cross-reference note thereto. On the taxation of credits due a foreign corporation, see *In re Appeal of Union Tank Line Co.*, 204 Ill. 347, 98 Am. St. Rep. 1108; *Armour Packing Co. v. City Council*, 118 Ga. 552, 98 Am. St. Rep. 128; *Matzenbaugh v. People*, 194 Ill. 108, 88 Am. St. Rep. 134.

NEWMAN v. SCARBOROUGH.

[115 La. 860, 40 South. 248.]

GUARANTY—Acceptance.—If a guaranty is demanded and received as a condition of withholding judicial proceedings, which are withheld, there is a sufficient acceptance of the guaranty without other action. (pp. 280, 281.)

GUARANTY—Mistake in—Rights of Parties.—If a person signing a guaranty thinks that he is signing for a certain amount, when in reality the guaranty is for a much larger amount, there is such error going to the substance of the contract as makes it binding only up to the amount about which there is no error, although such error was not induced by the person to whom the guaranty is given. (p. 281.)

GUARANTY—Mistake—Consent.—Consent given in error to a guaranty is no consent, no matter by whom or what induced, and cannot give birth to a contract of guaranty in so far as such error enters into it. (p. 282.)

W. A. Wilkinson, for the appellant.

Hall & Jack, for the appellee.

861 PROVOSTY, J. This suit is brought upon the following instrument:

“H. & C. Newman, Limited, New Orleans, La.

“Gentlemen: My son W. C. Scarborough who is doing business with you informs me that owing to the failure of the R. Rd. Co. to furnish cars to move cotton, he has not been able to make you shipments lately and in consequence his indebtedness to you at present is larger than he or you expected it to be. I therefore desire to reassure you that by granting my son further indulgence, say until February 15th next, he will by that time pay you in full and I guarantee you that this shall be done, else you can look to me to satisfy you in full any balance he may be due you.

“D. M. SCARBOROUGH.”

The defenses are that this letter was signed in error, the defendant thinking that the amount was eleven hundred dollars, instead of eleven thousand dollars, and that the guaranty evidenced by the letter was never accepted by the plaintiffs until after it had been withdrawn.

The facts are that plaintiffs, who were commission merchants in the city of New Orleans, had made advances to W. C. Scarborough, the son of defendant, in Red River parish,

to an amount exceeding fourteen thousand dollars, against certain shipments of cotton that were to be made, and that, finding that the shipments were slow, plaintiffs sent D. M. Marsh, their treasurer, to inquire into the business affairs of their debtor. Mr. Marsh called upon ⁸⁶² Mr. Scarborough on Christmas Day, and insisted upon having a guaranty for the payment of the debt; otherwise, he would take judicial proceedings. Scarborough undertook to procure the guaranty of his mother, and thereupon the above letter was written, it being dated the 24th, so as to avoid giving it the date of a legal holiday. It was drafted by Marsh and left with Scarborough for him to procure the signature of his mother. It was to be handed to Marsh on the second day thereafter, when he would call for it. Marsh called for it accordingly on the 27th of December, but it had not yet been signed. He insisted upon having the guaranty, and thereupon Scarborough summoned a messenger, and sent the letter to his mother, who lived about a mile off, together with a note reading: "Mama: Please sign this." Marsh was anxious to leave by a train that was nearly due, and accordingly, as the messenger was leaving, he asked him to make haste. The messenger returned with the letter as the train was leaving. He handed it to Marsh in the presence of Scarborough. Marsh asked Scarborough if it was the signature of his mother, and Scarborough answered that it was. Marsh left on the train, taking the letter with him. On the 31st of December plaintiffs wrote to defendant the following letter:

"Mrs. D. M. Scarborough, Williams, La.

"Dear Madam: We beg to acknowledge receipt of your communication of the 24th inst., requesting us to grant your son indulgence until Feby. 15th, and agreeing therein to guarantee us against any loss in his account, should he owe us any balance at that time. We trust that your son will soon have a quantity of cotton in our hands, so that the account may be liquidated and that you will not be obliged to assume any of his indebtedness.

"With 'Compliments of the Season,' we beg to remain,

"Yours respectfully,

"H. & C. NEWMAN, Ltd.,

"Per E."

Scarborough making no further shipments, the traveling man of plaintiffs called on the defendant, Mrs. D. M. Scar-

borough, and it would seem she then for the first time learned ⁸⁶³ how large the debt was. The information caused her considerable emotion. But she did not then say that she had signed the letter in error. Ten days afterward, she having in the meantime consulted counsel, she wrote to plaintiffs the following letter, which embodies the defense made by her in the present suit.

“Mess. H. & C. Newman, New Orleans, La.

“Gentlemen: Your favor of 19th inst. received and noted regarding the debt you hold against my son.

“The letter of guarantee which your agent sent me to sign did not state the amount of the debt and I refused to sign it until the messenger told me that it was only eleven hundred dollars; now it turns out that it is several thousand dollars, and I do not consider that I am bound for the debt or even for the eleven hundred dollars since the letter was signed in error, which is often close akin to fraud.

“I would thank you to send me a copy of the document.

“Very respectfully,

“(Mrs.) D. M. SCARBOROUGH.”

On the witness-stand she repeats the statement of this letter touching the representation made to her by the messenger as to the amount of the debt, and the messenger also testifies to his having made the statement. He, however, is so discredited on cross-examination that his testimony can hardly be looked upon as amounting to corroboration.

No suspicion of fraud or practice can attach to plaintiffs. The letter was left with Scarborough for him to get the signature of his mother to it. There was the fullest opportunity for him to inform his mother of what the amount of plaintiffs' debt was. The nonmention of any amount in the letter is fully explained by the fact that plaintiffs had one hundred and thirty bales of cotton on hand yet unsold, the proceeds of which would have to go in reduction of the debt, so that the guaranty was in reality to be of an eventual debt.

The district judge gave judgment for defendant. His reasons for judgment are not in the record.

The second defense, that of the nonacceptance ⁸⁶⁴ of the guaranty, can hardly be serious. The plaintiffs demanded this guaranty as a condition of withholding immediate legal proceedings. They got it, kept it, said nothing about not accepting it, withheld the threatened legal proceedings, and

wrote to defendant expressing the hope that she would not have to answer for the debt. This conduct clearly amounted to an acceptance. The argument that this letter should have contained an explicit and categorical acceptance of the guaranty strikes us as being without any force whatever. Of what use to say expressly in the letter that the guaranty was accepted, when it had been accepted already. It had been demanded, taken, kept and acted upon.

The other defense, and which doubtless was the one sustained by the learned judge *a quo*, is more serious. Defendant positively testifies that she signed the document on the representation that the debt was of eleven hundred dollars, and that she would not have signed otherwise; and we find no reason for disbelieving her statement. While, on the one hand, it is strange that she should not have pleaded this error at the interview with plaintiffs' agent when she was informed of the amount of the debt, on the other hand, her unmistakable surprise when so informed convinces the most impartial mind of the sincerity of her statement. So great was her emotion that strength forsook her, and she had to be assisted out of the room. That she said nothing to plaintiffs about this error until some time thereafter, and until after she had consulted with counsel, is accounted for by the fact that she in that time had no occasion to communicate with plaintiffs.

A consent given in error is no consent, and without consent there is no contract; hence, in so far as defendant consented to this guaranty in error, it is not her contract and is not binding on her as such. But up to eleven hundred dollars she consented to be bound, and as a consequence ⁸⁶⁵ up to that amount the guaranty is binding upon her.

The argument of the learned counsel for defendant that error as to part of an agreement vitiates the whole may do well enough when the obligation is indivisible, and must either exist for the whole or not at all; but it can have no force in a case like the present one, where the obligation is divisible. If I agree to sign a note for one thousand dollars, and I sign it for two thousand dollars, I am certainly bound as to the one thousand dollars.

In a case closely analogous to this one, but not so strong in its facts, the court of cassation held the surety liable for the part of the debt as to which there was no error while granting relief as to the excess.

A person had agreed to become surety for a debt already secured by mortgage. Before signing as surety the person had had the titles to the mortgaged property examined, and had finally consented to sign only after the titles had been pronounced satisfactory. It turned out that part of the mortgaged property did not belong to the mortgage debtor and was not subject to the mortgage. To the extent of the value of the property as to the title to which there had been error the court relieved the surety, but held him bound for the remainder of the debt, as to which there had been no error: *Gran c. Rogier*, J. du P. 1895, vol. 1, p. 72.

In behalf of plaintiffs it is contended that the error, if error there was, was not induced by plaintiffs, and therefore cannot prejudice their rights under the contract. In support of that contention counsel cited the cases of *Calhoun v. McKnight*, 44 La. Ann. 575, 10 South. 783; *Miles v. Oden*, 8 Mart. (N. S.) 214, 19 Am. Dec. 177; *Thomas v. Mead*, 8 Mart. (N. S.) 341, 19 Am. Dec. 187; *Jones v. Purvis*, 9 La. 288; *Ferrari's Admx. v. Lamdbeth*, 11 La. 101; *Blanchard v. Castille*, 19 La. 362; *Richardson v. Hyams*, 1 La. Ann. 286; *Sexton v. McGill*, 2 La. ⁸⁶⁶ Ann. 190; *Boudreau v. Bergeron*, 4 La. Ann. 83; *Thompson v. Whitbeck*, 47 La. Ann. 49, 16 South. 570; *Reusch v. Keenan*, 42 La. Ann. 419, 7 South. 589; *Watson v. Planters' Bank of Tennessee*, 22 La. Ann. 14; *Allen v. Whetstone*, 35 La. Ann. 846; *Keough v. Foreman*, 33 La. Ann. 1434; *Prescott v. Cooper*, 37 La. Ann. 553.

The cases do not sustain the contention. It stands to reason that error is error, no matter by whom or by what induced, and that a consent given in error is no consent, and cannot give birth to a contract.

But a person cannot in justice visit upon another the consequences of his or her own error, and hence Mrs. Scarborough is answerable to plaintiffs to the extent that the error has caused them a loss. To that extent, and in that connection, the cases cited above by plaintiff's learned counsel are in point, as also are the following additional cases cited by him: *Frosten v. Legendre*, 3 La. Ann. 400; *Walker v. Cassaway*, 4 La. Ann. 19, 50 Am. Dec. 551; *Florant v. Marchand*, 26 La. Ann. 741; *Mahan v. Dubuclet*, 27 La. Ann. 45; *Woodhouse v. Crescent Mut. Ins. Co.*, 35 La. Ann. 238; *Carpenter v. Allen*, 16 La. Ann. 435; *Lieuteaud v. Jeanneaud*, 20 La. Ann. 327; *Bell v. Keefe*, 13 La. Ann. 524; *Davis v. Police Jury*, 1 La. Ann. 288; *Bank of Pittsburgh v. Neal*, 22 How. 96, 16 L. ed.

323; Fowler v. Allen, 32 S. C. 229, 10 S. E. 947, 7 L. R. A. 745; Allen v. South Boston R. Co., 150 Mass. 200, 15 Am. St. Rep. 185, 22 N. E. 917, 5 L. R. A. 716; Dair v. United States, 16 Wall. 1, 21 L. ed. 491.

As the court said in the case of Forsten v. Legendre, 3 La. Ann. 400: "Even if she made an unintentional mistake, her innocence cannot protect her; for the rule is that, where one of two innocent persons must suffer, he must suffer who by his own act occasioned the confidence and loss."

The learned counsel for Mrs. Scarborough seek to relieve her altogether from the consequences of the error by contending that the error was superinduced by plaintiffs, because ⁸⁶⁷ the messenger upon whose information she acted was the agent of plaintiffs. The contention is in direct conflict with the evidence. The messenger was a man in the employ of Scarborough, and was sent by Scarborough, and the only message he bore was the letter of Scarborough: "Mama: Please sign this."

Plaintiffs are entitled to be placed in as good a position as they would have been in if the defendant had not given the guaranty and thereby induced them to extend indulgence to Scarborough; that is to say, they are entitled to recover judgment for whatever amount they can show they might have recovered from Scarborough had they not foregone judicial proceedings against him at the time the guaranty was given. What that amount is, is not shown in the present case, which was based simply on the contract. Up to eleven hundred dollars the debt is on the contract, and plaintiffs are entitled to judgment for it. Beyond that the debt has not been proved, and as to this excess plaintiffs must be nonsuited, with full reserve of right to bring another suit.

It is therefore ordered, adjudged and decreed that the judgment appealed from be set aside, and that plaintiffs have judgment against Mrs. D. M. Scarborough for the sum of eleven hundred dollars, with interest from judicial demand, and that plaintiff's demand be otherwise rejected as in case of nonsuit, with full reserve of all rights. All costs of present suit to be paid by defendant.

Contracts of Guaranty are discussed at length in the monographic note to Pearsall Mfg. Co. v. Jeffreys, 105 Am. St. Rep. 502-526.

Mistake of Fact as invalidating a contract is discussed in the monographic note to Miles v. Stevens, 45 Am. Dec. 631.

IN RE CURTIS.

[115 La. 918, 40 South. 334.]

CORPORATIONS, FOREIGN—Service of Process upon.—A statute requiring surety companies of other states or countries to appoint an agent upon whom service of process may be made does not provide an exclusive, but only an additional, mode of service. (p. 288.)

CORPORATIONS, FOREIGN—Service of Process upon.—If a foreign corporation conducts business within the state at a permanent place of business, service of process at such place, upon its agent, in connection with a matter growing out of such business is good if like service would be good if made upon a domestic corporation. (p. 289.)

CORPORATIONS, FOREIGN—Service of Process.—Any service which would be sufficient as against a domestic corporation may be authorized by statute to commence an action against a foreign or nonresident corporation. (p. 289.)

McCloskey & Benedict, for the appellant.

P. M. Milner and Howe, Spencer & Cooke, for the appellee.

⁹¹⁹ **PROVOSTY, J.** The suit that gives title to this case, *Curtis v. R. W. Jordan*, was instituted in September, 1901. It was on a debt for two thousand dollars, due for the stabling and keeping of certain horses. A privilege was claimed on the horses, and they were sequestered. On the showing of plaintiff that their keep under seizure would be expensive, they were ordered to be sold. J. H. Jordan and J. W. Jordan, the father and brother of the defendant, intervened in the suit. They enjoined the sale and bonded the sequestration, and obtained possession of the horses, claiming to be the owners of them. The sureties on their injunction and forthcoming bonds were the American Surety Company of New York and the Fidelity and Deposit Company of Maryland. The litigation was protracted. It ended in a judgment maintaining the sequestration and dismissing the interventions. Execution then issued upon the judgment, and, it having been returned nulla bona, Curtis took a rule on the said sureties on the forthcoming bonds to show cause why they should not produce the bonded horses, or, in default thereof, ⁹²⁰ be condemned to pay the judgment. The sureties made no appearance to this rule, but suffered judgment

to go against them, and then brought a suit enjoining its execution and asking its nullity, on the ground that it had been rendered without citation. This suit in nullity is the matter now to be considered. The district court dismissed the suit; but its judgment was set aside by the court of appeal, and the matter is now before this court on writ of review.

Before proceeding to the discussion of the question of citation vel non, we shall dispose of two minor matters.

The first of these matters is this: There was filed by the plaintiff a supplemental petition raising questions that pertain to the merits on the rule. We need hardly say that, so long as the judgment rendered on the rule is not set aside, it is *res adjudicata* of the merits of the rule.

The second of the minor matters just referred to as to be disposed of preliminarily, is this: The learned counsel for Curtis say that, by urging other grounds of nullity than that of citation, the plaintiffs have waived the ground of want of citation. Counsel invoke here a familiar doctrine; but they do so in the wrong connection. It is perfectly plain that an appearance in this suit in nullity is not an appearance in the proceeding by rule wherein the judgment complained of was rendered, and therefore does not waive the want of citation in the rule.

Coming, then, to the question of citation: The returns of the sheriff on the citation addressed to the surety companies read as follows:

“Received Friday, January 20, 1904, and on the 30th day of January, 1904, at 11:25 a. m., I served a copy of the within rule on the Fidelity & Deposit Company of Maryland, defendant in rule, by personal service on Charles H. Black, of the firm of Warner & Black, their general agent.

“C. M. GOSS,

“Deputy Sheriff.

“And on the 30th day of January, 1904, at 11:30 a. m., I served a copy of the within rule on the American Surety Company of New York, ⁹²¹ defendant herein, by personal service on P. F. Pescud, its agent.

“C. M. GOSS,

“Deputy Sheriff.”

One of the forthcoming bonds sued on in the rule is signed as follows:

“J. W. JORDAN.

“AMERICAN SURETY CO. OF N. Y.,

“By A. A. MAGINNIS,

“Res. Vice-President.

“Attest: PETER F. PESCUO,

“Res. Secretary.”

The other forthcoming bond is signed as follows:

“J. W. JORDAN & CO.

“FIDELITY & DEPOSIT COMPANY OF MARY-
LAND,

“By P. M. MILNER,

“Local Director.

“Attest: WARNER & BLACK,

“Gen. Agent.”

The evidence shows that the companies do business at the places where the citations were served, and that the persons upon whom the services were made are their agents. It shows further that the Fidelity and Deposit Company was cited in precisely the same manner in the suits of *Borches v. Fidelity etc. Co. of Maryland*, No. 66,718 of the same court, and *Puller v. Fidelity etc. Co. of Maryland*, No. 59,252 of the same court, and that it made no objection to that form of citation; and that the American Surety Company was cited in precisely the same manner in the suit of *Fee v. American Surety Co.*, No. 67,796 of the same court, and that it made no objection to that form of citation. The evidence shows, further, that the Fidelity and Deposit Company had theretofore appointed the same person, Charles H. Black, its agent to receive service of citation, as appears by the following power of attorney, to wit:

“Know all men by these presents, that the Fidelity & Deposit Co. of Md., a surety insurance company of the city of Baltimore, in the state of Maryland, having been admitted, or having applied for admission, to transact business in the state of Louisiana, in conformity with the laws thereof, does hereby make, constitute, and appoint Charles H. Black, of the city of New Orleans, parish of ———, its true and lawful attorney, in and for the state of Louisiana, on whom all process of law, whether mesne or final, against said insurance company, may be served in any action or special ⁹²² proceedings

against said company in the state of Louisiana, subject to and in accordance with all the provisions and statutes of laws of said state of Louisiana now in force and such other acts as may be hereafter passed amendatory thereof and supplementary thereto. And the said attorney is hereby duly authorized and empowered, as the agent of said company, to receive and accept service of process in all cases as provided for by the laws of the state of Louisiana, and such service shall be deemed valid personal service upon said company. This appointment to continue in force for the period of time and in the manner provided by the statutes of the state of Louisiana, and until another attorney shall be duly and regularly substituted.

"In witness whereof, the said company, in accordance with a resolution of its board of directors, duly passed on the sixteenth day of April, A. D. 1895 (a certified copy of which is hereto attached), has to these presents affixed its corporate seal, and cause the same to be subscribed and attested by its president and secretary, at the city of Baltimore, in the state of Maryland, on the 12th day of December, A. D. 1895.

EDWIN WARFIELD,

"President.

"HERMAN E. BOSLER,

"Secretary."

This power of attorney had been given in order to comply with the requirements of Act No. 41, page 45, of 1894, entitled: "An act to authorize certain corporation to become surety upon bonds required to be furnished by law, and prescribing the conditions upon which they may do so."

Section 4 (page 47) of this act provided that: "If such company is incorporated under the laws of any other state than this state, it shall, besides, file a power of attorney appointing some resident of this state upon whom service of process can be made as required by existing laws."

In 1898, Act. No. 105, page 132, of that year was enacted, requiring that, as a condition precedent to doing business in this state, insurance companies of other states and of foreign countries should appoint the Secretary of State to receive service of process. Shortly after the adoption of this act the Fidelity and Deposit Company, acting under the same resolution of its board of directors under which the power

of attorney had been given to Black, appointed the Secretary of State its agent for service of process.

⁹²³ The court of appeal held that Act No. 41 of 1894 had been superseded by Act No. 105 of 1898, and that the power of attorney to Black had, as an effect of its own terms, ceased to be effective. It provided expressly that it should "continue in force for the period of time and in the manner provided by the statute of the state of Louisiana, and until another attorney shall be duly and regularly substituted." Incidentally the court of appeal held that Act No. 105 of 1898 applies to surety companies.

We do not propose to review the latter ruling, nor that by which it was held that the power of attorney to Black had terminated. Both apparently were correct; but another question was submitted to the court of appeal, upon which it did not pass, and upon which, in our opinion, the decision of the case should have rested. It is whether the statutes requiring the appointment of an agent for the receiving of service, or designating the Secretary of State for that purpose, must be understood as excluding every other mode of service.

It ought to be sufficient to point out that the language of the statutes is merely permissive, not in any way prohibitive. That of Act No. 149, page 188, of 1890, and of Act No. 41 of 1894, is "upon whom service of process can be made." That of Act No. 105 of 1898 is "upon whom process may be served": Art 2, p. 142, sec. 1. But the point has been abundantly adjudicated.

In the case of *Mutual Reserve Fund Life Assn. v. Cleveland Woolen Mills*, 82 Fed. 508, 27 C. C. A. 212, the circuit court of appeal for the sixth circuit, interpreting an exactly similar statute of the state of Tennessee, held the mode of service prescribed by it not to be exclusive; and a like conclusion was reached by the court of civil appeals of Texas, with respect to a similar statute of the state of Texas, in the case of *Bankers' Union of the World v. Nabors*, ⁹²⁴ 36 Tex. Civ. App. 38, 81 S. W. 91. See, also, *Johnson v. Hanover Fire Ins.*, 11 Biss. 452, 15 Fed. 97; *Lesser Cotton Co. v. Yates*, 69 Ark. 396, 63 S. W. 997; *Green v. Equitable Life Assn.*, 105 Iowa, 628, 75 N. W. 635; *Mutual Reserve Fund Life Assn. v. Phelps*, 190 U. S. 147, 23 Sup. Ct. Rep. 707, 47 L. ed. 987, notes.

Concluding that service upon an agent specially appointed under the statute, or upon the Secretary of State, is not the exclusive mode, we pass to the next question, whether the persons upon whom the services were made in the case were sufficiently the agents of the surety companies for the service to be good.

If the surety companies were domestic corporations, no one would doubt the sufficiency of the citation. It would have been made in exact conformity with the statute regulating the matter—article 198 of the Code of Practice: “When a suit is brought against a corporation, . . . the service must be made as follows: In suits against civil corporations . . . on their president in person, or at their office, if they hold such in permanence, by delivery to some of their agents.”

Each of these companies has a permanent business office, with its sign over the door, reciting that the person upon whom the service was made is its agent. Under these circumstances, the inference is that this agent is fully authorized to receive process, and that inference is materially strengthened by the fact that in other cases such service was not demurred to; but, if it were granted that the agent was without special authority to receive process, would the service be any the less effective on that account? We think not? Such a service would be admittedly good on a domestic corporation, and a fortiori ought to be good on a nondomestic corporation. For this proposition the cases cited hereinabove afford ample authority.

In the case of *Gravely v. Southern Ice Mach. 925 Co.*, 47 La. Ann. 389, 16 South. 866, this court said: “Any service which would be sufficient as against a domestic corporation may be authorized by the statute of a state to commence an action against a foreign or nonresident corporation.”

In the case of *Mutual Reserve Fund Life Assn. v. Cleveland Woolen Mills*, 82 Fed. 508, 27 C. C. A. 212, the court said: “It was not the purpose of that provision to prevent such corporation from being served with process in the ordinary way where they have a resident agent, but to provide an additional mode of obtaining jurisdiction which might be available if such company had no resident agent. The plea in abatement was properly overruled.”

In the case of *Johnson v. Hanover Fire Ins. Co.*, 11 Biss. 452, 15 Fed. 97, the United States circuit court for the northern district of Illinois held as follows: "Where by the statutes of the state where suit is brought no insurance company existing under the laws of another state is allowed to transact business in this state until such company shall first duly appoint an attorney in said state on whom process of law can be served, it was held that such statute did not preclude the service of such process upon any other agent of such foreign corporation transacting the business of the corporation in that state, and that the provision of the statute of Illinois regulating the service of legal process upon corporations was not confined to domestic corporations, but applied alike to all foreign corporations having agents for the transaction of its business in that state."

In the text of the opinion the court observed as follows: "The construction contended for by the defendant would give foreign insurance companies an advantage in this state over home or domestic corporations by requiring that service of process could only be made upon a single individual representing the foreign company while the domestic company could be reached by service 'upon any agent' found within the county or district, in the absence of the president or other superior officers. I cannot believe that the legislature intended to give foreign companies any such advantage, but rather intended that the company should be required to appoint an agent in such manner as to estop it from denying or questioning the validity of a service when made on him, leaving it for suitors to make their election whether they would serve the agent thus appointed, or take the risk of proving the agency of any other agent upon whom service might be obtained."

⁹²⁶ Our conclusion is that service upon the surety companies was good, and that the judgment of the court of appeal is erroneous.

It is therefore ordered, adjudged and decreed that the judgment of the court of appeal in this case be set aside, and the judgment of the district court be reinstated.

The costs of appeal and of this court to be paid by appellants.

Mode of Serving Process on Foreign Corporations, including the persons on whom service may be made, is discussed in the monographic note to *Abbeville Elec. etc. Co. v. Western Elec. etc. Co.*, 85 Am. St. Rep. 926-938.

LOWER TERREBONNE REFINING AND MANUFACTURING COMPANY v. POLICE JURY.

[115 La. 1019, 40 South. 443.]

ELECTIONS—Publication of Notice.—If an official journal is published but once per week, a statute requiring that a notice of an election “shall be published for thirty days in the official journal of the parish,” is complied with when such notice is published in such journal five consecutive Saturdays and the election is not held until thirty-two days after the first publication. (p. 292.)

ELECTIONS—Validity of Vote.—A vote cast before the time appointed for the opening of the election polls has arrived and before the arrival of any of the election commissioners, cannot be counted as a legal vote, and is void. (p. 293.)

ELECTION OFFICERS.—Bystanders who take it upon themselves to open election polls before the hour fixed by law for their opening has arrived are not de facto election commissioners and their act is void. (p. 293.)

ELECTION OFFICERS.—There can be no de facto commissioner of election at a time not fixed by law for the holding of an election. (p. 294.)

ELECTION OFFICERS.—Bystanders who take it upon themselves to open the election polls before the hour fixed by law for their opening has arrived cannot be deemed de facto election commissioners in a case of a voter who has himself appointed the regular election commissioners and has actual knowledge as to who the latter are. (p. 295.)

Suthon & Wurzlów, for the appellants.

Butler & Bourg, H. Gagne and W. P. Martin, district attorney, for the appellees.

1020 PROVOSTY, J. The validity of a special election held in a drainage district for the voting of a tax and the issue of bonds is contested in this case by taxpayers of the district, on two grounds: 1. That the notice of the election was not published for full thirty days, as was necessary; and 2. That the vote of Mr. R. R. Barrow, which changed the result of the election, was cast before the time fixed by the statute for the opening of the poll, and before anyone of the commissioners of election had reached the polling-place.

The notice of the election was required to be published “in the official journal of the parish”: Act No. 145, p. 250, sec. 2, Acts 1902. This “official journal” appeared only every Saturday. Hence a publication in this journal every Saturday was sufficient. The election was held thirty-two

days after the first publication, and during that time the notice was published every Saturday. This was clearly a full compliance with the law.

Interpreting Act No. 104, page 157, of 1878, providing for judicial advertisements in the parish of Orleans, this court has held that a publication "once a week" is sufficient (In re City of New Orleans, 52 La. Ann. 1073, 27 South. 592); and that it may be on any day of the week, so long as it precedes the sale: In re Lindner, 113 La. 772, 37 South. 720. Quoting these decisions, the learned counsel for plaintiffs argue that "there must be a publication once a week, during the weeks embraced within thirty full days, and the last publication must precede the election." As we understand this contention, it is that the statute under which the publication was made, in the instant case, divides off the thirty days into weeks and requires one of the publications to appear within each one of these weeks. In answer to this argument, ¹⁰²¹ it suffices to say that the statute does nothing of the kind. All that it requires is that the notice "shall be published for thirty days in the official journal of the parish."

Mr. Barrow was the president of the drainage district, was anxious to vote but was also anxious to catch an early train. When he reached the polling-place no one was there. Being pressed for time, he started out in search of the commissioners instead of waiting for them to arrive. Commissioner Aycock, whom he met, could not come immediately, as he had to go to his house and change clothes. While he was with Aycock, Mr. Theriot came along, having the ballot-boxes in charge. He and Theriot drove back to the polling-place, and found there Boudreaux and Duplantis. These two and Theriot at once opened the poll as commissioners, and Mr. Barrow voted before the hour fixed by law for the opening of the poll. The vote changed the result of the election.

Neither Theriot, Boudreaux nor Duplantis was a commissioner. Boudreaux was the clerk of election. Theriot had been appointed commissioner, but had subsequently been appointed deputy sheriff for the poll, and since it was he who carried the ballot-boxes, a function of the sheriff, and since he signed the election returns as deputy sheriff, we infer that he had accepted the appointment, thereby renouncing and vacating his appointment as commissioner. Duplantis was a mere bystander. Later the two commissioners, Aycock and

Caillouet, appointed him commissioner in the place vacated by Theriot.

Barrow, as president of the drainage district, had appointed the commissioners; but he had made the appointment by simply directing the secretary of the drainage board to appoint the same list of commissioners the president of the police jury had appointed for the election for public officers to be held at the same time and place.

¹⁰²² The evidence leaves no doubt that the entire proceeding was in the best of good faith. Had anyone challenged the vote on the grounds now urged, the probability is that Mr. Barrow, rather than jeopardize his vote, would have waited the two or three minutes until the commissioners and the time for opening the poll had arrived.

Under these circumstances, the learned judge a quo held the vote was good. We regret we cannot agree with him. His decision is founded on two well-recognized principles: 1. That in the absence of fraud, the courts are disposed to give effect to elections where possible (*Webre v. Wilton*, 29 La. Ann. 610); and 2. That the acts of de facto officers are valid: *Cooley's Constitutional Limitations*, 6th ed., pp. 750, 777.

But the latter of these principles does not apply to the facts of the case, and the former, if stretched to the cracking point, cannot manufacture a vote; and that is what would have to be done in this case before this so-called vote of Mr. Barrow could be counted. Of itself it is not a vote.

Before there can be a vote there must be an election, and it stands to reason that the act of three bystanders in opening a so-called poll at a time not appointed by law for the holding of an election is not an election. Boudreaux, Theriot and Duplantis had no better quality to act as commissioners than any other bystanders would have had; and the time fixed by law for the holding of the election had not yet arrived. The time had not arrived for holding an election; and there were no officers qualified to hold an election. Hence there was no election, and, as a consequence, no vote.

Time may not be so very sacramental that, in the absence of fraud, the election would be vitiated if the commissioners anticipated by a trifle the hour fixed by law for the opening of the poll. Their official character would give a legal color to their act. But, ¹⁰²³ when bystanders undertake to anticipate the time fixed by law for holding the election there

is nothing in the situation from which even a color of legality can be derived unless, indeed, it be from the mere presence of the ballot-boxes and election paper.

But, conceding, for argument, that even in such a case a vote cast by a voter who in good faith supposed the election to be going on regularly would be good, under the principle of the validity of the act of *de facto* officers, still the vote of Mr. Barrow is not good.

In the first place, there can be no *de facto* commissioner of election at a time not fixed by law for the holding of an election, on the principle that there cannot be a *de facto* officer unless there is a corresponding office in existence: 8 Am. & Eng. Ency. of Law, p. 799.

In the second place, for the purpose of Mr. Barrow's voting, the three gentlemen in question were not officers *de facto*, for the further reason that Mr. Barrow knew, or must be held to have known, that they were not the commissioners.

A *de facto* officer is defined in the American and English Encyclopedia of Law, volume 8, page 781, as follows: "A fuller definition has been given by Chief Justice Butler as follows: 'An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised, first, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be; second, under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like; third, under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public; fourth, under color of an election or appointment by or pursuant to a public unconstitutional ¹⁰²⁴ law, before the same is adjudged to be such.' "

Of the reasons here given why the acts of a *de facto* officer are upheld, the only one that can have any possible application to this case is the first, namely, that the commissioners

were acting "under such circumstances of reputation and acquiescence as were calculated to induce" Mr. Barrow, "without inquiry, to submit to or invoke" their "action, supposing" them "to be the officers they assumed to be." Now, this reason is obviously inapplicable to a case where the person "induced to act with out inquiry" happens to be the very person charged by law with the appointment of the officer. Plainly, to apply the principle to such a case would be stretching it beyond the cracking point. Not only this, but it is very far from being made out that Mr. Barrow "supposed" the three gentlemen in question to be the commissioners. From the fact that, instead of waiting for them to appear, he had started out in search of them, the inference would be that he knew who they were. He certainly knew that Aycock and Theriot had been appointed commissioners, and the inference is very strong that he knew who the third commissioner was; and that inference is much strengthened by his refusal on the witness stand to disclaim his having had such knowledge. To the question whether he knew who the commissioners were, he answered: "At that time, I don't know. I might have known at that time." The vote should have been rejected.

It is therefore ordered, adjudged and decreed that the judgment appealed from be set aside, and that there be judgment in favor of the petitioners in the suit and against the defendants, the police jury of the parish of Terrebonne and the board of commissioners of the third drainage district of said parish, declaring the election held on the nineteenth day of April, 1904, to take the census of the ¹⁰²⁵ property taxpayers of the third drainage district on the two propositions submitted to them by said board, to have been and to be null and void and of no effect, and that the result of the said election as declared be set aside and annulled, and that the defendants pay the costs of this suit.

Irregularities in the Conduct of Elections are discussed at length in the monographic note to *Patton v. Watkins*, 90 Am. St. Rep. 46-92.

CASES
IN THE
SUPREME COURT
OF
MASSACHUSETTS.

BAILEY v. AGAWAM NATIONAL BANK.

[190 Mass. 20, 76 N. E. 449.]

WAYS, Right to, When Reciprocally Created or Reserved.—If a conveyance from M., the owner of a tract having two houses thereon, to H., after describing the land conveyed, provides that a passageway is to be kept open and for use in common between the two houses, ten feet in width, five feet of such passageway to be furnished by H. and five feet by M. from the land adjoining that conveyed, the conveyance shows an intention on the part of the parties to it that the rights in a passageway ten feet wide shall be rights of perpetuity and for the benefit of the two adjoining lots of land. (p. 299.)

WAYS, Reservation of Rights of, When Restricted to the Life of the Grantor.—A reservation in a conveyance of a right of way in favor of the grantor is restricted to his life, unless it contains the word "heirs." (p. 299.)

WAYS, Right of by Exception.—A right of way cannot be excepted by deed when there is not any way existing in law or in fact at the date of the conveyance. (p. 299.)

WAYS, Rights of, When Reserved or Created by Contract.—A clause in a conveyance purporting to provide that a passageway shall be kept open between the house retained by the grantor and the house conveyed by him operates as a contract perpetually binding on the grantee and his successors with notice, and subjects the land conveyed to a burden in favor of the land retained. (p. 299.)

WAYS, Contracts for, Specific Performance of.—If a provision in a conveyance amounts to a contract in favor of the grantor for a right of passageway, successors in interest of the grantee, who take with notice, are bound in equity to perform, and specific performance may be decreed against them. (p. 300.)

COVENANTS Against Encumbrances—Right to Passageway.—A provision in a deed amounting to a contract in favor of the grantor for a passageway to be kept open between the lands conveyed and those retained by him amounts to an encumbrance. (p. 301.)

WAYS, Right of, When not Restricted to Building in Existence. A provision in a deed amounting to a contract for the keeping open and for use in common of a passageway ten feet in width between two houses, five feet to be furnished by the grantor and an equal

amount by the grantee, is not limited to the life of the two dwellings on the lots at the execution of the deed, but is intended to be for the benefit of the two lots of land. (p. 301.)

COVENANTS Against Encumbrances, Damages for Breach of.— If an Encumbrance is of a Permanent Nature, like a perpetual servitude, such as the covenantee cannot remove, he is entitled to recover as damages a just compensation for the real injury resulting from its continuance, which should be estimated as of the date of the deed and not of the date of the trial. (p. 302.)

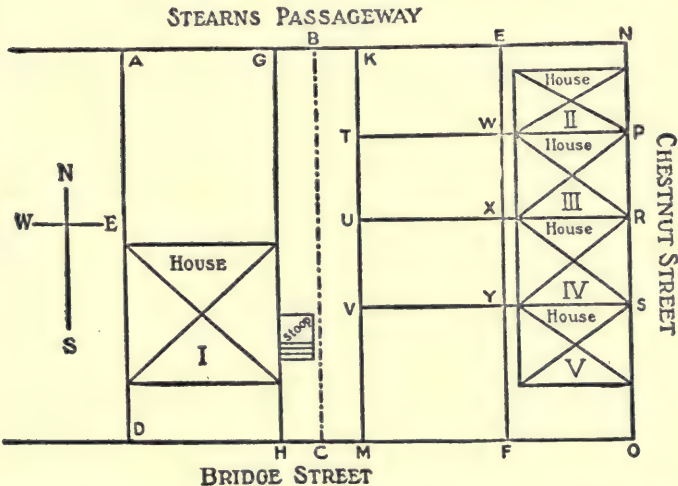
A COVENANT Against Encumbrances is Broken as Soon as Made. (p. 302.)

S. S. Taft and D. E. Tilley, for the plaintiffs.

C. H. Beckwith, for the defendant.

²⁰ LORING, J. Before December, 1862, one Moore owned the parcel of land which on the plan printed on this page is indicated by the letters A E F D. On this land were two houses, one on parcel A B C D marked I; the other, not shown on the plan, on parcel B E F C.

On December 1, 1862, Moore conveyed to one Henry in fee lot A B C D by a deed, in which, after the description of the land conveyed, is this provision: “A passageway is to be kept ²¹ open and for use in common between the two houses ten feet in width, five feet of said passageway to be furnished by said Henry and five feet by me from land lying east of the land here conveyed. To have and to hold the aforesaid



granted premises to the said Michael Henry, his heirs and assigns, to their use and behoof forever.” The bill of ex-

ceptions states that "The said passageway is represented by G K M H on the plan. There was no passageway there before this deed."

By mesne conveyances parcel A B C D came from Henry to the defendant and was conveyed by it to the plaintiffs by a full warranty deed dated June 15, 1892.

This action was brought for breach of the covenant against encumbrances in that deed. The breach complained of is the existence of a passageway over the five foot strip G B C H, part of the parcel A B C D conveyed to the plaintiff by the warranty deed, which right is or is in effect appurtenant to the land B E F C.

The main defense set up is that the right to a passageway in favor of lot B E F C created by this deed over the strip G B C H was a right during the life of the grantor, and that it came to an end on his death, to wit, on December 31, 1893. The case was tried by a judge of the superior court without a jury. The ²² judge ruled that the right of lot B E F C in the passageway G K M H was a right in perpetuity, and assessed the damages as of the date of the trial. In assessing the damages the judge proceeded on the basis that "the right of way was limited in its use to the land mentioned in the deed Moore to Henry and its use could not be extended for uses in connection with lands beyond." This refers to lot E N O F, which was not owned by Moore when he conveyed to Henry in December, 1862. The defendant also contended that the right in the passageway was a "restricted right of way to be used only for purposes incident to the use and occupation of a dwelling-house on the dominant estate"; that it had been abandoned; and also that "if the court finds for the plaintiffs, the damages should be assessed as of the date of the delivery of the deed." The judge found for the plaintiff and assessed damages in the sum of nine hundred and fifty dollars, stating: "I have assessed the damages as of the date of the trial (see *Richmond v. Ames*, 164 Mass. 467), and I find that the plaintiffs' estate at the date of the trial, was diminished in value in the sum of nine hundred and fifty dollars (\$950) by reason of the existence of the encumbrance. If the damages shall be assessed as of the date of the deed from the defendant to the plaintiffs, then I find the damages were four hundred and fifty dollars (\$450), to which should be added interest at the rate of six per cent per annum, viz., three hundred nineteen dollars and

fifty cents (\$319.50), making seven hundred and sixty-nine dollars and fifty cents (\$769.50) in all."

The case is here on exceptions to the refusal to rule as requested by the defendant.

1. As matter of construction of the clause here in question, it was, in our opinion, the intention of the parties to it that the rights in the passageway ten feet wide there provided for should be rights in perpetuity, and for the benefit of the two adjoining lots of land. If this clause is to operate in favor of the grantor ²³ Moore by way of reservation or exception, this intention fails, so far as half the passageway, to wit, lot G B C H is concerned, for lack of the word "heirs." If it is to operate by way of reservation, that is to say, by implied grant by the grantee to the grantor, the word "heirs" is necessary: *Ashcroft v. Eastern R. R.*, 26 Mass. 196, 30 Am. Rep. 672. It cannot operate under the Massachusetts doctrine by way of exception, because it is a new way not existing in law or in fact (that is to say, physically on the ground) at the date of the conveyance: *Simpson v. Boston etc. R. R.*, 176 Mass. 359, 57 N. E. 674, and cases there cited.

But the clause in question does not purport to be a conveyance by way of exception or reservation; it purports to be a contract, which, as we have said, as matter of construction provides for a passageway in perpetuity for the benefit of the two adjoining lots of land. And it is a contract of which the grantee Henry's successors have taken with notice. Having taken their estate with notice of it, Henry's grantees are bound in equity to perform it. It was on this ground (namely, that the subsequent grantee took with notice of the prior agreement imposed in perpetuity for the benefit of adjoining lands), that the right to equitable relief by specific performance of a contract restricting the use of land in respect to the buildings to be erected on it and the use to be made of them was established when both the land benefited and that subjected to that burden had passed to grantees: *Whitney v. Union Ry. Co.*, 11 Gray, 359, 71 Am. Dec. 715; *Tulk v. Moxhay*, 2 Phil. 774. And see 17 *Harvard Law Review*, 174.

It is on its face a novel proposition that there should be a right to a passageway by way of equitable restriction over lot A in favor of lot B. But in case the owner of lot A has made an agreement in writing, but not under seal (and for that reason not capable of being held to be a grant), that

the owner of lot B shall have a right of way over it in perpetuity, there is nothing anomalous in holding that this agreement should be specifically enforced in equity against all taking lot A with notice of that agreement in favor of the owner of the land for the benefit of which the agreement was made. In such a case it may be said, and is said, that there is an equitable restriction on A in favor of B. But that is apt to be misleading. The so-called equitable restriction results from the fact that equity will enforce the ²⁴ agreement against those taking with notice in favor of the then owner of the land to be benefited. Equity does not enforce the agreement because there is an equitable restriction: See *Whitney v. Union Ry. Co.*, 11 Gray, 359, 71 Am. Dec. 715; *Tulk v. Moxhay*, 2 Phil. 774, and 17 Harvard Law Review, 14. This, perhaps, was lost sight of in the opinion in *Hazen v. Mathews*, 184 Mass. 388, 68 N. E. 838.

Again, there is nothing anomalous in going into equity to enforce a right to a passageway. An injunction against obstructing it is the usual remedy invoked by the owner of a legal easement to that effect. And many an indenture under seal as to setbacks and restrictions on the kind of buildings to be erected and the use to be made of them has been held to create a legal easement although the rights under them undoubtedly are usually spoken of as equitable restrictions. For instances, see *Hogan v. Barry*, 143 Mass. 538, 10 N. E. 253; *Ladd v. City of Boston*, 151 Mass. 585, 21 Am. St. Rep. 481, 24 N. E. 858.

It remains to say a word of the cases in which a reservation has been held to be for life only, for lack of the word "heirs."

Clafin v. Boston etc. R. R., 157 Mass. 489, 32 N. E. 659, 20 L. R. A. 638, was an action of tort for obstructing a right of way. To maintain a way in that case it was necessary to make out a legal easement. The same, however, is not true of *Ashcroft v. Eastern R. R.*, 126 Mass. 196, 30 Am. Rep. 672, or of *Simpson v. Boston etc. R. R.*, 176 Mass. 359, 57 N. E. 674. In *Simpson v. Boston etc. R. R.* there is nothing to show that the clause which was in terms a reservation in favor of the grantor was intended to be perpetual. Neither one of these two things, however, is true of *Ashcroft v. Eastern R. R.*, 126 Mass. 196, 30 Am. Rep. 672. The plaintiff in that case brought a bill in equity, and the clause was "reserving to myself the right of passing and repassing, and repairing my aqueduct logs forever, through a culvert six

feet wide and rising in height to the superstructure of the railroad, to be built and kept in repair by said company." We need not now determine whether that case is to be distinguished on the ground that the doctrine now laid down was not then contended for, or is to be supported on the ground that the court will not help out a conveyance defective for lack of the word "heirs" by letting it operate as an agreement. It is settled that the word "agree" may be read "grant," and an agreement under seal construed to be a grant: ²⁵ *Hogan v. Barry*, 143 Mass. 538, 10 N. E. 253; *Ladd v. City of Boston*, 151 Mass. 585, 21 Am. St. Rep. 481, 24 N. E. 858. But it is another matter to hold that what is defective as a grant is valid as an agreement where the parties have undertaken to make a grant. As we have said, that need not be determined now.

If the owner of lot B E F C has a right in perpetuity specially to enforce in equity the agreement that the strip G B C H shall be kept open as a passageway for the use of that lot, there is as much an encumbrance on the strip G B C H as there would be in case the owner of lot B E F C had a legal easement over the strip G B C H as appurtenant to his lot.

2. We are of opinion that the clause in question is not to be construed to limit the use of the way to the life of the two dwelling-houses then on the two lots, or for use in connection with a dwelling-house, but that it was intended that the way should be for the benefit of these two lots of land. For that reason it was not abandoned or lost in 1862 when the dwelling-house on the lot retained by Moore was removed and that lot cut up into back yards for houses fronting on Chestnut street, although the right of passageway could not be used in connection with the lots on Chestnut street not owned by Moore at the date of the deed: *Greene v. Canny*, 137 Mass. 64; and the presiding judge was right in so ruling. But the right to use the passageway in question attached, and now attaches, to all the land then owned by Moore: *Blood v. Millard*, 172 Mass. 65, 51 N. E. 527.

3. We are of opinion that the defendant was right as to the date as of which the damages are to be assessed. The ruling appears to have been made on the authority of the concluding remarks of Chief Justice Field in *Richmond v. Ames*, 164 Mass. 467, 41 N. E. 671. The true rule is laid down in that case, namely: "In an action on the covenant against en-

cumbrances, when the encumbrance is a right of way and has not been relinquished, the damages are that amount of money which is a just compensation to the plaintiff for the real injury resulting from the encumbrance: *Wetherbee v. Bennett*, 2 Allen, 428. The general rule is stated in *Harlow v. Thomas*, 15 Pick. 66, 69, as follows: 'The general rule in cases of this kind is plain and undisputed. If the covenantee has fairly extinguished the encumbrances, he ought to recover the expenses necessarily incurred in doing it. ²⁶ If they remain and consist of mortgages, attachments, and such liens on the estate conveyed as do not interfere with the enjoyment of it by the covenantee, he can recover only nominal damages. But if they are of a permanent nature, like the perpetual servitudes in this case, such as the covenantee cannot remove, he should recover a just compensation for the real injury resulting from their continuance: *Prescott v. Trueman*, 4 Mass. 627, 630, 3 Am. Dec. 246.' See *Batchelder v. Sturgis*, 3 Cush. 201." See, also, *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335; 3 Sedgwick on Damages, 8th ed., sec. 972; Rawle on Covenants for Title, secs. 190, 191.

A covenant against encumbrances, if broken, is broken at the date of the deed (*Jenkins v. Hopkins*, 9 Pick. 543), and the damages accrue at that date. The damages (and we are here speaking of damages under a covenant against encumbrances as distinguished from the other covenants in a warranty deed) are a just compensation for the injury actually suffered at that time. What was probably meant by the concluding remarks of Chief Justice Field in *Richmond v. Ames*, 164 Mass. 467, 41 N. E. 671, is that subsequent events may be put in evidence to show what the damages then incurred in fact were, and that in making up the amount of the verdict or finding, interest may be added to the amount so found down to the date of the verdict or finding. It cannot be that the amount of damages is not fixed at the date of the breach, but is dependent upon there being a rise or fall in the market value of the estate sold between the date of the breach and the date of the trial. Were it the rule, as it is in some jurisdictions, that a subsequent rise in value of an article of fluctuating value (see Sedgwick on Damages, sec. 512) may be considered in actions of trover, there might perhaps be some reason for the rule adopted by the judge in this case; but that is not so in this commonwealth: *Kennedy v. Whitwell*, 4 Pick. 466; *Stone v. Codman*, 15 Pick. 297; *Johnson*

v. Sumner, 1 Met. 172; East Tennessee Land Co. v. Leeson, 183 Mass. 37, 67 N. E. 427.

The exception as to the measure of damages is sustained; all the other exceptions are overruled.

The Rights and Obligations of parties to private ways are discussed in the monographic notes to Dudgeon v. Bronson, 95 Am. St. Rep. 318-330; Bakeman v. Talbot, 88 Am. Dec. 279-282. The rights and remedies of the parties to ways are further discussed in the monographic note to Welch v. Wilcox, 100 Am. Dec. 114-119. For recent decisions on this subject, see Schmoele v. Betz, 212 Pa. St. 32, 108 Am. St. Rep. 845; Mendelson v. McCabe, 144 Cal. 230, 103 Am. St. Rep. 78; Gibbons v. Ebbing, 70 Ohio St. 298, 101 Am. St. Rep. 900.

GARDNER v. BEACON TRUST COMPANY.

[190 Mass. 27, 76 N. E. 455.]

FRAUD, Who Must Suffer From.—Where One of Two Innocent Persons Must Suffer in consequence of the fraud of another, the loss must fall upon the one who, by his trust and confidence, enabled the perpetrator of the fraud to commit it. (p. 305.)

NEGOTIABLE INSTRUMENTS, Transferee of Overdue, Title of.—If the holder of an overdue negotiable instrument, after first indorsing, transfers and delivers it to another for a special purpose, who fraudulently sells and transfers it to a bona fide purchaser, the latter, notwithstanding the instrument is overdue, acquires a perfect title thereto as against the true owner. (p. 306.)

NEGOTIABLE INSTRUMENTS Overdue, Purchaser of, Whether Put upon Inquiry.—One purchasing a negotiable instrument long overdue is not put upon inquiry for the purpose of inquiring whether the title of his vendor was procured by fraud from the former owner whose assignment appears thereon. (p. 306.)

GUARDIAN AND WARD.—A Guardian May Sell and Transfer Past Due Negotiable Instruments without first procuring an order or license from the probate court authorizing him to do so. (p. 307.)

R. G. McClung and G. F. Wales, for the plaintiff.

F. G. Cook and J. J. Dolan, for the defendant.

27 MORTON, J. This is a bill in equity brought by a minor, by her next friend and guardian, to compel the defendant, the Beacon Trust Company, to assign and deliver to her a mortgage and the note thereby secured alleged to have been fraudulently obtained from the plaintiff's guardian by one Edwin M. Thayer, since deceased, and fraudulently assigned by him to the trust company. As to certain of the defendants the bill was dismissed, and a decree was entered

in favor of the plaintiff against the trust company and other defendants. The case is here on appeal by the trust company. All of the evidence is reported.

Briefly stated the facts are as follows: In January, 1903, the plaintiff was the owner of a mortgage, and the note thereby secured, for fifteen hundred dollars, on land in Quincy, given by the defendant Brown to one Hattie L. Carr, and transferred by successive assignments to the plaintiff. Her mother, Mary E. Gardner now Mary E. Wales, was her guardian. The note and mortgage had been long overdue. By means of fraudulent misrepresentations that the owner of the equity wished to pay off the mortgage, Thayer obtained from the plaintiff's guardian an ²⁸ assignment of the note and mortgage to himself, and subsequently assigned them to the trust company as security for a note of two thousand dollars for money borrowed by him of the company. The trust company took the assignment in good faith for value, and without any notice of Thayer's fraud or of any defect in his title, unless the fact that it took it when the note was overdue constituted such notice.

We assume in favor of the plaintiff that the fact that the note was secured by mortgage does not affect its character as an overdue negotiable instrument when taken by the trust company, although it is said in *Murphy v. Barnard*, 162 Mass. 72, that there is a distinction between the purchase of ordinary commercial paper and that of notes known to be secured by a mortgage of real estate, though bought as negotiable paper: See *Fish v. French*, 15 Gray, 520; *Vinton v. King*, 4 Allen, 562; *Willcox v. Foster*, 132 Mass. 320; *Bacon v. Abbott*, 137 Mass. 397. But the note did not cease to be property or to be negotiable because overdue: *Baxter v. Little*, 6 Met. 7, 39 Am. Dec. 707; *Fisher v. Leland*, 4 Cush. 456, 50 Am. Dec. 805; *Leavitt v. Putnam*, 3 Comst. 494. And the question is, whether, assuming for the moment the validity of the transfer by the plaintiff's guardian to Thayer, which will be considered later the fact that the note and mortgage were overdue when the trust company took them so affected its title as to postpone its right to that of the defrauded owner. The general rule is thus stated by Lord Herschel in *London Joint Stock Bank v. Simmons*, [1892] App. Cas. 201, 215: "The general rule of the law is, that where a person has obtained the property of another from one who is dealing with it without the au-

thority of the true owner, no title is acquired as against the owner, even though full value be given and the property be taken in the belief that an unquestionable title thereto is being obtained, unless the person taking it can show that the true owner has so acted as to mislead him into the belief that the person dealing with the property had authority to do so. If this can be shown, a good title is acquired by personal estoppel against the true owner." He then goes on to say that there is an exception in the case of negotiable instruments, manifestly meaning those not yet due, and that as to them, any person in possession of them can convey a good title even if acting in fraud of the true ²⁰ owner. This is the only exception mentioned by him to the general rule which he lays down, and which would seem, therefore, to have been regarded by him as applying to overdue negotiable notes as well as to other property when circumstances brought them within it. Applying the rule thus laid down, or the rule that, where one of two innocent persons must suffer in consequence of the fraud of another, the loss must fall upon the one who by his trust and confidence has enabled the perpetrator of the fraud to commit it (*Easter v. Allen*, 8 Allen, 7; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341), it would seem plain that the loss in this case should fall upon the plaintiff, unless the fact that the note and mortgage were overdue makes a difference. She had assigned the note and mortgage to Thayer by an instrument valid upon its face, and had delivered possession of them to him. As a consequence of her conduct he had possession of them as apparent owner with full dominion over the property which they represented. This apparent ownership was obtained from the guardian by Thayer's fraud, it is true; but although that would have enabled her to avoid the transaction as between her and him so long as the note and mortgage remained in his hands, his apparent ownership was not affected thereby.

Does, then, the fact that the note and mortgage were overdue when the trust company took them make a difference? The purchaser of an overdue negotiable note takes it subject to all the equities, if any there are, attached to it at the time of the transfer in favor of the maker, the owner, or of third parties: *Vinton v. King*, 4 Allen, 562; *Vermilye v. Adams Express Co.*, 21 Wall. 138, 22 L. ed. 609; *In re European*

Bank, L. R. 5 Ch. 358; In re Overend, L. R. 6 Eq. 344. If there are no equities attached to the note, the purchaser gets as good a title after as before maturity (In re Overend, L. E. 6 Eq. 360), and it makes no difference that the note is dishonored. If there are equities attached to it, he takes it subject to them. This is what is meant when it is said that the purchaser has no better title, legal or equitable, than his transferrer had, and that the note is subject in his hands to the same infirmities of title as against the true owner, and to the same defenses as against the maker which it was subject to in the hands of his transferrer: 1 Daniel on Negotiable Instruments, 3d ed., sec. 724 ³⁰ et seq. If, for instance, an overdue note is stolen from the owner, a subsequent purchaser acquires no title as against the true owner (Vermilye v. Adams Express Co., 21 Wall. 138, 22 L. ed. 609); if an overdue note has been paid by the maker and is fraudulently put in circulation by the payee, a purchaser, though for value and in good faith, takes it subject to the defense of payment by the maker. In such a case the very fact that the note is dishonored is sufficient to put the purchaser upon inquiry as against the maker: Gold v. Eddy, 1 Mass. 1; Brown v. Davies, 3 Term Rep. 80; Losee v. Dunkin, 7 Johns. 70, 5 Am. Dec. 245. But the case is very different where the owner of an overdue note transfers it under circumstances which enable his transferee to deal with it, though obtained by fraud, as if he were the true owner, and when an innocent purchaser for value takes it from such transferee before the transfer has been avoided. In such a case no equity attaches to the note in favor of the true owner as against the innocent purchaser for value, since it was by his own act that the perpetrator of the fraud was enabled to commit it. The true owner of an overdue note may deal with it as with any other property, and the mere fact that the note is overdue does not in such a case, in the absence of anything in the transaction to suggest suspicion, put a purchaser upon inquiry any more than a purchaser is bound in any other case to inquire into the title of his vendor: See White v. Dodge, 187 Mass. 449, 73 N. E. 549. The possibility that the title may have been obtained by fraud exists in all cases. But that is not enough to put a purchaser upon inquiry. Any other view would put upon the innocent purchaser for value of overdue negotiable paper the onus of a defective title, no matter how much he may have been misled by the con-

duct of the true owner. We do not think that such is the law: *Cochran v. Stewart*, 21 Minn. 435; *Moore v. Moore*, 112 Ind. 149, 2 Am. St. Rep. 170, 13 N. E. 573; *Neuhoff v. O'Reilly*, 93 Mo. 164, 6 S. W. 78; *Etheridge v. Gallagher*, 55 Miss. 458; *Connell v. Bliss*, 52 Me. 476; *Eversole v. Maull*, 50 Md. 95; *Jones on Mortgages*, sec. 841; *Ames' Cases on Trusts*, 2d ed., 310. In *Foley v. Smith*, 6 Wall. 492, 18 L. ed. 931, the above principle was recognized, though it was held that the facts did not bring the case within it. So far, therefore, as the plaintiff relies upon the fact that the note and mortgage were overdue when taken by ³¹ the trust company, her contention must fail. The note being dated before January 1, 1899, the negotiable instruments act does not apply: See Rev. Laws, c. 73, sec. 211.

The plaintiff, relying upon Revised Laws, chapter 145, section 35, further contends that the guardian could not transfer the note and mortgage without a license from the probate court, which she did not have. That statute provides that upon the application of the guardian, or of any person interested in the estate of the ward, the probate court may authorize the guardian to sell and transfer any personal property held by him as guardian, and invest the proceeds in such manner as shall be most for the interest of all concerned. The provision comes in substance from Statutes of 1820, chapter 54, section 3, except that it was there provided that the application should be made to the supreme court of probate: Stats. 1820, c. 54, sec. 3; Rev. Stats., c. 79, sec. 21; Gen. Stats., c. 109, sec. 22; Pub. Stats., c. 139, sec. 38; Rev. Laws, c. 145, sec. 35. But the object of this provision was and is, we think, to furnish a way in which a guardian could protect himself and his sureties by obtaining in advance a judicial approval of the sale and investment, and not to require him to obtain a license from the court in order to sell and transfer personal property of his ward. This was the view taken by the commissioners on the reversion of the statutes in 1834 (Report of Commissioners on Rev. Stats., c. 69, sec. 11, note, and c. 79, sec. 22, note), and is the construction which was, in effect, given to a similar statute in Mississippi by the supreme court of the United States in *Maclay v. Equitable Assur. Soc.*, 152 U. S. 499, 14 Sup. Ct. Rep. 678, 38 L. ed. 528, and to our own statute by *Woodruff, J.*, in *Wallace v. Holmes*, 9 Blatchf. 65, Fed. Cas. No. 17,100. The Statutes of 1817, chapter 190, section 35, which

provides that stock in the public funds, shares in banks, insurance offices and other corporations, and loan office certificates could not be transferred by a guardian without a license from the probate court, was repealed by the Revised Statutes (Rev. Stats., p. 825), and, though various provisions in that act were re-enacted, section 35 was not and has not been since. If the legislature had had any intention that a guardian should obtain leave of the probate court to sell and transfer personal property of his ward, it would seem that this provision would have been kept alive or subsequently re-enacted. The case of *Ex parte Blair*, 13 Met. 126, which held that an executor or administrator could not³² assign a mortgage without license from the probate court, rested upon statutory provisions which were applicable to executors and administrators alone (Rev. Stats., c. 65, secs. 11, 14; *Burt v. Ricker*, 6 Allen, 77), and which were changed by Statutes of 1849, chapter 47, re-enacted in General Statutes, chapter 96, section 12, Public Statutes, chapter 133, section 9, and Revised Laws, chapter 150, section 10. In *Atkinson v. Atkinson*, 8 Allen, 15, the shares were transferred by the guardian without a license from the probate court. The decision was not, however, put on that ground as it would have been if a license had been necessary in the opinion of the court, but on the ground that the transferee took the shares with knowledge of all the facts which showed that the shares were transferred by the guardian to a surety on his bond for the purpose of indemnifying him as such surety; in other words, that they were transferred by the guardian on his personal account and were taken by the transferee with knowledge of that fact. The case of *O'Herron v. Gray*, 168 Mass. 573, 60 Am. St. Rep. 411, 47 N. E. 429, 40 L. R. A. 498, relied on by the plaintiff, is very different from this. That was the case of a felonious appropriation by the cashier of a bank of certificates of shares, which had been wrongfully pledged by a guardian to secure his own debt, and had been left in the custody of the bank after the debt was paid, and had been taken by the cashier and used as security for his own indebtedness. The guardian was ignorant of the whole transaction and did nothing whatever to mislead the parties to whom the cashier pledged the certificates.

The result is that so much of the decree as adjudges that the mortgage remains, and still is, the property of the plain-

tiff, and orders the trust company to assign and convey its interest in the same to her is reversed and the rest is affirmed. So ordered.

The Bona Fide Ownership of Negotiable Instruments is discussed in the monographic note to *Bedell v. Herring*, 11 Am. St. Rep. 309-326. The indorsee of an overdue bill or note takes it subject to equities growing out of the transaction and existing at the time of the transfer, but not to a setoff arising out of collateral and independent matters: *Davis v. Noll*, 38 W. Va. 66, 45 Am. St. Rep. 841; *Kelly v. Staed*, 136 Mo. 430, 58 Am. St. Rep. 648; *Loewen v. Forsee*, 137 Mo. 29, 59 Am. St. Rep. 489. As to bona fide ownership of paper put in circulation in violation of instructions or conditions, see the note to *Bedell v. Herring*, 11 Am. St. Rep. 314-317; *Boston Steel etc. Co. v. Stener*, 183 Mass. 140, 97 Am. St. Rep. 426. If a wife makes her husband agent to deliver a note signed by both, her signature appearing first, she is bound by his representation to the payee that she is principal: *Tomkins v. Triplett*, 110 Ky. 824, 96 Am. St. Rep. 472.

The Powers of Guardians are discussed in the monographic note to *Schmidt v. Shaver*, 89 Am. St. Rep. 257-316.

SIPLEY v. STICKNEY.

[190 Mass. 43, 76 N. E. 226.]

CONTRACTS, No Recovery Under, by One Who Fails to Perform.—One who voluntarily fails to complete a piece of work to be done under a special contract for an entire sum is without remedy. (p. 312.)

CONTRACTS, Willful Failure to Perform a Stipulation not Going to the Essence of.—A willful default in the performance of a stipulation not going to the essence of the contract bars all recovery. Hence, if one employed to carry on a farm, whose duty it is to render true accounts of its expenses, intentionally deceives his employer by holding back certain bills, such employé cannot recover either under his contract or upon a quantum meruit, though his breach of duty has not caused any loss to his employer. (p. 314.)

A. C. Collins, for the plaintiff.

W. H. Brooks and W. Hamilton, for the defendant.

⁴³ LORING, J. This case comes before us on exceptions to the charge to the jury in an action of contract in which the plaintiff had a verdict.

The defendant is a lawyer, residing and practicing in the city of New York. From 1900 to 1902 he owned a farm of some four hundred acres in Sheffield, Massachusetts, on which he had a herd of from twenty-five to thirty milch cows, sev-

enteen heifers and two bulls. He was at the farm but little, and employed the plaintiff in July, 1900, to take charge of it for him. The plaintiff resigned his position in July, 1902, but stayed on until October 10th, apparently to accommodate the defendant, who could ⁴⁴ not get another farmer at the time. This action was brought by the plaintiff to recover one hundred and ninety-three dollars and seventy-three cents, a balance due him for wages for August, September, and the ten days in October on which he worked, amounting to ninety-seven dollars and twelve cents, together with sixty-one items of cash paid out in August and September, amounting to two hundred and sixty-seven dollars and fifty-one cents, after crediting the defendant with nine items of cash received during August and September for the products of the farm, amounting to one hundred and seventy dollars and ninety cents. All the items, with the exception of the three for wages, were agreed to be correct; that is to say, the defendant admitted that he owed the plaintiff ninety-six dollars and sixty-one cents, the balance of cash expended by the plaintiff, but contested his liability for the wages amounting to ninety-seven dollars and twelve cents.

The defendant set up in defense to the claim for the wages that the plaintiff in his monthly accounts had intentionally misstated the debts incurred in running the farm, to deceive the defendant. The presiding judge charged the jury that "the plaintiff in undertaking to manage the farm of the defendant was bound to act with diligence, integrity and skill. That is a general obligation. It is the obligation of anyone who undertakes any employment. It is the same in other concerns, other business, in other employment as it was in this. It is a general obligation on the part of any person who undertakes an employment to act with diligence, integrity and skill. It was the undertaking, it was the duty of Siple in his dealings with the defendant Stickney to so act, and it is upon the plaintiff in this case to satisfy you that he did so act. The burden of proof is upon him to entitle him to prevail in this action to satisfy you that he did act in his dealings with Mr. Stickney, the defendant, with diligence, integrity and skill, and to the extent that he failed in either or all of the three respects which I have enumerated, in so far as he failed in either one or more of those respects and injury resulted to Mr. Stickney, the defendant in this case, there is a right to use that injury in reduction of this claim.

and if such injuries are sufficient to extinguish the claim, then your verdict is for the defendant in this case." To this the defendant excepted, contending "that unless the plaintiff satisfied the jury that the plaintiff rendered his services with fidelity, the defendant was entitled to a verdict without regard to the question whether or not damage resulted from the plaintiff's failure to perform." The judge also instructed ⁴⁵ the jury: "If you find that the plaintiff SipleY was bound to render true and accurate accounts, by reason of any arrangement between the parties of the farming business in his hands, of the payments and receipts, and if you find upon the evidence that there was failure to render such accounts, and especially if you find that he deceived the defendant as to the condition of the accounts, that fact will be a sufficient ground in law for your refusal to allow him any compensation, if you find that such failure or such deception injured the defendant to an extent sufficient to extinguish his claim." To this the defendant excepted, contending "that it was immaterial whether or not damage resulted from the failure of the plaintiff to render true accounts; but that if the plaintiff rendered accounts which were not true or failed to render accounts, he had failed to perform his contract and was not entitled to recover." There were other instructions and other issues and other exceptions, but the only exceptions insisted upon at the argument are those above stated.

The evidence which gave rise to the parts of the judge's charge now attacked was in substance this: The result of the conduct of the farm had been disappointing in the crops raised, in the deterioration of the stock, and particularly in the amount of money paid out. It appeared that the plaintiff rendered accounts to the defendant each month. The defendant testified that in the first winter (1900-1901) he learned of a bill for one hundred and twenty dollars that the plaintiff had not paid; that the next time he saw the plaintiff he told him what had happened, and that it must not happen again; that he must pay cash as he went, and that he could not have him running up bills for him, the defendant, to pay; that shortly after the time when he accepted the plaintiff's resignation (which was in July, 1902), he was at the farm and the plaintiff produced a grain bill from Manvel for seventy-nine dollars and two cents, the last item on it being April 18, 1902; that the statements rendered by the

plaintiff to him from time to time showed payments to Manvel for grain, and that he supposed that the items on the statements paid for all the grain bought, while in fact he kept back the bulk of the account. Then a week later he produced a bill for one hundred and eighty dollars for supplies bought before July; and in this connection also he had been putting in his monthly statements ⁴⁶ payments which the defendant supposed covered all expenses. Later, after the plaintiff had gone, he found another instance in a bill for hardware, amounting to one hundred and fifty dollars and ten cents.

Under these instructions the jury were allowed to find a verdict for the plaintiff, although he had intentionally deceived the defendant as to the expenses incurred by him in running the farm.

The defendant relies on the doctrine long established in this commonwealth and last applied in *Homer v. Shaw*, 177 Mass. 1, 58 N. E. 160, where the earlier cases are collected, namely, that one who voluntarily has failed to complete a piece of work to be done under a special contract for an entire sum is without remedy.

The weight of authority is the same in other jurisdictions: *Forman & Co. Proprietary v. The Ship Liddesdale*, [1900] App. Cas. 190; *Hansbrough v. Peck*, 5 Wall. 497, 18 L. ed. 520; *Scheible v. Klein*, 89 Mich. 376, 50 N. W. 857; *Kohn v. Fandel*, 29 Minn. 470, 13 N. W. 904; *Timberlake v. Thayer*, 71 Miss. 279, 14 South. 446, 24 L. R. A. 231; *Smith v. Brady*, 17 N. Y. 173, 72 Am. Dec. 442; *Ginther v. Shultz*, 40 Ohio St. 104; *Posey v. Garth*, 7 Mo. 94, 37 Am. Dec. 183; *Beach v. Mullin*, 5 Vroom, 343; *Hartman v. Meighan*, 171 Pa. St. 46, 33 Atl. 123; although there are decisions in some jurisdictions the other way, the leading case being *Britton v. Turner*, 6 N. H. 481, 26 Am. Dec. 713.

But the doctrine of *Homer v. Shaw*, 177 Mass. 1, 58 N. E. 160, does not necessarily reach the case at bar. For we assume that in *Homer v. Shaw*, 177 Mass. 1, 58 N. E. 160, and the other cases *supra* the breach went to the essence of the contract, and that in the case at bar the failure to return accurate statements might have been held not to go to the essence of the contract. We also assume that a breach after part performance not going to the essence of the contract ordinarily will not prevent a recovery on the contract.

But we are of opinion that a willful default in the performance of a stipulation not going to the essence of the contract bars a recovery. In this commonwealth, where there is a remedy under some circumstances outside the contract in case a building is erected on the defendant's land, it is restricted "to cases in which there is an honest intention to go by the contract": *47* Hayward v. Leonard, 7 Pick. 181, 19 Am. Dec. 268. To the same effect see Hattin v. Chase, 88 Me. 237, 33 Atl. 989; Kane v. Stone Co., 39 Ohio St. 1; Moore v. Carter, 146 Pa. St. 492, 23 Atl. 243; Barrett v. Raleigh etc. Co., 51 W. Va. 416, 90 Am. St. Rep. 802, 41 S. E. 220.

In New York, where under somewhat similar circumstances there is a remedy on the contract, the right to recover is restricted in the same way "to cases of honest intention of contractors to fairly perform their contracts": *Crouch v. Gutmann*, 134 N. Y. 45, 30 Am. St. Rep. 608, 30 N. E. 271. See, also, *Heckmann v. Pinkney*, 81 N. Y. 211. To the same effect see *Leeds v. Little*, 42 Minn. 414, 44 N. W. 309; *Elliott v. Caldwell*, 43 Minn. 357, 45 N. W. 845, 9 L. R. A. 52; *Linch v. Paris Lumber etc. Elevator Co.*, 80 Tex. 23, 15 S. W. 208.

The ground on which it is held that a default after part performance not going to the essence of the contract does not bar a recovery on the contract is this: Where the parties have not in terms made the performance of the stipulation in question a condition precedent to the payment of the entire price named in the contract, the court is asked to hold that by implication it was the intention of the parties that a failure to perform this stipulation which does not go to the essence of the contract should defeat the plaintiff's right to the contract price. In such cases the court has held that by implication such cannot be taken to have been the intention of the parties, and has left the defendant to his cross-action or other remedy for such a breach.

Where the plaintiff has honestly tried to perform his contract, it is one thing to hold that it must have been the intention to make the commission of such a breach a condition precedent. But where the default is willful, the question, in our opinion, is a different one. Where a contractor commits a willful default and yet claims the contract price, he in effect claims that he has a right to break his contract. But he has no such right. "The doctrine that a breach after part performance is not a defense unless it goes to the es-

sence does not give a party a right to commit a breach because it does not go to the essence; it merely excuses the breach to the extent just stated after it has been committed": Langdell on Summary of the Law of Contracts, sec. 168.

In Metcalf on Contracts, pages 7-9, the general doctrine is laid ⁴⁸ down that: "If the failure to perform the express contract be intentional, it is such bad faith that he can recover nothing": See, also, *Nelichka v. Esterly*, 29 Minn. 146, 12 N. W. 457.

For these reasons we are of opinion that the rulings were wrong; and the entry must be exceptions sustained.

Recovery upon a Quantum Meruit under special contracts is discussed in the monographic note to *Hayward v. Leonard*, 19 Am. Dec. 272-282. And the question of when complete performance is essential to a cause of action *ex contractu* is discussed in the monographic note to *Huyett & Smith Co. v. Chicago Edison Co.*, 59 Am. St. Rep. 277-295. It is said in *Walsh v. Fisher*, 102 Wis. 172, 72 Am. St. Rep. 865, that an employé working under an entire contract who voluntarily abandons his work before the end of the term without a valid excuse cannot recover for such services as he has rendered.

ROBERTSON v. BOSTON AND NORTHERN STREET RAILWAY COMPANY.

[190 Mass. 108, 76 N. E. 513.]

APPEAL AND ERROR—Instructions Presented After Close of Arguments.—Under rule 48 of the supreme court the presiding judge may, if he so elects, receive and pass upon instructions presented after the closing argument, and allow an exception to the party aggrieved by the giving or refusing of them. (p. 315.)

STREET-CARS, Passengers on, Persons Who are not.—One who entered a street-car, erroneously supposing it to be going to his destination, and who, on the conductor calling out that the car went to the stables only, tried to alight and was injured by its sudden starting, is not a passenger, because he had not been accepted as such at the time of the accident and had abandoned his intention of becoming a passenger, and he cannot maintain an action against the corporation operating the car if it has exercised ordinary care. (p. 316.)

J. C. Woodman and C. Toye, for the plaintiff.

E. P. Saltonstall and S. H. E. Freund, for the defendant

¹⁰⁸ MORTON, J. The plaintiff, with some companions, boarded in Revere at half-past 11 in the evening of April 20,

1902, a car belonging to the defendant, thinking that it was the proper car to take him to his home. The car had stopped at a stopping place upon a signal from another person, meaning, as we construe the exceptions, some other person who wished to alight. After the plaintiff had boarded the car and taken a seat the conductor called out, "This car goes to the stables only," in consequence of which, after several of the plaintiff's companions had left the car, he attempted to get out, and, as he was doing so, the car suddenly started and threw him, causing the injuries complained of. The stables, if that is material, were in the direction in which the plaintiff was going.

¹⁰⁹ The plaintiff alleged in his declaration that he "boarded one of said company's cars in said town with the intent of becoming a passenger; that while he was in the act of alighting . . . and in the exercise of due care, he was thrown to the street, in consequence of the sudden starting of the car," etc.

The judge instructed the jury "that the defendant owed to the plaintiff the duty of ordinary care only, and that he had not the rights of a passenger, as he had not claimed in his declaration that he was a passenger." At the conclusion of the charge the counsel for the plaintiff handed to the judge for the first time a written request that the jury be instructed that, if they found that the plaintiff boarded the car intending to become a passenger, then the defendant was bound to exercise the same degree of care toward him as toward a passenger. The judge declined to instruct the jury as thus requested, and saved the plaintiff's exception thereto, understanding that the whole question as to the degree of care was raised by and saved to the plaintiff. Thereupon the defendant excepted to the giving by the presiding judge of an exception to the plaintiff after the arguments and charge had been completed. There was a verdict for the defendant and the case is here on the plaintiff's exceptions to the refusal of the judge to instruct the jury as above requested.

The defendant objects that under Rule 48 of the superior court the exceptions are not properly here because the request was not made before the closing arguments. But there is nothing in that rule to prevent the presiding judge from receiving and passing, if he so elects, upon requests for instructions presented for the first time after the closing arguments and allowing an exception to the party aggrieved by the giving or refusing of them. Receiving requests for instruc-

tions and giving or refusing them and allowing the aggrieved party an exception is in effect giving the special leave to present them that is provided for in the rule. The rule does not mean that leave must be obtained to present requests later, but the requests presented later cannot be entertained without the leave of the judge.

Upon the undisputed facts the plaintiff had not been accepted by the defendant as a passenger at the time of the accident, and had himself abandoned the intention of becoming one upon hearing ¹¹⁰ the announcement by the conductor. The judge therefore properly instructed the jury that the defendant was bound to exercise ordinary care only: See *Webster v. Fitchburg R.*, 161 Mass. 298, 37 N. E. 165, 24 L. R. A. 521; *Jones v. Boston etc. R. R.*, 163 Mass. 245, 39 N. E. 1019.

Exceptions overruled.

The Question of Who are Passengers on street railways is discussed in the recent note to Duchemin v. Boston etc. Ry. Co., 104 Am. St. Rep. 584-589. Who are passengers on railways other than street railways is considered in the note to *Illinois Cent. R. R. Co. v. O'Keefe*, 61 Am. St. Rep. 75-104.

O'KEEFFE v. CITY OF SOMERVILLE.

[190 Mass. 110, 76 N. E. 457.]

TRADING STAMPS, Excise Tax on Business Conducted by.—A statute undertaking to levy an excise tax on the business of selling, giving, or delivering trading stamps, checks, coupons, or similar devices in connection with the sale of articles is unconstitutional. The right to transact business in this manner is not a commodity within the meaning of the provision of the state constitution authorizing taxes to be levied on commodities. (pp. 319, 320.)

J. H. Jones, R. M. Morse and P. F. Hall, for the plaintiff.

F. W. Kaan and R. E. Joslin, for the defendant.

¹¹⁰ KNOWLTON, C. J. This is an action of contract to recover the amount of a tax levied upon the plaintiff's business under the Statutes of 1904, chapter 403, and paid to the defendant under protest. This statute is entitled, "An act to impose an excise tax on the business of selling, giving or delivering

trading stamps, checks, coupons or similar devices in connection with the sale of articles." The first section is as follows: "Every person, firm or corporation selling, giving or delivering trading stamps, checks, coupons or similar devices, in connection with the sale of articles, entitling the holders to receive articles other than the articles so sold, shall pay an excise tax for carrying on such business equivalent to three per cent of the gross receipts by such person, firm or corporation from the sale of the articles so sold and from the trading stamps, checks, coupons or similar devices sold, given or delivered in connection therewith." The second section requires returns to be made semi-annually by persons carrying on the ¹¹¹ business mentioned in section 1, showing their receipts from sales, and provides for the collection of the prescribed tax by the collector of taxes, upon a warrant issued by the town treasurer. Section 3 prescribes a penalty for a failure to make the returns required.

In the superior court the case was submitted upon an agreed statement of facts with exhibits annexed. The presiding judge found for the defendant, and reported the case for determination by this court.

Upon the stipulation of the parties and the report of the judge, the sole question presented is whether this statute is valid. The plaintiff contends that it is unconstitutional, and if his contention is correct, he is entitled to recover. Plainly, it cannot stand under the first part of chapter 1, section 1, article 4 of the constitution of Massachusetts, which gives the legislature power to "impose and levy proportional and reasonable assessments, rates and taxes," etc., for such taxes are assessed upon property, and they must be proportional as well as reasonable. The defendant's contention is that the tax is valid under the provision, in the same article, which gives the legislature authority "to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise and commodities whatsoever brought into, produced, manufactured, or being within the same," etc. It is conceded that a tax under this statute is not a tax upon goods, wares or merchandise. The first and principal question before us is whether the right to conduct the business in the manner described in the first section is a commodity within the meaning of the constitution.

The word "commodities," as used in this article, was considered in *Portland Bank v. Apthorp*, 12 Mass. 252, and was

given a very broad meaning, which was derived by the court in part from the early practice of the legislature in imposing excise duties and customs upon various articles of merchandise, and upon certain kinds of business: See Stats. 1781, cc. 17, 33; Stats. 1782, c. 33; Stats. 1783, c. 12; Stats. 1789, c. 48. In some of the later cases similar language has been used, but in others the court seems to have held that the statement, in reference to the taxation of the business of an auctioneer, or an attorney, or a tavern-keeper, or a retailer of spirituous liquors, that the ¹¹² legislature "may impose the same conditions upon every other employment or handicraft," is too broad. In *Gleason v. McKay*, 134 Mass. 419, it was held that a statute, imposing an excise tax upon partnerships and similar associations "in which the beneficial interest is held in shares which are assignable without consent of the other associates specifically authorizing such transfer," was unconstitutional. In giving the opinion of the court, Chief Justice Morton said: "This imposition is clearly not in the nature of a license fee, but is an excise upon a franchise or privilege. The right to levy excises upon franchises has never been extended further than to corporate franchises specially granted by the government, or enjoyed and exercised by its permission. . . . We do not see how this peculiar feature can be called a commodity, subject to a special excise, any more than the agreement of copartnership itself, or any clause or part of it, or any other agreement, right or mode of transacting any business can be called a commodity, and so liable to taxation at the will of the legislature. If this tax can be upheld, it seems to us that the necessary result will be that the legislature has the power to select any business, occupation or calling carried on, or any natural right enjoyed, under the protection of our laws, and impose upon it at its will a special tax or excise. This would be extending the meaning of the word 'commodities' beyond any reasonable limits." In *Minot v. Winthrop*, 162 Mass. 113, 38 N. E. 512, 26 L. R. A. 259, this court decided that the right or privilege of transmitting property to one's heirs, legatees or devisees in succession after one's death is a commodity, within the meaning of the constitution, and so may be made the subject of an excise tax. Chief Justice Field said in the opinion: "The language of the constitution of Massachusetts is general, and may be held to authorize the laying of excises upon all such gainful employments and privileges as are

created or may be regulated by law, and commonly have been considered legitimate subjects of taxation in other states and countries."

It is not necessary in the present case to determine the meaning of the word "commodities," in reference to every possible application of it, but we are of opinion that it is not broad enough to include every occupation which one may follow, in the exercise of a natural right, without aid from the government, ¹¹³ and without affecting the rights or interests of others in such a way as properly to call for governmental regulation. Whatever may be done by the Congress of the United States under its general power to levy excise taxes (see *Thomas v. United States*, 192 U. S. 363, 24 Sup. Ct. Rep. 305, 49 L. ed. 481), we are of opinion that, under the limitation to commodities, the general court of Massachusetts cannot levy an excise tax upon the business of a husbandman or an ordinary mechanic. If this is not the necessary effect of the decision in *Gleason v. McKay*, 134 Mass. 419, it certainly is, intimated by the language of the court in the opinion.

In the statute before us the selling or giving of trading stamps in connection with the sale of articles can hardly be considered a business in itself; but the business which the statute seeks to reach is the selling of articles under an arrangement to deliver stamps as a part of the sale, or as an accompaniment of it. The statute includes sales of articles of every kind, and it describes the delivery of stamps in terms that include deliveries which, under the decisions of this court, are entirely unobjectionable in law: *Commonwealth v. Sisson*, 178 Mass. 578, 60 N. E. 385; *Commonwealth v. Emerson*, 165 Mass. 146, 42 N. E. 559. Such deliveries have generally been considered permissible in connection with the sale of articles, in the exercise of a common right, and many cases have been decided which invalidate statutes or ordinances intended to prevent such deliveries: *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; *People v. Zimmerman*, 102 App. Div. (N. Y.) 103, 92 N. Y. Supp. 497; *Ex parte McKenna*, 126 Cal. 429, 58 Pac. 916; *State v. Dalton*, 22 R. I. 77, 84 Am. St. Rep. 818, 46 Atl. 234, 48 L. R. A. 775; *Long v. State*, 74 Md. 565, 28 Am. St. Rep. 268, 22 Atl. 4, 12 L. R. A. 425; *Young v. Commonwealth*, 101 Va. 853, 56 Atl. 983; *State v. Shugart*, 138 Ala. 86, 10 Am. St.

Rep. 17, 35 South. 28; State v. Dodge, 76 Vt. 197; Winton v. Beeson, 135 N. C. 271, 47 S. E. 457, 65 L. R. A. 167.

Even if the legislature might constitutionally impose an excise tax upon the business of selling articles in the usual way, it has not attempted to do so, and this statute, if it were construed in reference to the general business of selling alone, would be unreasonable and unconstitutional, because it would impose a tax upon some vendors and not upon others. We are therefore brought to the question whether the peculiar way of selling, to which the statute relates, involves a material difference in the nature of the business such as to warrant the imposition of an excise tax on that account. The only difference referred to is ¹¹⁴ the giving or delivering, as a part of the sale or in connection with it, of a stamp, or other similar device, which represents an additional right of property. Because this is entirely legitimate (see cases above cited) the attempt to tax it, as a peculiar kind of sale, is "a discrimination founded upon an immaterial fact," which renders such a statute invalid: *Minot v. Winthrop*, 162 Mass. 113, 38 N. E. 512, 26 L. R. A. 259. Taking the acts referred to in the broad terms of the description in the statute, they are not dependent for their legality upon the legislative will, nor do they call for legislative regulation. They are performed in the exercise of a natural right, and are not in any sense rights or privileges conferred by law.

If these stamps were used in such a way as to constitute a lottery or game of chance, the use would be punishable. But this statute purports to deal with such methods of sale as appeared in *Commonwealth v. Sisson*, 178 Mass. 578, 60 N. E. 385, and in other cases above cited.

One of the reasons why these methods are allowable is found in the familiar principle that constitutional liberty means "the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation." The restrictions upon conduct which may be imposed in the exercise of the police power to include everything that may be necessary in the interest of the public health, the public safety or the public morals, and they include nothing more. These doctrines have often been discussed and elaborated, and it is unnecessary to consider them at length in this case. In applying them to the business mentioned in this statute, no reason appears for the imposition of an excise tax upon the

business of selling articles with an accompaniment of stamps which entitle the vendee to other property.

Judgment for the plaintiff.

The Constitutionality of Statutes intended to suppress the trading stamp business is denied in *City Council v. Kelly*, 142 Ala. 552, 110 Am. St. Rep. 43; *State v. Hawkins*, 95 Md. 133, 93 Am. St. Rep. 328; *State v. Dalton*, 22 R. I. 77, 84 Am. St. Rep. 818.

McISAAC v. ADAMS.

[190 Mass. 117, 76 N. E. 654.]

INFANT'S LIABILITY for Attorneys' Fees.—An infant is not liable to an attorney at law who, at the suggestion of the former's relatives, acts for him in the settlement of the estate of a deceased person, but is not employed either by the infant or the latter's guardian. (p. 322.)

INFANTS, Necessaries for, What are not.—The services of an attorney at law not employed by a guardian, in connection with the settlement of an estate in which the infant is interested as a legatee, do not come within the term "necessaries" as used in reference to the liability of minors. (pp. 322, 323.)

J. R. Murphy, for the plaintiff.

H. W. Hardy, for the defendant.

¹¹⁷ KNOWLTON, C. J. The plaintiff is an attorney at law, and he brings this action against the defendant, a minor, to recover on a quantum meruit for professional services. The defendant is a grand-nephew of Julius Adams, who died unmarried and without issue, leaving a will by which he disinherited his brother Durward Adams, the grandfather of the defendant. The plaintiff was employed by Durward Adams and others interested in ¹¹⁸ the estate of Julius Adams, and he appeared for them in the probate court, and afterward in the supreme court, and rendered services in these courts, and in making a compromise by which there was a modification of the will, which was adopted in the settlement of the estate. He also assumed to represent the defendant and to render services to him as well as the others. It is not contended that he was employed by the defendant in person, for he testified at the trial that he had never seen the defendant. During a considerable part of this time the defendant had a probate

guardian, and for a while he had also a guardian ad litem. The plaintiff acted independently of the guardian ad litem, and, if we are to consider facts which appear in *Elder v. Adams*, 180 Mass. 303, 62 N. E. 373, to which the plaintiff referred in his testimony, it would seem that during a part of the time he acted adversely to this guardian. The plaintiff testified that the probate guardian, who is the grandmother of the defendant, employed him for herself and for her son Reginald Adams, of whom she was guardian, and who became twenty-one years of age about that time, and employed the plaintiff for himself, and that he was acting generally for different members of the family, and represented the whole family; but he did not recall any conversation or instructions in regard to the defendant. The presiding justice rightly found that the probate guardian made no contract to bind herself or the ward's estate for services to the ward. The plaintiff is, therefore, in the position of a volunteer, acting at the suggestion of relatives of the defendant. In such cases, ordinarily, there can be no recovery: *Jones v. Woods*, 76 Pa. St. 408; *Westmoreland v. Martin*, 24 S. C. 238.

In the aspect of the case most favorable to the plaintiff, he has no standing unless the services were necessities. The plaintiff's testimony was the only evidence introduced at the trial, and we are of opinion that there is nothing in it which warrants the finding in his favor. The services were rendered in connection with the settlement of an estate, in which the defendant's only interest was as a legatee who would receive a not very large sum if the will should be allowed, or as a descendant of his grandfather who would take as an heir at law if the will should be set aside. Protection of such an interest of a minor ¹¹⁹ does not come within the term "necessaries," as used in reference to the liability of minors. Ordinary rights of property are to be protected by a guardian, and not left to the care of the minor himself, or to the irresponsible action of third persons: Rev. Laws, c. 145, sec. 25. When proceedings affecting the minor as a party are going on in a court, a guardian ad litem is appointed: Rev. Laws, c. 145, sec. 23. A judgment against a minor, without a probate guardian or a guardian ad litem to represent him, is voidable upon a writ of error: *Johnson v. Waterhouse*, 152

Mass. 585, 23 Am. St. Rep. 458, 26 N. E. 234, 11 L. R. A. 440.

We can conceive of conditions such that a minor may be bound to pay a reasonable compensation for the services of an attorney, on the ground that they were necessary; but ordinarily this liability is limited to cases where the services are rendered in connection with the minor's personal relief, protection or liberty. The cases of *Crafts v. Carr*, 24 R. I. 397, 96 Am. St. Rep. 721, 53 Atl. 275, 60 L. R. A. 128, *Barker v. Hibbard*, 54 N. H. 539, 20 Am. Rep. 160, *Munson v. Washband*, 31 Conn. 303, 83 Am. Dec. 151, and *Askey v. Williams*, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176, are illustrations of the application of this rule. In the first the services were rendered in an action brought by the next friend of a female minor to recover for an indecent assault upon her. In the second the plaintiff had been employed to defend the defendant upon a charge of being the father of a bastard. In the third the defendant had been seduced, and afterward had been turned out of doors by her father, and the plaintiff had brought an action for the defendant against the seducer. In the fourth the services were rendered in defending a minor upon an indictment for stealing. These cases recognize the general doctrine that legal services rendered to a minor in regard to ordinary rights of property are not necessities: See, also, as to this last proposition, *Phelps v. Worcester*, 11 N. H. 51; *Thrall v. Wright*, 38 Vt. 494; *Conant v. Burnham*, 133 Mass. 503, 43 Am. Rep. 532; *Tupper v. Cadwell*, 12 Met. 559, 46 Am. Dec. 704.

With the protection which the law gives minors in regard to their property, through its provisions for the appointment of guardians, it cannot be held that services of an attorney, without employment by a guardian, are necessary to a minor in the settlement of the estate of a deceased person in which he is interested.

Exceptions sustained.

Attorney Fees may be recovered against an infant as necessities when the services rendered by counsel affect the infant's personal relief, protection or liberty, or when they are necessary and financially beneficial to the infant's estate: *Crafts v. Carr*, 24 R. I. 397, 96 Am. St. Rep. 721, and monographic note thereto. The liability of a husband for legal services rendered his wife is discussed in the monographic note to *Wanamaker v. Weaver*, 98 Am. St. Rep. 636-639.

HASKELL v. BOSTON DISTRICT MESSENGER CO.

[190 Mass. 189, 76 N. E. 215.]

A CORPORATION Carrying on a General Messenger Business is not a Common Carrier, where it merely furnishes boys, on request, to carry messages or perform such other services as the persons to whom they are sent may require of them. (p. 326.)

CORPORATIONS Engaged in Furnishing Messengers, Duties and Liabilities of.—A corporation engaged in the general messenger business impliedly contracts that the messengers furnished by it are suitable and proper persons for the performance of the ordinary duties of messengers, so far as the exercise of ordinary care in the selection and employment of them will enable it to procure such persons, and for a failure to take due precautions in these particulars the corporation may be held liable, either for negligence or upon an implied contract, to any person who suffers from the misconduct of the messenger whom it has furnished. (p. 326.)

MESSENGER BOY Corporations, Liability of for Money Intrusted to Messenger.—A corporation furnishing messenger boys is not liable for moneys intrusted to them by the persons to whom they are furnished. (pp. 326, 327.)

EVIDENCE—Knowledge of Messenger Corporation.—Evidence is not admissible in an action against a messenger service corporation to show that it and its agents know that the messengers furnished by them to customers were sometimes intrusted by the latter with money and other property. (p. 327.)

Action against the defendant corporation to recover on account of the loss of money intrusted by the plaintiff to a messenger furnished him by the defendant. At the trial evidence offered on behalf of the plaintiff for the purpose of proving that the defendant and its officers knew that persons to whom messengers were furnished sometimes intrusted them with money and other property was excluded, and the plaintiff excepted. The jury was instructed to return a verdict for the defendant, and the plaintiff alleged exceptions.

W. A. Abbott, for the plaintiff.

R. F. Sturgis, for the defendant.

¹⁹¹ **KNOWLTON, C. J.** The defendant is a corporation, organized under the laws of New Hampshire for the purpose of "carrying on a general messenger business, leasing, operating, erecting and maintaining wires and fixtures for call-boxes, telegraphs and other things relating to and useful in the receiving and transmitting and delivery of messages." For many years it has had a general office and branch offices

in the city of Boston, and has been engaged in the business of furnishing messengers for hire. The ordinary method of doing the business has been for the company to send a messenger in response to a call, and to send with him a printed slip, with blank spaces for filling in the "Time started," "Name," "Address," "Messenger occupied" (Time), "Expenses" (Paid), "Total," "Messenger detained" (Minutes), "By" (Name of person employing messenger). There were other blanks to be filled, to show where the messenger was sent, by whom the message was received, where the answer was delivered, and by whom it was received. An advertising pamphlet issued by the defendant gave the rates of charges for a messenger ¹⁹² between specified points in all parts of Boston, and also rates by the hour. At the bottom of one of its pages was a printed statement, "We employ bright, intelligent boys who are thoroughly experienced in messenger work." The rates stated are all without reference to the nature or importance of the work in which the particular messenger may be employed. The pamphlet contained numerous other advertising statements, all of which implied that the business done by the company was only in furnishing messengers for the service of others, except that at the bottom of one page there was this statement: "We deliver addressed circular work, bills, monthly statements, catalogues, calendars, etc. Get our prices." It also appeared that for several years, shortly before Christmas, the defendant had distributed a card saying that it made a specialty of delivering Christmas presents. In carrying on its business the defendant employed boys fifteen or sixteen years of age.

The plaintiff signaled to the defendant for a messenger by means of a call-box, and delivered to the messenger sent in response to his call a receipted bill for rent, amounting to fifty-eight dollars and thirty-three cents, and sent him to a tenant to collect it. The messenger collected the money and failed to return it. The question is whether there was any evidence at the trial which would warrant the jury in finding for the plaintiff for the amount of this money which he seeks to recover.

The plaintiff contends that the defendant acted as a common carrier in receiving the bill and undertaking to bring back the money. We find nothing in the evidence tending to show this. It undertook to furnish messengers to be used by its employers in any way in which messengers could properly

be employed. If special and peculiar service was wanted special arrangements were to be made for it. In the ordinary conduct of its business the defendant did not assume any control of the work in which the messengers were to be employed, and usually had no knowledge of it until after it was completed. Even then it had no knowledge of the nature of the message delivered, or the particulars of the service. The employer was left to direct the messenger, to determine what he should do and how he should do it, subject only to an implied understanding that he should not be called upon to render service of a different kind from ¹⁹³ that which can properly be performed by messengers. In this service the messenger became, for the time, a servant of the employer, while he was still in the general service of the defendant: *Linnehan v. Rollins*, 137 Mass. 123, 50 Am. Rep. 287; *Hasty v. Sears*, 157 Mass. 123, 34 Am. St. Rep. 267, 31 N. E. 759; *Samuelian v. American Tool etc. Co.*, 168 Mass. 12, 46 N. E. 98; *Delory v. Blodgett*, 185 Mass. 126, 102 Am. St. Rep. 328, 69 N. E. 1078, 64 L. R. A. 114.

It was shown that messengers had often been intrusted with money and property by those who called them. So far as appears, this was under the general arrangement already stated, which gave the defendant no knowledge nor any responsibility in regard to the way in which the messenger was used. The evidence tended to show that some of the agents of the company, and perhaps the general manager of the company, knew that sometimes messengers were so used. But this creates no liability for the money or property, so long as the messengers were furnished only to be used and controlled by the employer as he might choose.

What is the implied contract or duty of the defendant growing out of this kind of business? Does the defendant become a common carrier and insurer of everything intrusted to the messengers? It seems quite plain that it does not. It impliedly contracts that the messengers whom it furnishes are suitable and proper persons for the performance of the ordinary duties of messengers, so far as the exercise of ordinary care in the selection and employment of them will enable it to procure such persons. Its duty is not very unlike that of a stable-keeper who furnishes a horse and carriage for the use of a hirer. Because, for the proper performance of their duties, these messengers should be worthy of confidence, ordinary care in the selection of them requires that investiga-

tion should be made and precautions be taken to insure the exclusion of all unfit persons from this employment, and to secure persons of such mental and moral qualifications as render them trustworthy. For a failure to take due precautions in these particulars the defendant may be held liable, either for negligence or upon an implied contract, to any person who suffers loss from the misconduct of a messenger whom it has furnished. In the present case there was no evidence of negligence of the defendant in this particular.

If, in the delivery of Christmas presents, or of bills, statements, ¹⁹⁴ catalogues, etc., the defendant becomes a common carrier, it is liable as such. But that can be only by an arrangement different from that made with this plaintiff.

The exceptions in regard to the exclusion of evidence must be overruled. None of the testimony excluded had any tendency to show that the defendant became liable as a common carrier for money or property intrusted to messengers under ordinary arrangements like that made with the plaintiff. Mere knowledge that employers sometimes intrusted money to them without any contract other than the usual one, under which the messenger is furnished to be used by the employer in the ordinary way, would not make the defendant liable for loss of money through his dishonesty, unless there was a failure to use proper care in the selection of the messengers.

Exceptions overruled.

If a Corporation Engaged in Supplying Messenger Boys to perform various services, on being asked for a boy competent to drive a pair of horses to a stable, sends a boy who undertakes to drive them there, but through whose negligence or want of skill they run away, the corporation is answerable for the injury occasioned: American Dist. Tel. Co. v. Walker, 72 Md. 454, 20 Am. St. Rep. 479.

COSTELO v. BARNARD.

[190 Mass. 260, 76 N. E. 599.]

NEGOTIABLE INSTRUMENT, Forger of, Whether Liable to Third Person for Negligence.—One who, with intent to deceive any person to whom it may come, writes out what purports to be an instrument payable to bearer and to be signed by the proper officers of a municipal corporation, is not answerable for negligence in letting such writing go out of his possession to another from whom the plaintiff in the action, in the exercise of reasonable diligence, purchased the writing believing it to be genuine. (p. 329.)

Action of tort, the complaint containing three counts. The jury found in favor of the defendant on the first count, and the trial court sustained a demurrer to the other two. Plaintiff appealed.

E. C. Bates, for the plaintiff.

C. F. Choate, Jr., for the defendant.

263 MORTON, J. This case comes here on appeal by the plaintiff from an order sustaining a demurrer to the second and third counts of the declaration and entering judgment for the defendant. The action is one of tort.

The second count alleges in substance that the defendant, intending to deceive any person to whom it might come, made a written instrument in imitation of, and purporting to be, a negotiable promissory note of the town of Watertown, and unlawfully signed thereto the names of the persons holding the offices of selectmen and treasurer, and, knowing that any person to whom such instrument might come would be deceived thereby though using reasonable diligence, carelessly permitted it to pass from his custody and control, and the plaintiff, being in the exercise of due and reasonable care and diligence, took the same before maturity for value.

264 The third count omits the allegations that the instrument was made by the defendant with the intent to deceive and defraud any person to whom it might come, and alleges that the defendant knew that it was worthless. Otherwise the allegations are substantially the same as those contained in the second count. A copy of the instrument is incorporated into the second count, and annexed to the third count, and represents an instrument payable to bearer.

We think that the ruling was right. It is manifest that there was nothing harmful in the instrument itself, and the defendant, therefore, owed the plaintiff no duty to prevent its escape or loss. It became harmful to the plaintiff only by the act of some third person which could not be reasonably anticipated, and which the defendant was not therefore required to guard against. His knowledge that the note was worthless and his execution of it with the intent to defraud anyone to whom it might come do not without anything more render him liable to the plaintiff. In order to render him liable to the plaintiff some act of commission or some representation or misfeasance on his part which caused the plaintiff to take the note as genuine is necessary. Mere negligence on his part, though accompanied by a general fraudulent intent in executing the note, is not enough to render him liable; See *Arnold v. Cheque Bank*, L. R. 1 C. P. D. 578. It is manifest that no matter how much the defendant may have intended to deceive anyone into whose hands the instrument might come, no wrong was done to anyone and no possible right of action accrued to anyone, so long as the note remained in his own possession and he did nothing to give it currency.

Judgment affirmed.

Negotiable Instruments Never Delivered, but obtained and put into circulation without the knowledge of the maker, are generally considered unenforceable by bona fide holders: See the monographic notes to *Bedell v. Herring*, 11 Am. St. Rep. 313-317; *Willard v. Nelson*, 37 Am. St. Rep. 458-460. A negotiable security stolen from the maker before it has become effective by delivery cannot be enforced by any subsequent innocent holder: *Salley v. Terrill*, 95 Me. 553, 85 Am. St. Rep. 433.

WESTON v. BOSTON AND MAINE RAILROAD.

[190 Mass. 298, 76 N. E. 1050.]

DAMAGES for Breach of Contract as Affected by the Knowledge of the Parties.—It is always competent to show knowledge by the parties to a written contract of the circumstances on the basis of which it was made, for the purpose of showing what was within the contemplation of the parties at the time of making it, and such knowledge is competent on the question of what damages were in contemplation of the parties to it, whether a party seeks to recover ordinary or special damages. (p. 331.)

DAMAGES, Value of the Use of Property as an Element of. Where plaintiff is deprived of the use of property valuable for use, and the property is such that it cannot be replaced, the measure of damages is what such property is ordinarily worth for use. (p. 331.)

CARRIER, Damages Recoverable for a Failure to Deliver Theatrical Scenery.—If a carrier, on contracting to deliver theatrical scenery, is notified that it is to be used for certain exhibitions, and that the expenses of the owner in connection with such exhibitions is large, the carrier, on proof of negligent delay in delivery, is liable for the ordinary gross earnings of the exhibition the giving of which was prevented, less the amount of expenses which the inability to use the property saved the owner. (p. 333.)

Action brought for negligent delay in forwarding and delivering scenery and other theatrical property used in connection with an amusement enterprise called the Galatea Exhibit. The plaintiff's recovery was limited in the trial court to four dollars, and the plaintiff alleged exceptions.

J. C. Sanborn, for the plaintiff.

H. F. Hurlburt, for the defendant.

298 LORING, J. This case presents in different forms but one question, namely: To what damages is the owner of a theatrical exhibit entitled in case of a negligent delay in the transportation of his scenery and other theatrical properties by a carrier who had full knowledge that they were to be used in an exhibition previously widely advertised at the place of destination, and that the owner was under an expense of three hundred or four hundred dollars a week in that connection? **299** The judge ruled that the plaintiff was limited to four dollars, "the actual money lost or expended in looking up his goods."

The first ground on which the defendant has undertaken to support this ruling is that the shipping receipt or the shipping

receipt and the shipping order constitute a written contract between the parties by which, and by which alone, their rights are to be determined.

No authorities have been cited for this contention, and we conceive that none can be found to support it. We assume for the purposes of this decision that this shipping receipt, or, at any rate, the shipping order and this receipt taken together, constitute a written contract. But it is always competent to show knowledge by the contracting parties to a written contract of the circumstances on the basis of which it is made, for the purpose of showing what was within the contemplation of the parties in making it. Knowledge of the circumstances which form the basis on which the contract is made is competent on the question of what damages were in the contemplation of the parties to it, whether a party seeks to recover ordinary or special damages. That has been laid down in all the cases on the subject: See for example, *Scott v. Boston etc. Steamship Co.*, 106 Mass. 468; *Harvey v. Connecticut & Passumpsic Rivers R. R.*, 124 Mass. 421, 26 Am. Rep. 673; *Mather v. American Express Co.*, 138 Mass. 55, 52 Am. Rep. 258; *Lonergan v. Waldo*, 179 Mass. 135, 88 Am. St. Rep. 365, 60 N. E. 479; *Hadley v. Baxendale*, 9 Ex. 341; *Horne v. Midland Ry.*, L. R. 7 C. P. 583, L. R. 8 C. P. 131; *Simpson v. London etc. Ry.*, 1 Q. B. D. 274; *Grebert Borgnis v. Nugent*, 15 Q. B. D. 85.

The next ground on which the defendant has sought to support the ruling is on the authority of *Waite v. Gilbert*, 10 Cush. 177, *Harvey v. Connecticut & Passumpsic Rivers R. R.*, 124 Mass. 421, 26 Am. Rep. 673, and *Swift River Co. v. Fitchburg R. R.*, 169 Mass. 326, 61 Am. St. Rep. 288, 47 N. E. 1015.

But the plaintiffs in those cases were confined to the damages to which the plaintiff was confined in the case at bar, for want of proof of the necessary notice, while in the case at bar proof of the necessary notice was plenary.

Where a plaintiff is deprived of the use of property valuable for use and the property is something that can be replaced, his ³⁰⁰ damages are the expenses of hiring the property which he is forced to substitute for it.

But if the property is such that it cannot be replaced, the measure of damages is what such property is ordinarily worth for use: See *Fletcher v. Tayleur*, 17 Com. B. 21; *Cory v.*

Thames Ironworks etc. Co., L. R. 3 Q. B. 181; *Ex parte Cambrian Steam Packet Co.*, L. R. 6 Eq. 396, L. R. 4 Ch. 112.

There are no cases in this commonwealth very near to the one under discussion. Perhaps the nearest are the cases in which it is held in an action of trover that where the property converted has no market value, but has a special value to the plaintiff, he can recover that value: *Stickney v. Allen*, 10 Gray, 352; *Green v. Boston etc. R. R.*, 128 Mass. 221, 35 Am. Rep. 370; *Mather v. American Express Co.*, 138 Mass. 55, 52 Am. Rep. 258. See, also, in this connection, *Wall v. Platt*, 169 Mass. 398, 48 N. E. 270.

Where the article of the use of which the plaintiff has been wrongfully deprived cannot be replaced and the plaintiff recovers for being deprived of the use of what such property ordinarily earns, he recovers profits in one sense of the word, but not in that sense of the word in which it is used when it is said that profits cannot be recovered because too remote. What is meant by that is that the plaintiff cannot recover for the loss of special profits, such as a particular bargain which he has lost. For a good statement of the distinction, see *Masterton v. Mayor of Brooklyn*, 7 Hill, 61, 42 Am. Dec. 38.

There are cases where contracts are made with reference to such special profits, and where such special profits can be recovered. Such profits were recovered in *Grebert Borgnis v. Nugent*, 15 Q. B. D. 85; and it was such special profits that were unsuccessfully sought for in *Waite v. Gilbert*, 10 Cush. 177, *Harvey v. Connecticut & Passumpsic Rivers R. R.*, 124 Mass. 421, 26 Am. Rep. 673, *Swift River Co. v. Fitchburg R. R.*, 169 Mass. 326, 61 Am. St. Rep. 288, 47 N. E. 1015, *Hadley v. Baxendale*, 9 Ex. 341, and *Horne v. Midland Ry.*, L. R. 7 C. P. 583, L. R. 8 C. P. 131. The difference between those cases and the case at bar is this: Delay in the delivery of scenery and the other properties of a traveling theatrical company ordinarily means no performance by the company. But delay in the transportation of the broken shaft of a mill, for ³⁰¹ example, as in *Hadley v. Baxendale*, 9 Ex. 341, does not ordinarily mean that the mill will stop.

We construe the statement of the plaintiff's counsel in the case at bar "that he claimed no loss of profits and no loss in the market value of the goods by reason of the delay in the delivery of the goods, but that he did claim loss in the rental value or the loss of the use of the property," to be a state-

ment that he did not ask for loss of special profits, but for loss of the ordinary earnings of the property here in question.

The case at bar is not a case of special profit or special damage, but a case of the ordinary damages consequent on a delay in the delivery of scenery and other properties of a traveling theatrical company. That a common carrier with notice is liable in such a case is plain from the decision made in *Simpson v. London etc. Ry.*, 1 Q B. D. 274, as to delay in the delivery of samples to be exhibited at a cattle show.

The ordinary damages in case of a delay in the transportation of such property as we have in the case at bar are different from the ordinary damages in case of a delay in the transportation of ordinary merchandise, and for that reason carriers usually put such property in a different classification from that in which ordinary merchandise is put. The question, however, is the ordinary damage from a delay in the transportation of that kind of freight. To get those ordinary damages, notice that the freight to be transported is that kind of freight and that it is to be used at its destination must be given to the carrier; and the damages recoverable are the ordinary earnings of the property in question: See *Cory v. Thames Iron Works etc. Co.*, L. R. 3 Q. B. 181, and *Ex parte Cambrian Steam Packet Co.*, L. R. 6 Eq. 396, L. R. 4 Ch. 112.

The case at bar presents a further question not raised by the facts of the cases last cited. There was evidence here that the plaintiff told the defendant that he was "under a big expense, between three and four hundred dollars a week," in the use of the thing delayed in transportation. In such a case, since the owner has to pay the expenses, or some of the expenses, incident to using the property, he can recover not the ordinary net earnings, but the ordinary gross earnings less such expenses, if any, as the deprivation of the use of the property saved him from.

The concession made by the plaintiff's counsel that he did not ³⁰² ask for special profits saves us from considering the suggestion thrown out in *Lonergan v. Waldo*, 179 Mass. 135, 88 Am. St. Rep. 365, 60 N. E. 479, that it may be that the fact that a carrier cannot refuse to carry goods offered to him for transportation prevents him from being held for special damages or special profits, as to which see *Kelly*, C. B., in

Horne v. Midland Ry., L. R. 8 C. P. 131; Mayne on Damages, 7th ed., 42.

The defendant raised a question as to whether an exception was properly taken to the refusal of the offer to prove the expense the plaintiff was under while waiting for the goods in question. But since, in our opinion, the case must go back for a new trial by reason of his other exceptions, it is not necessary to decide whether that exception was properly saved or not.

The plaintiff is entitled to a new trial on the question of damages.

So ordered.

For Recent Authorities Bearing upon the doctrine of the principal case, see Traywick v. Southern Ry. Co., 71 S. C. 82, 110 Am. St. Rep. 708; American Express Co. v. Jennings, 86 Miss. 329, 109 Am. St. Rep. 708.

COMMONWEALTH v. CALDWELL.

[190 Mass. 355, 76 N. E. 955.]

CONSTRUCTION of the Word "Provisions."—A statute permitting the sale of provisions without a license does not apply to tea or coffee. (p. 334.)

CONSTITUTIONAL LAW, State Regulation of Foreign Commerce, What is.—A statute permitting the sale by peddlers of agricultural products of the United States without a license, but forbidding the unlicensed sale of agricultural products of other countries is unconstitutional, because it amounts to a regulation of foreign commerce. (p. 336.)

H. T. Lummus and C. N. Barney, for the defendant.

W. S. Peters, district attorney, for the commonwealth.

356 KNOWLTON, C. J. The defendant was prosecuted under the Revised Laws, chapter 65, section 16, for peddling tea and coffee without a license. Section 15 of this chapter permits the sale of provisions without a license, and the first question in the case is whether tea and coffee are provisions, within the meaning of this section. We think that they are not. The word "provisions" as here used has been held to mean "food, victuals, fare, provender": Common-

wealth v. Lutton, 157 Mass. 392, 32 N. E. 348; Commonwealth v. Reid, 175 Mass. 325, 16 N. E. 617. Tea and coffee are not used as food, in the form in which they are sold by shopkeepers. They are used to make decoctions, to be taken as a beverage for their agreeable taste or their stimulating effect. In this respect they are not very different from wine and beer, which in many countries are in common use at meals. We are of opinion that they are not included in the term "provisions," in its ordinary sense, or in the meaning of this statute.

The next question is whether the statute is a regulation of commerce, in violation of article 1, section 8, of the constitution of the United States, which provides that: "The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." The statute permits the sale by peddlers of agricultural products of the United States without a license, while it forbids unlicensed sales of agricultural products of other countries. Many agricultural products are articles of commerce, and in this respect there is, in the statute, a discrimination in favor of articles produced in the United States. It has been held many times that such an attempt at discrimination by a state is of no effect: *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Cook v. Pennsylvania*, 97 U. S. 566, 24 L. ed. 1015; *Guy v. Baltimore*, 100 U. S. 434, 25 L. ed. 743; *Brown* ³⁵⁷ v. Maryland, 12 Wheat. 419, 6 L. ed. 678; *Commonwealth v. Petranich*, 183 Mass. 217, 66 N. E. 807; *Higgins v. Three Hundred Casks of Lime*, 130 Mass. 1; *State v. Pratt*, 59 Vt. 590, 9 Atl. 556; *State v. Furbush*, 72 Me. 493. The cases enunciating the general doctrine in the supreme court of the United States are very numerous, and many of them are cited and reviewed by Mr. Justice Gray, in *Emert v. State*, 156 U. S. 296, 15 Sup. Ct. Rep. 367, 39 L. ed. 430. While in many of them the discrimination was against articles coming from other states, the rule in reference to discrimination against articles of foreign production is the same. In *Cook v. Pennsylvania*, 97 U. S. 566, 24 L. ed. 1015, Mr. Justice Miller said: "If a tax assessed by a state injuriously discriminating against the products of a state of the Union is forbidden by the constitution, a similar tax against goods imported from a foreign state is equally forbidden." In *Guy v. Baltimore*, 100 U. S. 434, 25 L. ed. 743, the general rule is stated by Mr. Justice Harlan as follows:

"It must be regarded as settled that no state can, consistently with the federal constitution, impose upon the products of other states, brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other states, more onerous public burdens or taxes than it imposes upon the like products of its own territory." In reference to the contention that the general rule should not apply after the imported goods have been mingled with the general mass of property in the state, this is the statement of Mr. Justice Field, in *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347: "The commercial power continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. That power protects it, even after it has entered the state, from any burdens imposed by reason of its foreign origin." We are of opinion that the discrimination in this statute between agricultural products of the United States and agricultural products of other countries, in reference to the requirement of a license to peddle them, renders the statute unconstitutional in this particular.

Other questions were raised by the defendant in regard to the constitutionality of the statute, some of which, in my opinion, well might be decided at this time. But a majority of the justices do not think it necessary to the decision of this case, nor ³⁵⁸ desirable, that they should now be considered, and we do not consider them.

Whether the unconstitutional part of the statute renders the whole statute invalid or leaves its other provisions in force if there is no other valid objection to them depends upon whether it is so far separable from the rest, and of so little comparative importance, that the legislature presumably would have enacted the other portion without it, if the attention of the legislature had been directed to its unconstitutionality: See *Edwards v. Bruorton*, 184 Mass. 529, 69 N. E. 328; *Commonwealth v. Petranich*, 183 Mass. 217, 66 N. E. 807; *Commonwealth v. Anselvich*, 186 Mass. 376, 104 Am. St. Rep. 590, 71 N. E. 790.

Exceptions sustained.

A Statute or Ordinance permitting all persons to peddle goods manufactured or produced within the state, but prohibiting the same persons from peddling goods of the same character manufactured

or produced in other states, is void as an attempt to regulate interstate commerce: *Sayre Borough v. Phillips*, 148 Pa. St. 482, 33 Am. St. Rep. 842. See, also, *State v. Montgomery*, 94 Me. 192, 80 Am. St. Rep. 386; *Saulsbury v. State*, 43 Tex. Cr. Rep. 90, 96 Am. St. Rep. 837; note to *People v. Wemple*, 27 Am. St. Rep. 561-563.

MORSE v. FRATERNAL ACCIDENT ASSOCIATION OF AMERICA.

[190 Mass. 417, 77 N. E. 491.]

INSURANCE, ACCIDENT, Right to Change Classification After Issuing the Policy.—Under a policy insuring against injury by accident and agreeing to pay the insured a specified sum, except that if injured while engaged in an occupation classified by the association as more hazardous than that he had given, his insurance and weekly indemnity shall be so much only as the premium paid by him will purchase at the rate fixed for such increased hazard, the insurer cannot, by subsequent legislation, cut down the amount which the insured is entitled to recover, though injured while engaged in a different occupation from that in which he was engaged when insured, if the two occupations were at the issuing of the policy in the same classification. (pp. 339, 340.)

INSURANCE, ACCIDENT—Consent to Change of Classification, When not Inferable.—If the insurer, after issuing a policy insuring against accident, notifies the insured of a change of classification greatly lessening the amount of his indemnity, his assent to such change is not to be conclusively inferred where he did not expressly assent, nor forward his policy to have it rewritten as requested, and the dues and assessments paid and required to be paid were the same as before. (p. 340.)

E. J. Whitaker, for the plaintiff.

M. H. Browne and J. M. Browne, for the defendant.

418 **SHELDON, J.** In this action the plaintiff seeks to recover the sum of twelve hundred and fifty dollars on an accident insurance certificate issued to his intestate, Elmer L. Morse, by the defendant. The case comes before us upon the defendant's appeal from a judgment of the superior court in favor of the plaintiff upon an agreed statement of facts.

The intestate took his certificate and became a member of the defendant association on June 15, 1888. He was then a stage-driver, and was insured as a member of class 5, according to the defendant's classification then in force; and by the certificate issued to him by the defendant on that date, the defendant agreed to pay to his executors or administrators the sum of twelve hundred and fifty dollars, in the

event of his death from the injuries insured against, "except that if the insured is injured while engaged temporarily or otherwise in any occupation or exposure classed by this association as more hazardous than that here given, his insurance and weekly indemnity shall only be so much as the premium paid by him will purchase at the rate fixed for such increased hazard." The policy also provided that the certificate-holder should be bound by the rules and regulations of the association.

In May, 1891, the intestate ceased to be a stage-driver and became a passenger brakeman on a railroad. At this time, by the defendant's classification of occupations and risks, a passenger brakeman was included in the same class as a stage-driver. On November 9, 1891, the intestate wrote a letter to the defendant's secretary and treasurer, stating that he had become a passenger brakeman, and inquiring how that would affect his insurance, to which, on the eleventh day of the same month, the secretary and treasurer answered by a letter stating that a passenger brakeman was entitled to the same amount of insurance, twelve hundred and fifty dollars, that the intestate had been holding, with the same weekly indemnity for disabling injuries received in that occupation.

⁴¹⁹ On January 17, 1896, the defendant, at a meeting duly called, adopted a new classification of "occupations and exposures, to be used as the manual or classifications of occupations and exposures of this association for all members now insured or to be hereafter insured in this association." By this new classification passenger brakemen were included in class 8, and the amount of insurance payable to them was reduced to two hundred and fifty dollars. On February 7, 1896, the defendant's secretary and treasurer wrote and mailed to the intestate a letter notifying him of this change, and requesting that his policy be returned to the defendant for rewriting so that it might conform to the new classification. It does not appear by the agreed facts whether the intestate received the letter or not; nor does the statement authorize the court to draw any inferences from the facts stated. The intestate continued to pay the same assessments and dues as before, and these were the same in amount that they had previously been. After the action was brought, the defendant's counsel tendered to the plaintiff's counsel the sum of two hundred

and eighty-seven dollars apparently being the reduced amount of insurance with interest and costs.

The question involved is whether the amount of the intestate's insurance was cut down by the change in the classification made in 1896, so that thereafter he was insured for only two hundred and fifty dollars instead of twelve hundred and fifty dollars, as stated in the policy.

If the original contract had provided that the defendant might make any alteration in its rules, there is no doubt that both the plaintiff and his intestate would have been bound by the change which was made: *Pain v. Société St. Jean Baptiste*, 172 Mass. 319, 70 Am. St. Rep. 287, 52 N. E. 502. On the other hand, if the policy here in question had provided absolutely for the payment of a fixed sum to the plaintiff, without reference to the character of his occupation, there is no doubt that the defendant could not, by such action as it has taken, cut down its liability to a smaller sum: *Newhall v. American Legion of Honor*, 181 Mass. 111, 63 N. E. 1. But this policy is not in terms made subject to any future alteration that the defendant might make in its rules; and, on the other hand, it contains the express stipulation that for any injury occurring while the insured is engaged in any occupation classed by the defendant as more hazardous than that mentioned in the policy, he shall be entitled only to a reduced amount of insurance. ⁴²⁰ The real question, accordingly, is whether this last stipulation shall be taken to refer only to the classification in force at the time of issuing the policy or to include any new classification that may from time to time be adopted by the defendant. Manifestly, the latter construction, if adopted, would, under the language of this policy, leave the plaintiff in a position where his rights could not be enlarged, but might be very greatly diminished, if not wholly taken away, by the mere action of the defendant. The payments to be made by the insured would remain unchanged; but the amounts to be paid by the insurer would be capable of reduction to any extent from time to time. In the case at bar, the change made by the defendant would have the effect to reduce the sum to be paid upon the death of the insured to one-fifth of the amount specified in the policy. On the other hand, if this were the intention of the parties, it is easy to say so in the policy. We do not think that the construction contended for by the defendant would be a reasonable one, though we

are aware that it seems to have prevailed in Pennsylvania in a case which turned largely upon the construction of the charter of the association: *St. Patrick's Male Ben. Soc. v. McVey*, 92 Pa. St. 510. We are of opinion that by the proper construction of this policy the stipulation as to the defendant's classification of occupations and the agreement of the certificate-holder to be bound by the defendant's rules and regulations must be taken to refer to the classification and to the rules in force at the time that the policy was issued.

But the defendant contends that the insured must be taken to have assented to this reduction, because although notified by the association of the change which had been made in the classification and of the effect which this change would have upon his insurance, he made no complaint and expressed no dissatisfaction; and the defendant relies on *Fox v. Masons' Fraternal Acc. Assn.*, 96 Wis. 390, 71 N. W. 363. But there the defendant's letter was written in answer to an inquiry of the insured, and there was no question that he had received it. In this case the agreed facts do not show that he received the notice; and although they do contain enough to warrant the court in drawing such an inference if it were at liberty to do so, ⁴²¹ yet in the absence of any provision to that effect, the court is not at liberty to infer the existence of any further essential facts which are not as matter of law necessarily to be inferred, but is confined to the consideration of the facts to which the parties have agreed: *Mayhew v. Durfee*, 138 Mass. 584; *Collins v. City of Waltham*, 151 Mass. 196, 24 N. E. 327. But even if the plaintiff's intestate had received the notice, we do not think his assent to the action taken could be conclusively inferred. He did not expressly assent to it; he did not forward his policy to have it rewritten, as requested by the notice; the dues and assessments which he afterward paid were the same that he was required to pay under his original agreement. The rights of the defendant were sufficiently protected by the stipulation that it might at any time cancel the policy.

The tender made by the defendant was for an insufficient amount, and we need not consider whether it was otherwise good.

The judgment for the plaintiff for the total amount named in the policy must be affirmed; and it is so ordered.

The Effect of Changes in the By-laws of beneficial associations as against pre-existing members is discussed in the monographic note to Strauss v. Mutual Reserve etc. Assn., 83 Am. St. Rep. 706-720. Members of an association who have stipulated in their contract of membership to comply with the laws of the society then in force or thereafter adopted, are bound by subsequent reasonable amendments to a by-law in force when they became members: Chambers v. Knights of Maccabees, 200 Pa. St. 244, 86 Am. St. Rep. 716. However, the power reserved by an association to make changes in its by-laws warrants only reasonable variances in its contracts with members, and not such as are destructive of vested rights: Wuerfler v. Trustees Grand Grove, 116 Wis. 19, 96 Am. St. Rep. 940. And the contract of membership cannot be impaired by subsequent enactments or change in the by-laws, unless the member, in express terms, has agreed to be bound by such enactments or changes as thereafter may be made: Peterson v. Gibson, 191 Mass. 365, 85 Am. St. Rep. 263. As to the retrospective operation of amendments limiting the occupations which a member may pursue, see Gilmore v. Knights of Columbus, 77 Conn. 58, 107 Am. St. Rep. 17; Langnecker v. Trustees Grand Grove, 111 Wis. 279, 87 Am. St. Rep. 860.

BOTHFELD v. GORDON.

[190 Mass. 567, 77 N. E. 639.]

GUARANTOR OF LEASE, Agreement for Judgment With a Stay of Execution, When does not Release.—If an action is pending against a lessee for unpaid rent and an agreement is entered into between him and his landlord for the entry of judgment by default, with a stay of execution for a time specified, this is not such an extension of the time for payment as releases the guarantor, if the time specified for the stay of execution does not exceed the time which the lessor could have procured by the ordinary course of proceeding in court had he not consented to judgment. (p. 343.)

GUARANTOR OF LEASE, When not Released by a Surrender.—The surrender of the leased premises to the landlord and his acceptance thereof do not release the guarantor not consenting thereto, with respect to rent due, when a default had occurred in the payment of rent entitling the landlord to possession, and the lease was in a form which forbade an assignment. (p. 344.)

Action against Albert L. Gordon as guarantor of the terms of a lease executed by Alvin J. Gordon to the plaintiff. The guaranty was in writing dated May 1, 1899. On October 1, 1902, the plaintiff brought an action against the lessee for the rent accruing for the previous months of August and September, and on November 1, 1902, another action for the rent accruing in the preceding October. Upon the bringing of the second action, the lessors and the lessee entered into an agreement for the surrender to the former of the

leased premises and into stipulations for the entry of judgments in the actions pending against the lessee for the amount of rent remaining unpaid, with the provision that execution should not issue until February 15, 1903. The guarantor pleaded the agreement and stipulations and insisted that their effect was to release him from a liability under the guaranty.

The trial court ordered judgment for the defendant, and plaintiffs appealed.

A. H. Wellman and A. R. Pike, for the plaintiffs.

C. R. Darling, for the defendant.

571 HAMMOND, J. The first ground of the defense is that by the agreements for judgment and stay of execution in the actions against the principal debtor time was given to him without the consent of this defendant. The actions were pending in the Newton police court, and inasmuch as the agreements were signed by an attorney in behalf of the defendant therein, it fairly may be assumed that the actions were being contested. It does not appear at what time the actions in the ordinary course of business in that court would have gone to judgment, but even if the defendant therein had been then defaulted, he could have appealed to the superior court, and it is manifest that in the ordinary course of proceeding in the appellate court the cases could not have been reached for trial until after February 15, 1903, the time to which the stay of execution under each agreement extended; and the defendant in the case before us does not argue to the contrary.

It is to be observed that this is not a case where an agreement for a stay of execution is made concerning a judgment already in force and upon which the judgment creditor at the time of the agreement has the right to take out execution, as in *Gibson v. Ogden*, 100 Ind. 20, and many other cases cited by the defendant. In the case before us the plaintiffs at the time of the agreement had no judgment. The agreement for a stay of execution was a part of that under which the judgment was obtained, and there is nothing to show that the agreement for judgment could have been then obtained without the clause relating to a stay of execution. Nor is it a case where by the agreement for the stay of execution the time is extended beyond the time in which, in the ordinary course of judicial proceedings, it could have

been obtained, as in *Wingate v. Wilson*, 53 Ind. 78, and several other cases cited by the defendant. The plaintiffs were prosecuting their claim by a suit against Gordon, the principal debtor, who ⁵⁷² had entered upon an active defense. By the agreement they obtained the right to an execution within a time shorter than that required by the ordinary course of judicial procedure. Although there is some conflict in the authorities, yet we think that upon principle and the great weight of authority such an agreement is not a giving of time within the true meaning of the phrase as contained in the general proposition that the giving of time to the principal discharges the surety. As stated in *Hulme v. Coles*, 2 Sim. 12: "Time was not given, but the remedy was accelerated." Among other cases supporting this view, see *Fullam v. Valentine*, 11 Pick. 156; *Stevenson v. Roche*, 9 Barn. & C. 707; *Price v. Edmunds*, 10 Barn. & C. 578; *Fletcher v. Gamble*, 3 Ala. 335.

The second ground of the defense is that without the assent of the defendant the lease was surrendered before its termination by arrangement between the plaintiffs and the lessee. In considering this claim it becomes necessary to look into the nature of the original contract. It was a lease for ten years, containing many covenants on the part of the lessee, of which one was that certain rent should be paid monthly, and another, that neither he nor his successors or assigns, or "others having their estate in the premises," would assign the lease without first obtaining the written consent of the lessors "or of those having their estate in the premises." The lease further provided that if the lessee should "neglect or fail to perform and observe any or either of the covenants . . . which on his part are to be performed," then the lessors might "immediately or at any time thereafter, and whilst such neglect and default continues, and without further notice or demand," enter into the premises and "repossess the same as of their former estate, . . . without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant," and that upon such entry the term should cease. The defendant guaranteed the prompt payment of the rent and the faithful performance of all the covenants of the lessee.

At the time of the surrender dated November 1, 1902, the rent for three months was due and unpaid and actions for

the collection of the same had been begun against the lessee, and the liability of this defendant to pay the same also had become fixed. ⁵⁷³ Under these circumstances, instead of forcing the lessors to make a formal entry into the premises, the tenant consented to surrender the estate, thereby relieving the lessors from the necessity of such entry. The transaction was in substance a termination of the estate in accordance with its original terms. It was simply applying the original contract to a condition of circumstances which had been anticipated therein, and substantially in a manner therein provided for. In a word, the term was ended substantially as it was provided that it should be ended; and the consent of the defendant, the guarantor, to such an ending must be presumed. Moreover, by the terms of the lease the defendant never could have become the assignee of the lease or have held possession under it if an entry had been made for possession by the lessors. The obligation to pay the past rent was not changed by the surrender, and the liability of the defendant to pay it, which before the surrender had become fixed, continued notwithstanding the termination of the lease: See *Kingsbury v. Westfall*, 61 N. Y. 356.

Judgment reversed; judgment for the plaintiffs for \$440.30, with interest from the date of the writ.

Contracts of Guaranty are discussed in the monographic note to *Pearsell Mfg. Co. v. Jeffreys*, 105 Am. St. Rep. 502-526. Generally speaking, a guarantor is discharged by an extension of the time for the payment of the debt: *Bishop v. Eaton*, 161 Mass. 496, 42 Am. St. Rep. 437. See, too, *Regan v. Williams*, 185 Mo. 620, 105 Am. St. Rep. 600.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

COURTEMANCHE v. SUPREME COURT, INDEPENDENT ORDER OF FORESTERS.

[136 Mich. 30, 93 N. W. 749.]

LIFE INSURANCE—Unintentional Self-destruction.—Death caused by the voluntary taking of carbolic acid by an insured person, not with the intent to take his life, but to frighten his wife into giving him money, is not within a clause in the insurance policy exempting the insurer from liability in case of suicide or self-destruction. (pp, 346. 355.)

Dickinson, Stevenson, Cullen, Warren & Butzel, for the appellant.

W. F. Denfield, for the appellee.

³⁰ **HOOKE**R, J. The plaintiff is the widow of one Oliver Courtemanche, and the beneficiary in a certificate of membership in the defendant society, a mutual benefit association. This policy contained the following limitations upon, or exceptions to, liability, viz.:

“1. Except as provided in subsections 2 and 3 of this section, the contracts for benefits heretofore or hereafter undertaken by the supreme court do not include assurance against self-destruction or suicide, whether the member be sane or insane.

“2. Any brother who commits suicide shall ipso facto avoid all his benefit certificates, and ipso facto forfeit all benefits whatsoever which his beneficiary or beneficiaries,³¹ heir or heirs, or legal personal representative or representatives would otherwise have been entitled, under the constitution and by-laws, to receive from the supreme court,

or from any branch of the supreme court." Subsection 1 being printed on the policy.

In an action brought upon this certificate, the plaintiff recovered death benefits to the amount of one thousand dollars, that being the face of the policy. The defendant has asked us to review the cause upon error.

The most important question arises over a claim that if the death was due to the voluntary taking of carbolic acid by deceased, not with the intent of causing death, but to frighten his wife into giving him money, she could not recover. The evidence was practically conclusive that the deceased died from taking carbolic acid, and there was proof from which the jury might have reached either of three conclusions: 1. That it was a case of suicide in the ordinary sense; 2. That the drug was taken under the belief that it was another and harmless drug; 3. That it was knowingly and intentionally taken for the purpose of frightening the wife, and not with an intention to cause death.

The court instructed the jury that in the latter case the beneficiary would not be precluded from recovering upon the policy, and error is assigned upon this instruction.

Counsel for defendant cite, in support of their contention, the case of *Lawrence v. Mutual Life Ins. Co.*, 5 Ill. App. 280. In that cause the deceased came to his death from repeated doses of laudanum, the first prescribed by a druggist, and others taken upon deceased's own judgment, after severe vomiting, under the belief that he had vomited up a portion of that taken. The policies contained the following provisions: "If the said person upon whose death the policy matures shall die in consequence of a duel, or of the violation of law, or by disease, violence, or accident brought about by intoxication, or shall impair his health by narcotics or ³² alcoholic stimulants . . . the company shall be released from all liability on account of this contract.

"It is hereby declared and agreed that the self-destruction of the person, whether voluntary or involuntary, and whether he be sane or insane at the time, is not a risk assumed by the company in this contract, but in every such case the company will, upon demand made and the surrender of this policy, accompanied with satisfactory proofs of such death, within sixty days after its occurrence, pay the net reserve held upon it by this company at the beginning of the year in which death occurs, calculated by the present legal stan-

dard of the state of New York, first deducting therefrom any indebtedness which shall have accrued to the company on account of this contract."

The court said: "The present appeal, then, must be decided precisely as though the defendant had expressly admitted that the deceased, at the time of his death, was sane; that his death was involuntary, and that it occurred without negligence on his part, and as the wholly unexpected, and therefore accidental, result of means which he was using in good faith for the purpose of alleviating his physical suffering. The question, then, is whether the accidental death of a sane person is within the meaning of the foregoing condition of the policies in suit, simply because some act of the deceased, performed with no design or intention of producing death, but for an entirely innocent purpose, and without negligence, happens to be the proximate cause of his death.

"We are clearly of the opinion that purely accidental death can in no proper sense be termed an act of self-destruction. In all the cases where construction has been given by the courts to conditions in life policies relating to the death of the insured by his own hand, the terms 'suicide,' 'self-destruction,' and 'death by his own hand' have been held to be practically synonymous. To say of a purely accidental death that it was a 'suicide,' or a 'death by his own hand,' would be simply an abuse of language. That which is purely accidental or fortuitous can no more be charged to the account of the person whose act happens to be the occasion of the accident than to that of anyone else. It is only where death results from an express design on the part of the deceased, or from some act which, though performed with no intention of producing ³³ death, is of itself culpably negligent, that the deceased can be charged with the responsibility of self-destruction. If a person in the pursuit of a proper object, and in the exercise of due care, should accidentally fall into a body of water and be drowned, or should unwittingly expose himself to the smallpox or the yellow fever, not knowing at the time of the existence of the contagion, and die of the disease, it would in no proper sense be a case of self-destruction. If in either case, however, he should be culpably negligent in exposing himself to danger, although not intending to destroy his life, he would be, in the common judgment of men, the efficient instrument of his own death.

“Upon principles quite analogous to the foregoing, it may be held that in case of a sane person, where there is an absence both of intention and culpable negligence, the death of the insured must be regarded as accidental, and not within a proviso against self-destruction. With this construction, full effect may be given to all of the words of the condition in the policies under consideration. Voluntary self-destruction obviously can mean nothing more than the taking of one’s life purposely and intentionally. Involuntary self-destruction would then include all those cases where a person, without intending to accomplish his own death, carelessly and negligently does acts which may naturally and probably result, and do in fact, result, in death. The condition would thus be held to include all cases where there exists on the part of the insured any direct and immediate legal or moral responsibility for his own death. To go beyond this, and relieve the insurers from liability in all cases where the acts of the insured, without design or negligence on his part, do in fact contribute to shorten or terminate his life, would in most cases render life policies of very little value to the insured.”

The foregoing indicates that the court was of the opinion that death through culpable negligence would not be covered by the terms of the policy. That this was at most a dictum appears from the following conclusion of the opinion: “It follows that the defense in this case rests solely upon a charge against the insured of culpable negligence. This fact seems to be recognized by the learned counsel for the defendant, and accordingly they have endeavored in ³⁴ their argument to demonstrate the negligence of the insured from the evidence in the case. If they desired to avail themselves of this defense, they should have allowed the question of negligence to be presented to the jury; but, having withdrawn it from the only tribunal legally competent to decide it, they are not now in a position to insist that any negligence has been proved.”

The case was again tried, resulting in a verdict for the plaintiff. The court charged, in substance, that the plaintiff should recover, unless the death was the result of “either gross carelessness, or circumstances constituting him a suicide”; and continued as follows: “The jury are further instructed, on the subject of negligence and gross carelessness, that, so far as the defense in this case depends thereon, the burden of proof rests upon the defendant; and that gross

carelessness consists of something more than the omission to do that which under the circumstances of a case an ordinarily careful man would have done to avoid injury."

The appellate court criticised the charge in this language: "It is plain that these instructions place upon the language of the policy an interpretation quite different from the one adopted by us on a former appeal. In our view, the exemption of the insurance company from liability depends, not upon the degree of the negligence of the insured, but upon its culpability. Indeed, we are unable to see how the ordinary division of negligence into degrees, such as slight, ordinary and gross, can have any application here, though it may serve a very useful purpose in cases where the doctrine of contributory or comparative negligence is invoked. The true inquiry here is whether the death of the insured was the proximate result of his own negligent act, and whether such act was, under all the circumstances of the case, a culpable act.

"The words 'voluntary' and 'involuntary' must be regarded as being used in the policy in a sense somewhat analogous to that in which they are employed in the criminal law. They do not include cases of death by accident or 'misadventure,' but they must be held to include all cases where death results immediately and proximately ³⁵ from the culpable negligence of the insured. Doubtless, also, if death should ensue from the performance by the insured of an unlawful or criminal act, it would be a case of involuntary self-destruction within the meaning of the policy.

"It follows from what we have said that the instructions limiting the effect of the condition of the policy under consideration to cases of gross negligence, and attempting to apply to this case the rules ordinarily applicable to that degree of negligence, were erroneous": *Mutual Life Ins. Co. v. Laurence*, 8 Ill. App. 488.

It would seem to us, from the discussion in that case, that the defendant had nothing to complain of in the charge, for, to our minds, culpability implies something more than any degree of negligence. However, that does not seem to have been the view taken, and we must consider the case as holding that, while no degree of negligence without culpability will relieve a defendant, any degree of culpability will; and we do not see how there was any culpability, other than mere negligence of some degree, shown in that case. The provisions

of this policy are not as broad as that involved in the Illinois case, which states that "self-destruction, though involuntary, is not a risk assumed by the company," while the policy before us excepts "assurance against self-destruction or suicide."

We approve the doctrine that losses by insurance companies through fire, accident or death cannot be avoided, under ordinary provisions, although they are due to want of care. Any other doctrine would make insurance nearly valueless, especially accident insurance; and if there is any doctrine applicable to cases arising upon contracts of insurance, akin to that of contributory negligence in actions of tort, we are not aware of it. Upon the other hand, there is some apparent force in the claim that insurance companies, and those who contract with them, do not anticipate that the insured will intentionally, deliberately, and unnecessarily incur the hazard of death by poison to coerce another into the payment of money to him, or for any other reason.

³⁶ This is a peculiar case. Perhaps none could arise where the act of the deceased (if defendant's claim is true) could present a more pusillanimous act. We can imagine cases in which acts of great hazard and danger would be heroic, and of which we should be reluctant to say that policies were avoided because the insured intentionally and understandingly faced almost certain death, as in the case of succoring the drowning or the burning. Between these two extremes all kinds of cases can be imagined, where risks are taken for pleasure, for profit, or from humanitarian motives, and we see no way of distinguishing between them, unless it be upon moral grounds. Perhaps the word "culpability" is a proper one to use, if not enlarged to include negligence in which no moral question is involved; but we think such a question would be more appropriately raised under a provision excepting cases of death caused while engaged in an unlawful act—a provision found in most policies, and regarding which the authorities are numerous.

We are cited to the case of *Ritter v. Mutual Life Ins. Co.*, 169 U. S. 139, 18 Sup. Ct. Rep. 300, 42 L. ed. 693, in support of the proposition that the act of the insured should preclude recovery. The question in that case was whether a recovery could be had in a case of suicide while sane, in the absence of a provision in the policy excepting such cases. It was held that recovery could not be had in such a case, upon the

ground that the parties did not contemplate insurance against deliberate, intentional self-destruction. The case is compared to and classed with the willful burning of insured property, and several similar cases are cited and discussed, viz.: *New York Mut. Life Ins. Co. v. Armstrong*, 117 U. S. 591, 6 Sup. Ct. Rep. 877, 29 L. ed. 997, where the beneficiary murdered the insured; *Hatch v. Mutual Life Ins. Co.*, 120 Mass. 550, 21 Am. Rep. 541, where a married woman died from an unlawful operation voluntarily submitted to; *Supreme Commandery Knights of the Golden Rule v. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332, where it was held that suicide was an exception to the contract of insurance, ³⁷ though not specifically made so by the policy; also the case of *Amicable Society v. Bolland*, 4 Bligh, N. S., 194, cited in support of the doctrine that, as a general proposition, "the law will not enforce contracts and agreements that are against the public good, and therefore are forbidden by public policy." In that case the assured was executed for forgery. In disposing of the case the court said: "It appears to me that this resolves itself into a very plain and simple consideration. Suppose that in the policy itself this risk had been insured against—that is, that the party insuring had agreed to pay a sum of money year by year, upon condition that in the event of his committing a capital felony, and being tried, convicted and executed for that felony, his assignees shall receive a certain sum of money; is it possible that such a contract could be sustained? Is it not void upon the plainest principles of public policy? Would not such a contract (if available) take away one of those restraints operating on the minds of men against the commission of crimes, namely, the interest we have in the welfare and prosperity of our connections? Now, if a policy of that description, with such a form of condition inserted in it in express terms, cannot, on grounds of public policy, be sustained, how is it to be contended that in a policy expressed in such terms as the present, and after the events which have happened, we can sustain such a claim? Can we, in considering this policy, give to it the effect of that insertion, which if expressed in terms would have rendered the policy, as far as that condition went at least, altogether void?"

Counsel persuasively apply the same test to this case, and urge that a policy which in express terms should contemplate and provide insurance against the danger result-

ing from the voluntary taking a chance of death, as in this case, would be void, as opposed to public policy. If the proofs showed that this was an experiment to determine whether death would follow the taking of the drug, showing that the contingency of death was not overlooked, it is possible that we might be justified in saying that such act, if followed by death, was not within the intent of the parties to the contract; but there is nothing in this case to indicate a design to take life, or that deceased thought ³⁸ that he was courting danger of death. We cannot suppose that anyone would approve such an act as taking poison to coerce a wife through sympathy or fear, but we are not sure that the test applied in the Bolland case (4 Bligh, N. S., 194), can be safely treated as an infallible one. We are unable to find any case where this has been so held, or any where the rule has been applied, except where the act has been criminal, or accompanied by an intention to produce death. In the Alabama case cited it is said: "The doctrine asserted in Fauntleroy's Case [*Amicable Society v. Bolland*, 4 Bligh, N. S., 194], that death by the hands of public justice, the punishment for the commission of crime, avoids a contract of life insurance, though it is not so expressed in the contract, has not, so far as we have examined, been questioned, though the case itself may have led to the very general introduction of the exception into policies. The same considerations and reasoning which support the doctrine seem to lead, of necessity, to the conclusion that voluntary, criminal self-destruction—suicide, as defined at common law—should be implied as an exception to the liability of the insurer, or, rather, as not within the risks contemplated by the parties, reluctant as the courts may be to introduce, by construction or implication, exceptions into such contracts, which usually contain special exceptions."

Again: "The fair and just interpretation of a contract of life insurance made with the assured is that the risk is of death proceeding from other causes than the voluntary act of the assured producing, or intended to produce, it. The extinction of life by disease or by accident, not suicide, voluntary and intentional, by the assured while in his senses, is the risk intended; and it is not intended that, without the hazard of loss, the assured may safely commit crime."

If one point a loaded pistol at himself, with no intention to fire, his death, being caused by its unintentional dis-

charge, would be accidental, and not suicidal, and the beneficiary under such a policy as this should be allowed to recover; for the death, though self-destruction in one sense, in another was not, the immediate cause being the unexpected and accidental discharge, and not the pointing, ³⁹ of the pistol, which was in itself a harmless, though perhaps a risky, act. The death in such case is a fortuitous result, not even a probable one, and such deaths are covered by policies. The case in question cannot be distinguished in principle from the foregoing, except in the greater degree of danger of a fatal result, or in the nature of the motive actuating the deceased. In the former the victim would believe he would be safe as long as he did not pull the trigger; in the latter, that he would not die if he limited the dose taken to an amount that would be insufficient, ordinarily, to cause death. A fatal result in either case, being unintended and unexpected, would be accidental, regardless of the motive which should prompt the act. It should be stated that such a death might not be covered by a policy which by its terms excepts cases where death or accident is due to voluntary exposure to danger, as in the Illinois policies discussed.

From the foregoing it would seem to follow that negligence is not a reason for relieving the insurer, and the motive certainly would not be in some of the instances we have mentioned. We do not see that the fact that the motive alleged here was to work upon the sympathy or fears of his wife would make the death of the insured any the less accidental, or that the act was a criminal one, and we are of the opinion that the court did not err in declining to direct the jury that they should treat this claim as a sufficient defense if proved.

Upon the trial the defendant's counsel introduced in evidence a letter written by plaintiff to defendant's lawyer, at his suggestion. Plaintiff testified: "After the death of my husband, I talked with Mr. Elliott G. Stevenson, of Detroit, once at Mr. Allen's office in this city, and once in Bay City. The talk I had with him at Saginaw led up to the writing of the letter that is introduced in evidence. I didn't see him at a meeting of the Foresters. I don't know what he came to Saginaw for. It was something about the Foresters, and I knew he was in town, and I made it my business to see him, ⁴⁰ because I wanted to see what he had to say about paying

that insurance; and he told me that the executive council was to meet in a short time, a week or two afterward, and he would see what he could do for me, and he told me to write him a letter a short time before, so he would have that to put before the council, whatever it was, to show if I could give any excuse for it—if I knew of any reason at all why he should have committed suicide, or anything of the kind.”

The letter is as follows:

“Mr. E. G. Stevenson.

“Dear Sir: My husband, Oliver Courtemanche, was a member of Court Valley 232, of East Saginaw, and died Sep. 28/98. The Corinors jury brought in a verdict of Sueside while Under the Influence of Liquor, which was Intirely False and unjust, as he had not been Drinking at all that Day. Dr. F. W. Freeman, who conducted the Post Mortom, also sais that there was not a Drop of Liquor or Beer of eny kind in his stomac, and if he took Carbolie Acid, as they say he did, I honistly and Firmly do not think it was with the Intentions of Killing himself, but rather to scare me into giving him Money. He had given three different People his checque, and had no Money in the Bank, and he knew he would get into trouble over it, and I had told him that I would not help him eny more and Borrow Money for him, and he had borrowed all He could, and so I Presume he thought he would have to do something more Desperet than usual In Order to Scare me Into getting the Money for him, And so tryed that way of getting it and took more than he Intended, for there is no reason that I know of why he should want to Kill Himself. We had not quarreled, And always got along well together, and there was nothing that trubbled him that I can find out outside of those checques, and surly Twelve Dollars, the Amount of three checques, wasent worth Killing onesself for, and I know he did not Intend to do It, for he always spoke and acted as if he had a horror of sueside. It is Nearly a year and two Months since he Died, but the Foristers havent Paid me the Thousand Dollars, the amount his Policy calls for, and I should very much like to have it, as he carried no other Insurance, and it is all I have in the world, and I have Myself to suport, and It would be very nice to know I had something for a Rainey Day. Will you kindly Present ⁴¹ this to the supream council at there next Meeting, and ask

them to Please Pay Me, and I will be sincerely grateful to You and Them.

[Signed] "MRS. EMMA COURTEMANCHE."

Counsel requested the court to charge: "The letter written by plaintiff in this case, in which certain admissions are made by her in respect to quarrels and the issuing of checks fraudulently, and the possible desire on the part of her husband to do something more desperate than usual, was proper evidence in this case against the plaintiff, and you shall consider such admissions for what they are worth in arriving at the question as to whether the plaintiff's intestate did not, for these reasons, and with the motive therein stated, take the carbolic acid or drug in question, and for no legitimate purpose."

This was not all of the request, the remainder being as follows: "If you find that he did so take the drug, and that, contrary to his expectation, the dose was fatal, even though such thought was farthest from his mind, nevertheless death resulting from such act would be suicide, and the plaintiff cannot recover in this case, save such amount as defendant has offered to pay in open court."

Having determined that the rule is not as stated in the last-quoted portion of the request, it is manifest that the court did not err in refusing a request of which it was a part.

We think it unnecessary to discuss the other questions raised.

The judgment is affirmed.

The other justices concurred.

For Authorities bearing upon the decision in the principal case, see the monographic note to Supreme Conclave v. Miles, 84 Am. St. Rep. 542, 543.

GILMAN v. BODEN.

[136 Mich. 125, 98 N. W. 982.]

PARTITION OF BUILDING—When Should be by Sale.—The partition of a hexagonal building consisting of stores on the ground floor and flats above should be by a sale of the property, rather than by a physical division which contemplates the erection of a dividing wall and the tearing out and changing of the interior partitions of the building to adapt it to ownership in severalty. (p. 357.)

George W. Radford, for the complainants.

John D. Harger, for the defendants.

126 MONTGOMERY, J. This is a bill filed by complainants, under the statute, for partition of lot 20 of Backus' subdivision of outlot No. 96 of the Woodbridge farm, situated on the southwest corner of Grand River and Trumbull avenues, in the city of Detroit, said Baxter H. Gilman and John M. Boden being equal owners thereof. Complainants appeal from a decree of the circuit court for the county of Wayne, entered July 22, 1903, directing a physical division of the property by the construction of a new brick wall through the building standing on the front portion of the lot, on a line supposed to divide the building into two equal portions, and fixing a basis of accounting for rents.

The lot is a hexagon in shape, with its southerly line at right angles to the westerly line of Trumbull avenue; the lot having a depth from Trumbull avenue of one hundred and twenty feet, and a width at the rear of thirty-five feet. The lot has a combined frontage of eighty-five and eight-tenths feet on Trumbull and Grand River avenues; the Trumbull avenue front being forty-five and eight-tenths feet, the Grand River avenue forty feet, forming an obtuse angle on the southwest corner of the two avenues. The westerly line of the lot is a broken line forming another obtuse angle at about the center, which is fifty-nine and nine-tenths feet from the southerly line of Grand River avenue, and at right angles thereto. From the center angle it extends forty-three and two-tenths feet parallel with the south line.

The building covers the entire front end of the lot and is sixty feet in depth. The width of the building at the rear end is about forty-four feet, the wall forming another obtuse angle.

The ground floor of the building is divided into three stores, separated from each other by two twelve-inch solid brick partition walls, extending from the foundation to the roof. The second story of the building is divided into three flats, each covering the space between the brick partition walls, the same as the stores below, and partitioned ¹²⁷ into several rooms each. The entrance to the flat over the southerly store, fronting on Trumbull avenue, is by means of a door and staircase leading up from the street. The other flats are reached by means of a like entrance, leading up from the street, in the front of the northerly store, which fronts on Grand River avenue.

The proposed wall ordered by the decree will bisect and extend from the corner of the building at the intersection of Trumbull and Grand River avenues to a point at the center of the rear wall. If such a wall is built, the middle or "key-stone" store, as it is described in the record, will be cut into two parts. The southerly part, fronting on Trumbull avenue, would have a frontage of about twenty-four feet by eight feet at the back end, while the other part, facing Grand River avenue, would have a frontage of about eighteen feet on Grand River avenue and about three feet at the back end. The defendant Boden, in order to do away with these narrow back ends, proposes, after the ground floor is divided by the proposed party-wall, to convert each half of the building into one store, to do which would necessitate the removal of the present inside partition walls. Similar changes would be made necessary in the upper story. The evidence fairly tends to show that the expense of these changes would amount to fifteen hundred dollars. The commissioners reported that partition could not be made without great prejudice to the owners, and complainants asked that a sale be directed under section 11045 of 3 Compiled Laws. The circuit judge overruled the commissioner, and directed a division as above indicated.

We think the case is one falling clearly within the purpose of the provisions of section 11045. If it be within the power of the court in any case to direct partition by building a partition wall, thus changing the purposes and adaptability thereto of a structure existing upon premises—a point which we do not find it necessary to decide—we are all agreed that the evidence in this case does not show that

such a course could be taken with the building in question without great prejudice to the owners. The proposed ¹²⁸ change involves more than mere construction; it involves a tearing down.

Complaint is also made of the finding of the court upon the question of rent and rental value, but we are not disposed to disturb the finding in this regard.

A sale of the premises will be decreed, and the case will be remanded, with directions to carry the decree into effect. Complainants will recover their taxable costs in this court.

Moore, C. J., Carpenter and Hooker, JJ., concur.

Grant, J., took no part in the decision.

Where Persons Own Land Jointly and the building thereon severally, a partition of the property by sale may be decreed: *Truth Lodge v. Barton*, 119 Iowa, 230, 97 Am. St. Rep. 303. Generally, however, a court has no right to decree a sale in partition proceedings, without the consent of the parties, unless it finds that a division in kind cannot conveniently be made, and that the interests of the owners will be promoted by a sale: *Croston v. Male*, 56 W. Va. 205, 107 Am. St. Rep. 918.

FISHER v. HAMPTON TRANSPORTATION COMPANY.

[136 Mich. 218, 98 N. W. 1012.]

TRUSTS—Taking Effect in Future—Consideration.—Before a trust can be enforced, where no consideration moves from the cestui que trust, it must be an executed or fully declared trust, to take effect in praesenti. (p. 360.)

TRUSTS—Purchase of Bankrupt's Estate.—An agreement between two persons, after one of them has parted with the title to his property by assigning it to a trustee in bankruptcy, to the effect that the bankrupt shall not bid at the trustee's sale of the property, but that the other shall bid it in and hold it in trust to pay specified obligations, and after making such payments shall assign it to whomsoever the bankrupt may designate, is without consideration, and the transaction does not amount to an executed trust, but rather a promise to make a gift in futuro. (p. 361.)

CONTRACT TO CHILL Bidding at Bankrupt Sale.—Where one has made an assignment in bankruptcy, his agreement with another bidder not to bid at the trustee's sale of the property, entered into after bids have already been made and the sale is still open, is void on grounds of public policy. (p. 362.)

CONTRACT—Necessity of Pleading Invalidity.—When a court is asked to enforce a contract which, upon the complainant's own showing, is against public policy, relief will be denied him, although the invalidity of the contract is not pleaded. (p. 363.)

McDonnell & Duffy, for the complainant.

T. A. E. & J. C. Weadock and Weadock & Purcell, for the defendants.

219 MONTGOMERY, J. In the year 1895, and for some years prior thereto, the defendant, the Hampton Transportation Company, was and had been a corporation, duly organized and existing under the laws of the state of Michigan, with a capital stock of fifty thousand dollars, represented by one thousand shares of the par value of fifty dollars per share. Its sole property was the steamer "Eddy." Complainant, at the time of the bankruptcy proceedings hereinafter referred to, was the owner of stock in this corporation, and was also the owner of four-ninths of a vessel known as the "Lizzie Madden."

On the 26th of June, 1899, complainant filed a voluntary petition in bankruptcy, and in his petition alleged that he was the owner of one-half of the stock of the Hampton Transportation Company and four-ninths of the "Lizzie Madden." As a matter of fact, however, Fisher was the owner of but four-tenths of the stock of the transportation company, one-tenth having been donated by him to his daughter at the time of the organization of this corporation, and thereafter retained by her. Boutell owned a ²²⁰ large interest in the corporation, and claims to have advanced to the company money in excess of the amount Fisher advanced. There was also owing by the Hampton Transportation Company, upon notes indorsed by both Fisher and Boutell, twenty-nine thousand dollars, to James S. Galloway, and the stock of the corporation stood pledged to Mr. Galloway as security for this sum.

The assets of the bankrupt were advertised for sale, and the sale opened on the 2d of October, 1899. At this sale both complainant and defendant Boutell were bidders upon the complainant's interest in the "Lizzie Madden" and the stock in the Hampton Transportation Company. The bid on the latter item exceeded twelve hundred dollars, and the sale was, on request of Mr. Fisher's representative, adjourned to October 5th.

On the morning of October 5th, previous to the sale of these vessel interests, Mr. Shepard, representing Mr. Fisher, Mr. Weadock, representing Mr. Boutell, and both Mr. Bou-

tell and Mr. Fisher, met at the courthouse, where the sale was to proceed, and entered into an arrangement. The parties are not agreed precisely as to what that arrangement was. The complainant contends that the agreement was that Mr. Boutell should bid in the interest of the bankrupt estate in these two vessel properties, and hold the same in trust for the purposes, first, of repaying the purchase price; second, of paying the claim held by the Saginaw Bay Towing Company (in which Mr. Boutell was interested) against the firm of Turner & Fisher up to the amount of twenty-five thousand dollars, or if the "Eddy" (which comprised the whole property of the Hampton Transportation Company) should sell for more than sixty-five thousand dollars, the excess should also be applied to the indebtedness of Turner & Fisher to the Saginaw Bay Towing Company up to the amount of five thousand dollars more; that the earnings of the boats should be applied toward the Turner & Fisher indebtedness at the rate earnings of the Fisher interests in the boats, to be applied twelve thousand five hundred dollars out of the first year's earnings, and the remainder out of the second year's earnings, in case the "Eddy" was ²²¹ not sold; and that, when these obligations were paid off, the property was to be assigned to whomsoever Fisher should designate.

The defendant disputes this agreement in some of its features. He denies that there was any agreement for trusteeship. He denies that there was an agreement to transfer the property at any time to Fisher, but insists that what he desired was to close out the property, and he did offer, in case he succeeded in doing so, to pay certain portions to Fisher, but that this was a mere gratuity; that the offer was made upon the theory that Fisher held a one-half interest in the "Eddy," and not a four-tenths interest, and that, as a matter of fact, the defendant has since been required to account to complainant's daughter, Grace E. Goodwin, for a one-tenth interest in the "Eddy" and her earnings, and has paid the same in excess of all that he should be required under the terms of his agreement to pay to complainant. The defendant also stands upon legal defenses, and insists that, at most, the entire arrangement was on his part a promise to make a gift to Mr. Fisher in the future; that there was no consideration passed to defendant Boutell which would support an executory trust; that the only conceivable consideration which

might be suggested is that, because of this agreement, Fisher refrained from further bidding at the sale; and that if the contract is based upon such a consideration, it is void upon grounds of public policy. The complainant, on the other hand, insists that there was a valid trust created. And this involves an inquiry as to what constitutes an executed trust.

Starting with the proposition that Fisher paid no consideration, it would seem to be clear, from the authorities, that before a trust could be enforced, either at law or in a court of equity, it must be an executed or fully declared trust, to take effect in praesenti. It seems also clear that in the present case, apart from the consideration furnished ²²² by refraining from further bidding, there was no actual consideration. At this time Fisher had parted with all title to the property in question. The title rested in his assignee in bankruptcy. He had no possible interest in the property. Whatever should come to him would be a mere gratuity, unless he could succeed in himself becoming the purchaser, and by this means make a profit on the stock or vessel. He could pass nothing to Boutell. The title had already passed to the assignee in bankruptcy.

It is difficult, then, to distinguish the transaction from a voluntary promise on the part of Mr. Boutell to buy in this property, and, if he should succeed in making a profit out of it, give to Mr. Fisher a portion of these profits. We do not understand such an arrangement to amount to an executed trust. It is a promise to make a gift in futuro and partakes none the less of that character because it is made conditional upon a question of profits. As was said by Mr. Justice Long, in *Hamilton v. Hall's Estate*, 111 Mich. 296, 69 N. W. 484: "The mere declaration of an intention or purpose to create a trust, which is not carried out, is of no value, and a mere agreement or statement of an intent to make a gift in the future is not sufficient. It must be such that, from the time it is made, the beneficiary has an enforceable equitable interest in the property, contingent upon nothing except the terms imposed by the declaration of the trust itself": See, also, *Clay v. Layton*, 134 Mich. 317, 96 N. W. 458, and *Levi v. Evans*, 57 Fed. 677, 6 C. C. A. 500, which latter case contains a full and able discussion of the subject.

Was there a valid consideration for this agreement? It is well settled that any agreement based upon a considera-

tion of an agreement to refrain from bidding at a sale of goods is void upon grounds of public policy: See *Atlas Nat. Bank v. Holm*, 71 Fed. 489, 19 C. C. A. 94; *Piatt v. Oliver*, 1 McLean, 295, Fed. Cas. No. 11,114; *Barton v. Benson*, 126 Pa. St. 431, 12 Am. St. Rep. 883, 17 Atl. 642; *Dudley* ²²³ v. Odom, 5 S. C. 131, 22 Am. Rep. 6; *Gardiner v. Morse*, 25 Me. 140; *Boyle v. Adams*, 50 Minn. 255, 52 N. W. 860, 17 L. R. A. 96; *Camp v. Bruce*, 96 Va. 521, 70 Am. St. Rep. 873, 31 S. E. 901, 43 L. R. A. 146.

It is suggested by complainant's counsel that the above rule, rendering void contracts entered into for the purpose of suppressing public competition at sales, does not prevent two persons from combining for honest purposes to purchase property, where such persons propose to hold and own the property together, and afterward divide it, even though the effect of the purchase happens to be that, as between the parties, competition is suppressed; and there are cases in which parties, in advance of a sale, have joined to become bidders, and which hold that such an agreement is not void, and, if such is the true purpose of the arrangement, courts will sustain the transaction. But we think these cases do not aid the complainant here. Here the bids had already been made, the sale was still open, and a plainer case of attempt to prevent competition could hardly be imagined.

But it is said that this defense was not pleaded. We think such defense need not be pleaded, but that, whenever the court is asked to enforce a contract which, upon the complainant's own showing, is against public policy, the relief will be denied: *Hall v. Coppel*, 7 Wall. 542, 19 L. ed. 244; *Meyer v. Farmer*, 36 La. Ann. 785.

The circuit court dismissed the bill, and the decree will be affirmed, with costs.

Moore, C. J., Carpenter and Hooker, JJ., concurred.

Grant, J., took no part in the decision.

Voluntary Trusts arising from the declaration of the trustor are discussed in the monographic note to *Williamson v. Yager*, 34 Am. St. Rep. 189-224. An executed trust is good in favor of a volunteer; if declared at the time the legal title passes, it will be enforced, though without consideration: *Sykes v. Boone*, 132 N. C. 199, 95 Am. St. Rep. 619.

On the Validity of Contracts calculated to prevent competition at public sales, see *Camp v. Bruce*, 96 Va. 521, 70 Am. St. Rep. 873; *Carter v. Gibson*, 29 Neb. 324, 26 Am. St. Rep. 381; *Fletcher v. Johnson*, 139 Mich. 51, 111 Am. St. Rep. 401.

DAWSON v. FALLS CITY BOAT CLUB.

[136 Mich. 259, 99 N. W. 17.]

ADVERSE POSSESSION.—Good Faith is not an essential element of adverse possession. (p. 364.)

BOUNDARIES—Instruction as to Evidentiary Value of Old Fence.—If the evidence concerning a disputed boundary is conflicting as to when a particular fence was built and as to whether it was afterward rebuilt on practically the same line, an instruction should be given on the evidentiary value of old fences. (p. 367.)

George H. Cady and John H. Goff, for the appellant.

E. S. B. Sutton and John W. Shine, for the appellee.

260 MOORE, C. J. This is an ejectment case. The land in dispute is a triangular piece from a point on Portage avenue to the St. Mary's river, where it is about fifteen feet wide. The case has been here before, and is reported in 125 Mich. 433, 84 N. W. 618. After the case was affirmed here, a second trial was had under the statute allowing a second trial in ejectment cases. If reference is made to the opinion in 125 Michigan, a very brief statement of facts will answer every purpose. It is the claim of the plaintiff that the disputed strip is a part of private claim No. 106, of which she is the owner. Defendant Wheeler interposes two defenses: 1. That the disputed strip is part of private claim No. 105; 2. If it is not, that he has acquired title by adverse possession.

Error is assigned as to that portion of the charge reading as follows: "It is also a question of fact as to whether there was peaceable possession, as claimed; and, in order to constitute an adverse possession sufficient to give title, there must be an actual, exclusive, continuous, visible, notorious, distinct and hostile possession of the land claimed to be held adversely for the period of fifteen years continuously next before the commencement of the suit. And in order for the defendant to retain by adverse possession the land mentioned in the declaration, or any part of it, he must satisfy you, by a preponderance of testimony, that it has been so held, or some part of it has been so held, in good **261** faith, for the period required by the statute; and the burden of proof, as I said before, in that particular, is upon the defendant."

It is claimed that good faith is not an element of adverse possession. On the part of the plaintiff it is said defendant was claiming adversely under color of title, and that, where he is claiming adversely under color of title, good faith is an indispensable element. It is further claimed on the part of the plaintiff that because, in the plea of the defendants, it is alleged defendants are in possession of the premises, "claiming title in good faith," they are estopped from objecting to the charge in relation to good faith. It is also said that because defendants asked the court to give requests 6 and 7, which read as follows: "6. The undisputed evidence in this case shows that Peter Gallagher received a deed from Leonard A. Harris in July, 1879, to all that part of private land claim one hundred and five lying between Portage street and St. Mary's river, and that said Gallagher, in 1883, deeded the same premises to his wife, Delia Gallagher, and that she deeded the same premises to Ebenezer S. Wheeler, one of the defendants in this suit. Now, if you find that, at the time of taking possession of the land described in the deeds above mentioned, the strip of land in question in this case was inclosed by a fence with the land conveyed by the deeds, and that said Peter Gallagher took possession of the same, and that he and his grantees above mentioned have exercised the same acts over that strip as they did over the lands described in the deeds, then the deeds themselves gave color of title in Gallagher and his grantees to this disputed strip, even if it was not included within the deeds.

"7. The defendant Wheeler and his predecessors, Gallagher and his wife, having color of title to the disputed strip of lands by reason of the inclosure of the strip with the lands described in the deeds to them, their possession of a part of the land under the deeds above mentioned would be presumed to be a possession of the whole of it, including the disputed strip, in the absence of anything to the contrary"; which were given, and asked the court, if he did not give these requests, then to give the tenth, which reads as follows: 262 "Good faith and a belief in one's title are not necessary to obtain title by adverse possession. Adverse possession may originate in a trespass, which, if continued for fifteen years, with other characteristics of adverse possession, will ripen into title."

The judge was justified in refusing to give the last-named request, and in charging the jury as he did in the general charge. It is also claimed, though good faith is not an element of adverse possession, that, because of the other portions of the charge, the jury were not misled.

On the part of the defendants it is said the suggestion in the plea of a claim of title in good faith was put in to enable the defendants to recover for the value of improvements made by them, which claim was waived on the trial. It is also claimed that requests 6 and 7 were prepared to give the jury to understand that defendants' claim under color of title would carry with it constructive possession to the disputed strip, and that nothing was done by defendants that should estop them from challenging the error in the general charge. The defendants also claim that the other portions of the general charge did not prevent the jury from being misled.

It must be conceded that, as to the question of whether good faith is an element of adverse possession, the authorities are not uniform. In this state the question is not now an open one. In *Campau v. Dubois*, 39 Mich. 274, Justice Campbell, speaking for the court, said: "There is also another point under the supplementary charge to the jury which is misleading. The court charged that the statute of limitations would not run against an adverse claim unless held under claim of title. This is incorrect. It is undoubtedly true that under the old doctrine, which made a deed void made by one out of possession of lands held adversely, the adverse holding, to produce that effect, must have been under claim of title. But for the purposes of the statute of limitations, an ouster of a trespasser would be as effectual as any other, if suit was not brought within the statutory period. Any intrusion may continue long enough to bar the right of entry. And if, in this case, the entry was not in right of the heirs ²⁶³ of Toussaint Campau, it was not their entry, and was an ouster, of which they could at once legally complain. In such case they must lose their rights unless prosecuted within the statutory period.

"In considering the authorities which have been cited before us, a considerable number will be found to have no direct bearing on the effect of possession as a foundation of defense under the statute of limitations. A difference is apparent between that peculiar hostile possession which,

under the old law, rendered conveyances executed by parties out of possession void, and that which will in time, if not disturbed, ripen into a title. The former required possession to be taken under color of title. The latter might originate in trespass as well as in any other way. The effect of any adverse possession, as amounting to such an ouster as will set the statute of limitations in motion, or authorize a possessory action by a tenant who is excluded, is so well settled as not to be open to controversy: *Doe d. Hellings v. Bird*, 11 East, 49; *Clapp v. Bromagham*, 9 Cow. 530; *Culley v. Doe d. Taylerson*, 11 Ad. & E. 1008; *Gordon v. Pearson*, 1 Mass. 323; *Wright v. Saddler*, 20 N. Y. 320; *Willison v. Watkins*, 3 Pet. 43," 7 L. ed. 596. To the same effect are *Campau v. Lafferty*, 50 Mich. 114, 15 N. W. 40; *Cook v. Clinton*, 64 Mich. 309, 8 Am. St. Rep. 816, 31 N. W. 317; *Bird v. Stark*, 66 Mich. 654, 33 N. W. 754; *Shearer v. Middleton*, 88 Mich. 621, 50 N. W. 737; *Michigan Land etc. Co. v. Thoney*, 89 Mich. 226, 50 N. W. 845; *Barnard v. Brown*, 112 Mich. 452, 67 Am. St. Rep. 432, 70 N. W. 1038, and the many cases cited; *Ward v. Nestell*, 113 Mich. 185, 71 N. W. 593.

It is likely, because of the way in which requests 6, 7, and 10 were presented, the failure of the judge to give the tenth one is not reversible error; but the point involved is not failure to give the tenth request, but the giving to the jury of an instruction in relation to the question of good faith which is contrary to the decisions of this court. We have carefully considered the other portions of the charge which counsel say prevented the jury from being misled. They are correct statements of the law, but nowhere do they advise the jury that, in order to acquire title by adverse ²⁶⁴ possession, the holding need not be in good faith. At nearly the conclusion of the charge the judge said: "You are to remember that the burden is upon the plaintiff in this case, in the first instance, before she can recover, to establish where the west boundary line of private land claim 106 is, to your satisfaction, and, in that connection, to show that the disputed strip is included within that boundary. If that is established, then, taking up the question of adverse possession, you are to remember that the burden of proof is upon the defendant to show to your satisfaction, by a preponderance of evidence, the claim of adverse possession, as already explained to you"; thus, in effect, repeating the objectionable portion of the charge. We think the charge as given is not in accord-

ance with the law in this state, nor do we think it can be said this was not harmful error: See *Sparrow v. Hovey*, 44 Mich. 63, 6 N. W. 93; *Ward v. Cochran*, 150 U. S. 597, 14 Sup. Ct. Rep. 230, 37 L. ed. 1195.

Defendants' eleventh request read, in part, as follows: "If the government stakes are no longer discoverable, the question is not where they ought to have been located, but where they were in fact located; and upon that question it is your duty to consider as evidence the practical location of the lines, such as the building of fences built at a time when the original monuments or stakes were presumably in existence, and probably well known. As between an old boundary fence and any resurvey made after the monuments have disappeared, the fence is by far the better evidence of the actual location of the lines of the survey."

This request was refused, and this is said to be error. It is claimed by plaintiff the evidence does not show any such fence as described in the request. The evidence was conflicting as to when the fence was built, and whether, after it was first built, it was rebuilt on practically the same line. It was the claim of defendants there was testimony which made it necessary the jury should be instructed as to the evidentiary value of the old fence, and that their request was framed to meet that phase of the ²⁶⁵ case. We are not prepared to say it was error not to give this request as framed, but we do not find that any instruction was given upon this branch of the case. In view of the fact that a new trial must be had, we regard it as proper to say an instruction should be given as to the evidentiary value of the old fence, along the lines indicated in *Diehl v. Zanger*, 39 Mich. 601; *Beaubien v. Kellogg*, 69 Mich. 333, 37 N. W. 691; *Hoffman v. City of Port Huron*, 102 Mich. 417, 60 N. W. 831.

We have examined the other errors assigned, but do not deem it necessary to discuss them. For the reasons stated above, the judgment is reversed, and a new trial ordered.

The other justices concurred.

The Question of Good Faith as an element of adverse possession is discussed in the note to *Power v. Kitching*, 88 Am. St. Rep. 712-716.

The Question of the Evidentiary Value of old fences in case of boundary disputes is considered in the note to *Washington Rock Co. v. Young*, 110 Am. St. Rep. 681, 682.

PAYNE v. UNION LIFE GUARDS.

[136 Mich. 416, 99 N. W. 376.]

LIFE INSURANCE—Death in Violation of Law.—Where the aggressor in an assault is killed, there can be no recovery on his life insurance policy, which exempts the insurance company from liability while the insured is “violating the laws of the land.” (p. 369.)

TRIAL—Credibility of Witness Question for Jury.—If the testimony of the sole witness to a transaction is contradicted in material points by contradictory statements, the jury is entitled to pass upon the question of what really occurred. (p. 369.)

Joseph H. Cobb and Lee E. Joslyn, for the appellant.

Pierce & Kinnane, for the appellee.

416 MONTGOMERY, J. This is an action on a policy or benefit certificate issued to plaintiff's father, Andrew W. **417 Payne.** The testimony shows the decease of Andrew W. Payne, Sr., while in good standing, and that by the terms of the policy there is due to plaintiff six hundred and thirty-two dollars and fifteen cents, the amount recovered below, unless the defense offered was established. All the errors assigned are devoted to rulings made upon the trial of this issue. A by-law, which is made a part of the policy, contains a provision that “no benefit shall be payable on account of the death of any member . . . while violating the laws of the land.” Andrew W. Payne, Sr., came to his death by violence at the hands of one George Hossler. It was the claim of the defendant that, when the deathblow was administered, deceased was engaged in an assault upon Hossler. The circuit judge charged the jury upon this subject as follows:

“The one simple thing for you to determine is, Who was the aggressor? Did Andrew Payne intend to bring about this controversy, start an affray, an assault, which resulted, unfortunately, in his death? If he did, if he was doing something that was in violation of the criminal law of the land, of the state; that is, seeking to assault or commit an assault and battery upon the person of the man Hossler—and brought about the affray which resulted in his death, he was violating the law of the land, and the plaintiff cannot recover. . . .

“If you find that Andrew W. Payne, the insured, went to the house of George Hossler, and that he then and there, by

means of any words spoken, did maliciously threaten any injury to the person of the said George Hossler, with intent to extort money or any pecuniary advantage, or with intent to compel said George Hossler to return his lumber or pay him for the lumber against his will, or to compel the said Hossler to do or refrain from doing any act against his will, and, as a result of such threats, a fight was brought on, then I charge you that the insured met his death while violating the laws of the land, and your verdict must be for the defendant."

These instructions, with further amplifications, which need not be set out at length, submitted fairly the question involved.

But it is contended that the testimony of Maud Hossler, the wife of George Hossler, the only witness to the affray, ⁴¹⁸ conclusively showed that deceased was the aggressor, and that therefore a verdict should have been directed for defendant. There are two answers to this contention: 1. The surroundings were such as to raise a question as to the witness' credibility, and, whenever this is the case, the jury is entitled to pass upon the question: *Molitor v. Robinson*, 40 Mich. 200; *Dibble v. Northern Assur. Co.*, 70 Mich. 1, 14 Am. St. Rep. 470, 37 N. W. 704; *Schulz v. Schulz*, 113 Mich. 502, 71 N. W. 854. 2. There was testimony which tended to contradict Maud Hossler in material points, by showing contradicting statements.

Other questions are discussed in the brief of appellant's counsel, but our views upon these questions were indicated at the argument. A re-examination of these questions has failed to convince us that any damaging error of which appellant is in position to complain was committed.

The judgment is affirmed.

The other justices concurred.

Life Insurance Policies exempting the insurer from liability where the death of insured occurs while he is in violation of the law, are discussed in the monographic note to *Conboy v. Railway Officials etc. Assn.*, 60 Am. St. Rep. 160-165. Where one brings on a personal encounter with another, but abandons it, and, while in good faith retreating to avoid further difficulty, is killed by his adversary, the death is not within the meaning of a policy exempting against liability for death in violation or attempted violation of any criminal law: *Supreme Lodge K. of P. v. Bradley*, 73 Ark. 274, 108 Am. St. Rep. 38.

UNION TRUST COMPANY v. PRESTON NATIONAL BANK.

[136 Mich. 460, 99 N. W. 399.]

CERTIFIED CHECK—Absence of Funds—Violation of Law—Bona Fide Holder.—A certified check is valid in the hands of a bona fide holder, although the drawer has no funds in the bank, and the certification of a check is prohibited and made a crime by statute, “unless the amount thereof actually stands to the credit of the drawer upon the books of the bank.” (p. 377.)

Geer, Williams & Halpin, H. R. Martin and Walker & Spalding, for the appellant.

Bowen, Douglas, Whiting & Murfin, John C. Donnelly and Frederick W. Whiting, for the appellee.

461 CARPENTER, J. Plaintiff brought this suit to recover a conceded balance of twenty-one thousand five hundred and eighty-five dollars and eleven cents owing by defendant to the City Savings Bank at the time plaintiff was appointed receiver. Defendant sought to set off against this indebtedness the sum of one hundred thousand dollars, represented by a check drawn on said City Savings Bank January 24, 1902, by F. C. Andrews, payable to defendant's order, and certified in due form by the teller of the insolvent bank. It appeared that, at the time this check was certified, its maker, Andrews, instead of having funds to his credit in said bank, had overdrawn his account, as shown by the bank's books, “to the amount of four hundred and five thousand dollars.” The defendant offered to prove that it received said check, after certification, on the day it was drawn, in the usual course of business, and paid to said Andrews, the maker, full value therefor, and at that time had no notice or knowledge of any infirmity in said check or of the fact that the account of said Andrews was overdrawn. This evidence was excluded, on the ground that said check was invalid in the hands of a bona fide holder, and a verdict directed for the plaintiff for the amount of the deposit in defendant's hands. The sole question presented by this record relates to the correctness of this holding.

462 It is authoritatively settled and conceded that at common law the fact that the maker of a certified check had no

funds in the bank affords no defense, if the check, negotiable in form, as in this case, has passed into the hands of a bona fide holder: See *Merchants' Bank v. State Bank*, 10 Wall. 604, 19 L. ed. 1008; *Farmers' etc. Bank v. Butchers' etc. Bank*, 16 N. Y. 125, 69 Am. Dec. 678. This case is not, however, to be determined solely by common-law principles. The correctness of the holding of the trial court depends upon the proper construction of certain statutory provisions in our banking act relative to the certification of checks. Section 6108 of 2 Compiled Laws, being section 19 of the general banking act, reads: "It shall not be lawful for any officer, clerk, agent or employé of a bank to certify a check, unless the amount thereof actually stands to the credit of the drawer upon the books of the bank, or to resort to any device, or receive any fictitious obligations, direct or collateral, in order to evade the provisions of this prohibition; and any officer, clerk, agent or employé who shall attempt any such evasion shall, upon conviction thereof, be deemed guilty of a misdemeanor, and punished as provided in section fourteen of this act."

Other sections of the banking act, viz., section 14 (2 Comp. Laws, sec. 6103), section 18 (2 Comp. Laws, sec. 6107), and section 58 (2 Comp. Laws, sec. 6147), make the violation of section 19 a crime.

In construing this act, we have not the benefit of decisions of other courts construing a precisely similar act, for, with the exception of the national banking act, which will be hereafter referred to, there is no similar act.

It will thus be seen that the certification in question was forbidden by law, and punishable as a crime. The statute does not, however, expressly declare that the check so certified shall be void in the hands of a bona fide holder. Indeed, it does not expressly declare that it shall be void in the hands of one who is not a bona fide holder. The fact, ⁴⁶³ however, that the certification is forbidden and made a crime, compels the inference that the legislature intended to avoid such certification between the original parties (see *Heffron v. Daly*, 133 Mich. 613, 95 N. W. 714); and this, it is almost unnecessary to say, avoids it in the hands of everyone not a bona fide holder. It by no means follows, however, because a contract made in violation of law, common or statutory, is void between the original parties, that, if given the form of negotiable paper, it is void in the hands of a bona fide holder. Indeed,

it is the distinguishing characteristic of the law of negotiable paper that, when a contract takes that form, it is not, in the hands of a bona fide holder, subject to the defense which avoided it in the hands of the original parties. Negotiable paper in the hands of a bona fide holder is not open to the defense that the contract from which it arose was illegal or forbidden by the principles of the common law. A note given to compound a felony is good in the hands of a bona fide holder: *Clark v. Ricker*, 14 N. H. 44; *Wentworth v. Blaisdell*, 17 N. H. 275. Nothing less than a statutory enactment will subject negotiable paper in the hands of a bona fide holder to the defense of illegality in its inception.

What, then, is the effect of a statute which merely prohibits the making of a particular contract, and punishes its making as a crime? How shall we determine what consequences the legislature intended should follow a violation of this law? Manifestly by applying in its construction the principles of the common law.

“Statutes are not, and cannot be, framed to express in words their entire meaning. They are framed, like other compositions, to be interpreted by the common learning of those to whom they are addressed—especially by the common law, in which it becomes at once enveloped, and which interprets its implications and defines its incidental consequences. That which is implied in a statute is as much a part of it as what is expressed”: 2 *Sutherland on Statutory Construction*, sec. 334.

464 In accordance with these principles, we would assume, and, as heretofore stated, we do assume, that the legislature intended to make such contract void between the parties; and we would likewise assume that it did not intend, if the contract took the form of negotiable paper, to affect its validity in the hands of a bona fide holder. But plaintiff's counsel contend that it is settled by authority that when a contract is prohibited and made a crime by statute, such a contract, if it takes the form of negotiable paper, is void in the hands of a bona fide holder; and they rely upon the following authorities: 1 *Clark & Marshall on Private Corporations*, sec. 225; *Endlich on Interpretation of Statutes*, sec. 449; 2 *Sutherland on Statutory Construction*, sec. 336; *Anson on Contracts*, 172; *Heffron v. Daly*, 133 Mich. 613, 95 N. W. 714; *State Life Ins. Co. v. Strong*, 127 Mich. 346, 86 N. W. 825; *Loranger v. Jardine*, 56 Mich. 518, 23 N. W. 203; *Bowditch v.*

New England etc. Ins. Co., 141 Mass. 293, 55 Am. Rep. 474, 4 N. E. 798; Union Nat. Bank v. Louisville etc. Ry. Co., 145 Ill. 208, 34 N. E. 135; Cincinnati Mut. Health Assur. Co. v. Rosenthal, 55 Ill. 85, 8 Am. Rep. 626; Milford v. Milford Water Co., 124 Pa. St. 610, 17 Atl. 185, 3 L. R. A. 122; Edgerly v. Hale, 71 N. H. 138, 51 Atl. 679; Woods v. Armstrong, 54 Ala. 152, 25 Am. Rep. 671; McConnell v. Kitchens, 20 S. C. 430, 47 Am. Rep. 845; Texarkana etc. R. Co. v. Bemis Lumber Co., 67 Ark. 542, 55 S. W. 944; Snoddy v. American etc. Bank, 88 Tenn. 573, 17 Am. St. Rep. 918, 13 S. W. 127, 7 L. R. A. 705.

None of these authorities, except Texarkana etc. R. Co. v. Bemis Lumber Co., 67 Ark. 542, 55 S. W. 944, and Snoddy v. American etc. Bank, 88 Tenn. 573, 17 Am. St. Rep. 918, 13 S. W. 127, 7 L. R. A. 705, which will receive attention later in this opinion, related to a case of negotiable paper in the hands of a bona fide holder. All that can justly be claimed for these authorities, with the exceptions above referred to, is that they hold that, when the making of a contract is prohibited and made a crime by statute, it is void as between the original parties, or—what is the same thing—as between parties who do not stand in the attitude of a bona fide holder of negotiable paper arising therefrom. It is true that many of these decisions ⁴⁶⁵ say that such a contract is void, and one of them (see Milford v. Milford Water Co., 124 Pa. St. 610, 17 Atl. 185, 3 L. R. A. 122), says that it “is utterly void, and there is no power that can breathe life into such a dead thing.” This language must, however, in accordance with every just principle of construction, be understood as applying to the case before the court. It may not be improper to describe the particular contracts under consideration as void, and as utterly void. But it by no means follows that negotiable paper issued on such contract would be void in the hands of a bona fide holder for value. These authorities cannot be regarded as authority for the proposition for which plaintiff’s counsel cite them. They are not inconsistent with the rule (which we deem it our duty to undertake to show is well settled by authority) that, though a contract is prohibited and made a crime by statute, that contract, if it takes the form of negotiable paper, is valid and enforceable in the hands of a bona fide holder. Says Mr. Daniel, in his work on Negotiable Instruments, section 197: “The bona fide holder for value, who has received the paper in the usual

course of business, is unaffected by the fact that it originated in an illegal consideration, without any distinction between cases of illegality founded in moral crime or turpitude, which are termed 'mala in se,' and those founded in positive statutory prohibition, which are termed 'mala prohibita.' The law extends this peculiar protection to negotiable instruments because it would seriously embarrass mercantile transactions to expose the trader to the consequences of having the bill or note passed to him impeached for some covert defect."

In *Vinton v. Peck*, 14 Mich. 287, defendant was an accommodation maker of a negotiable promissory note dated on Monday, but in fact made on the preceding Sunday, contrary to the statute expressly prohibiting, under penalty of a fine, "any manner of labor, business, or work, except only works of necessity and charity": See 1 Comp. Laws 1857, sec. 1574. It was held that the note was valid and enforceable in the hands of a bona fide purchaser, because "the statute has not declared that notes made ⁴⁶⁶ contrary to the Sunday law shall be void under all circumstances. Their invalidity is only to be implied from the prohibition of Sunday business, and under such a statute a bona fide holder is protected." *State Capital Bank v. Thompson*, 42 N. H. 369, is almost precisely like the above case.

In *New v. Walker*, 108 Ind. 365, 58 Am. Rep. 40, 9 N. E. 386, a negotiable note was taken in violation of a statute requiring, under a penalty, to be stated therein, "Given for a patent right." The court held this note valid in the hands of a bona fide holder, saying (pages 374, 375): "Our opinion is that a statute making it a crime to take promissory notes in a prohibited transaction does not make the notes void in the hands of innocent purchasers, although the person who violates the statute commits a crime. This conclusion is well sustained by authority"; citing, among other cases, *Palmer v. Minar*, 8 Hun, 342, and *Cook v. Weirman*, 51 Iowa, 561, 2 N. W. 386, which are similar to the principal case.

In *Smith v. Columbus State Bank*, 9 Neb. 31, 1 N. W. 893, the court expressed its disapproval of a statement in *Kittle v. De Lamater*, 3 Neb. 325: "Or, if the note be founded upon an illegal consideration, prohibited by some positive statute, no recovery can be had, even though the indorsee may not be privy to the original transaction."

In *Hart v. Livermore etc. Machine Co.*, 72 Miss. 809, 17 South. 769, it was held that negotiable paper issued in viola-

tion of a statute of Tennessee forbidding corporations doing business in that state without compliance with its provisions was valid in the hands of a bona fide holder, the court saying (pages 833, 834): "The statute, while forbidding foreign corporations from doing business in the state without compliance with its conditions, does not declare, by express terms, that any contracts made with delinquent corporations shall be void, nor does it denounce as invalid any securities given by or to it under such contracts. The English and some ⁴⁶⁷ of the American statutes against usury and gaming declared that all assurances and securities given in consideration thereof should be void. Under such declarations, it has very generally been held that negotiable paper, even in the hands of a bona fide holder, is void, because of the language of the law. But where only the contract is declared void, and there is no declaration of nullity against securities, it is held that while, as between the parties, and those taking with notice or after maturity, no recovery can be had, a bona fide holder will be protected."

In *Press Co. v. City Bank*, 58 Fed. 321, 7 C. C. A. 248, notes issued in violation of a statute forbidding foreign corporations doing business except in compliance with its terms were held valid in the hands of a bona fide holder, the court saying (58 Fed. 322, 7 C. C. A. 249): "It is urged that public policy forbids a recovery; that to hold otherwise will nullify the statute. We do not think so. If the legislature intended the consequences claimed, we would expect it to say so."

In *Lynchburg Nat. Bank v. Scott*, 91 Va. 652, 50 Am. St. Rep. 860, 22 S. E. 487, 29 L. R. A. 827, it was contended that a note obligating the maker to pay usurious interest was void in the hands of a bona fide holder. The court answered that contention by saying (page 659): "If the maker of a negotiable note contests the right of one who has acquired it by indorsement, for value, before maturity, and without notice of any defense, to recover of him the amount of the note, he must, to prevail, be able to show a statute that in express terms, or by necessary implication, declares the note to be void."

So it has been held: "If a statute declares a security void, it is void in whosoever hands it may come. If, however, a negotiable security be founded on an illegal consideration—and it is immaterial whether it be illegal at common law or by

statute—and no statute says it shall be void, the security is good in the hands of an innocent holder, or of anyone claiming through such a holder”: *Glenn v. Farmers’ Bank*, 70 N. C. 191; *Smith v. Columbus State Bank*, 9 Neb. 31, 1 N. W. 893; *Grimes* ⁴⁶⁸ *v. Hillenbrand*, 4 Hun, 354; *Hill v. Northrup*, 4 *Thomp. & C.* 120; *Converse v. Foster*, 32 Vt. 828; *Lauter v. Trust Co.*, 85 Fed. 894, 29 C. C. A. 473; *Hatch v. Burroughs*, 1 Woods, 439, Fed. Cas. No. 6203.

Other authorities hold that “when a statute expressly or by necessary implication, declares the instrument absolutely void, it gathers no vitality by its circulation, in respect to the parties executing it”: 1 *Daniel on Negotiable Instruments*, sec. 197; *Pope v. Hanke*, 155 Ill. 625 et seq., 40 N. E. 839, 28 L. R. A. 568; *Thompson v. Samuels* (Tex.), 14 S. W. 143.

We have already referred to the fact that two of the authorities cited by plaintiff’s counsel, viz., *Snoddy v. American etc. Bank*, 88 Tenn. 573, 17 Am. St. Rep. 918, 13 S. W. 127, 7 L. R. A. 705, and *Texarkana etc. R. Co. v. Bemis Lumber Co.*, 67 Ark. 542, 55 S. W. 944, arose upon negotiable paper in the hands of a bona fide holder. *Snoddy v. American etc. Bank*, 88 Tenn. 573, 17 Am. St. Rep. 918, 13 S. W. 127, 7 L. R. A. 705, is authority for this proposition: “Notes given in consideration of a contract against morals, public policy and public statutes are void in any hands.” This, as we have already shown, and as we understand plaintiff’s counsel to concede, is opposed to almost unanimous authority, and cannot, therefore, be accepted as a correct declaration of the law. In *Texarkana etc. R. Co. v. Bemis Lumber Co.*, 67 Ark. 542, 55 S. W. 944, suit was brought upon a negotiable promissory note made by the plaintiff corporation, contrary to the constitution and statutes of the state of Texas, for the accommodation of its president. It was held that this note was void in the hands of a bona fide holder. The argument of the court in support of this contention is this: “A contract prohibited by the constitution or statute of a state, although negotiable in form, is not so in fact, and no innocence or ignorance on the part of the holder will make it enforceable. It is an absolute nullity”—citing 1 *Daniel on Negotiable Instruments*, sec. 807, and decisions of the supreme court of the United States and of the supreme court of Texas.

The decisions referred to do not sustain the proposition for which they are cited. The section of *Daniel* cited has

⁴⁶⁰ reference to cases where an express statutory provision declares a note void. We cannot follow this authority without repudiating our own decision of *Vinton v. Peck*, 14 Mich. 287, and the almost unanimous authority of other courts.

Plaintiff's counsel assert that the case at bar is not ruled by decisions which hold that negotiable paper based upon an illegal consideration is valid in the hands of a bona fide holder. They insist that such cases are not authority, because the statute under consideration in this case did not merely make the consideration illegal; it actually "prohibited and penalized" the making of the contract itself. We are unable to see that this circumstance, if it affords a sound distinction, distinguishes the case at bar from several of the cases above referred to. In *Vinton v. Peck*, 14 Mich. 287, the particular act which was prohibited and punishable by fine was the making of the note in suit. It is true that the statute did not in express terms prohibit the making of the note, but, when it prohibited the doing of any business, it did prohibit the making of the note, for, as was expressly said by the supreme court of New Hampshire, in *State Capital Bank v. Thompson*, 42 N. H. 370: "Under the construction of our statute prohibiting unnecessary labor on Sunday, the execution and delivery of a promissory note upon Sunday has been declared 'business of a person's secular calling,' . . . and, as such, is prohibited under a penalty."

So, in *New v. Walker*, 108 Ind. 365, 58 Am. Rep. 40, 9 N. E. 386, a bona fide holder was allowed to recover on a note given for a patent right in violation of a statute which prohibited, under a penalty, the delivery of the note without the insertion of the clause that it was "given for a patent right." It is idle to say that the making of this note was not prohibited by a penal statute: See, also, *Palmer v. Minar*, 8 Hun, 342; *Cook v. Weirman*, 51 Iowa, 561, 2 N. W. 386. The only distinction that can be drawn between those cases and the case at bar is in the ⁴⁷⁰ nature and extent of the punishment for making the contract prohibited by law. Such an inconsequential distinction will not change a rule of law.

We conclude, therefore, that, though the making of a contract is prohibited and made a crime by statute, yet that contract, if it takes the form of negotiable paper, is valid in the hands of a bona fide holder for value. We think it also settled that negotiable paper in the hands of a bona fide holder for value is not subject to any defense which would

avoid it in the hands of the original holder unless some statute either expressly or by necessary implication, so declares. We affirm the proposition denied by plaintiff's counsel, that though the statute, "by necessary implication, make the contract made in violation thereof absolutely void as to non-negotiable contracts, and as to negotiable contracts in the hands of persons having knowledge of the defects, yet . . . the statute will not be considered to have that effect should the contract be negotiable in form, and be found in the hands of a bona fide holder." No strength is added to the foregoing proposition by saying that the statute, by implication, makes void all non-negotiable contracts, and negotiable contracts in the hands of persons having knowledge of the defect; for it follows from elementary legal principles that all such contracts are unenforceable if the original contract in the hands of the first parties thereto cannot be enforced. Nor is strength added to the proposition by saying that such contracts are "absolutely void." If they cannot be enforced in the hands of the original holders, we see no reason for quarreling with a person who chooses to call them absolutely void, though others might describe them as voidable: See *Thompson v. Samuels* (Tex.), 14 S. W. 143. It follows that plaintiff's counsel deny that negotiable paper can be enforced in the hands of a bona fide holder for value, if it arises from a contract which, by implication of law, is void or unenforceable between the original parties. In our judgment, the principle so denied is a correct statement of the law. If it were otherwise all ⁴⁷¹ negotiable paper arising out of illegal and forbidden transactions would be void in the hands of bona fide holders for value and yet nothing is better settled, by principle and authority, as we have already shown, than that such paper is valid.

There remains to be considered this question: Does the statute, by necessary implication, or by implication, even, make the check void in the hands of a bona fide holder for value? We have already seen that such implication cannot be found from the circumstance that the certification is prohibited and made a crime. It is insisted, however, that the intent of the legislature to make the check void in the hands of a bona fide holder is indicated by other circumstances. It is contended that the purpose of the legislature in enacting this law was "to protect the citizens, depositors and stockholders against just such an act as was committed in the case

at bar," viz., an attempt to withdraw the funds of the bank by means of a check falsely certified, and that, to make this purpose effectual, the check must be held void in the hands of a bona fide purchaser. If it were true that the sole purpose of the statute was to protect the depositors and stockholders of a bank against the criminal acts of its own officials, this argument would be very forcible. Are we warranted in declaring that the sole purpose of the legislature in passing this statute was to protect banks and their depositors from the consequences of criminal misconduct of their officials, and that there were not other purposes, which would fail if plaintiff's construction of the act prevails? We must bear in mind that the legislature, in passing this statute in 1887, had not learned the lessons taught by the disastrous failure of the City Savings Bank in 1902, which occasions this litigation, though counsel do not agree as to precisely what lessons are taught by this failure. We shall not, therefore, be materially aided—indeed, we are rather likely to be misled—if we look to that disaster to throw light upon the legislative purposes. The legislature has not, by this statute, expressly declared its purpose. Its purpose, then, ⁴⁷² is to be inferred. While we are bound to infer that one of its purposes was to protect the bank and its depositors from the criminal conduct of its officials, it is likewise to be inferred that there was a broader purpose, viz., to promote safe banking generally. We may infer the legislative purpose on the assumption that the law was made to be observed, as well as on the assumption that it would be violated. If the law is observed, we can readily see that it will benefit, and thus infer the legislative purpose to benefit, not merely the depositors and stockholders of banks whose officers are called upon to certify checks, but all persons taking such checks. In other words, the observance of this law tends to increase the certainty of the payment of certified checks and to promote safe banking.

In the case at bar, the allowance of the certified check will inure to the benefit of the stockholders of defendant bank, and to the damage of the depositors of the City Savings Bank, represented by plaintiff. But the law we declare in this case will certainly apply to a case, if such a case should, as it may, arise, where the allowance of such a check inures to the benefit of the depositors of the bank which takes it, and damages no one but the stockholders of the bank whose offi-

cials criminally certified it. Such a case would be presented here if the payment of the check under consideration would not sensibly impair the capital of the City Savings Bank, and if the funds withdrawn by its means from defendant had rendered it impossible for the latter to pay its depositors. And in such a case, under plaintiff's contention, the court should say that the legislature intended to prefer the interest of the stockholders of the bank whose officers were guilty of criminal misconduct, to that of the depositors of another bank damaged by such misconduct. We do not think we are warranted in imputing to the legislature such an intent. We think it not improper to infer that it was the legislative purpose to protect the interests of the stockholders and depositors of all banks, and not merely the stockholders and depositors of particular banks whose officials might be guilty of criminal misconduct.

473 The language of the statute prohibiting the certification does not compel the conclusion that its sole purpose was to protect the bank and its depositors against the criminal misconduct of its officials. Certification of a check is prohibited and made a crime "unless the amount thereof actually stands to the credit of the drawer upon the books of the bank." It will thus be observed that certification is forbidden, even though the drawer has funds in the bank which do not stand to his credit upon the bank's books, and certification is not forbidden if the amount of the certified check is credited upon the books, though that credit is fictitious. In making the last statement, we have not forgotten that plaintiff contends that the statute does forbid certification where the entry upon the books is fictitious; but, as stated above, we do not agree with this contention. The statute in such case forbids the fictitious entry; it does not forbid the false certification resulting therefrom. In many cases the distinction might be unimportant; in others it might be very important. Suppose the bookkeeper or cashier of the bank made the fictitious entry; and the teller, acting in the best of faith, relying thereon, certified a check. No reasonable construction of the act would make this certification a crime, or bring it within the statutory prohibition. It will thus be seen that certification is prohibited in a class of cases where the depositors and stockholders of the bank whose officers violated the law cannot be injured, and it is permitted in a class of cases where they are injured. If the sole

purpose of the act had been to protect the depositors and stockholders of the bank whose officers were guilty of this misconduct, different language would have been used. We are not, therefore, warranted in saying that this act was passed solely for the purpose of protecting the bank and its depositors from the criminal misconduct of its officers. We are warranted in declaring that there was a legislative purpose in passing this act which would be defeated by the construction contended for by plaintiff.

474 If the section is construed as plaintiff contends—if checks duly certified are void in the hands of bona fide holders because the amount thereof did not stand to the credit of the drawer on the books of the bank—this consequence follows: Certified checks, instead of being, as heretofore, the negotiable paper of the bank, and passing as current upon the faith of the bank's credit, will pass, if at all, only upon the credit of the particular bank official who certified it. Every person to whom a certified check is offered will be called upon to determine, not the credit of the certifying bank, not the authority of the certifying official, but the integrity and diligence of that official. Though one may have all confidence in such integrity and diligence, he may hesitate to take the check, because he fears that others to whom he may wish to transfer it lack such confidence. It will result, therefore, that certified checks, instead of being regarded in commercial circles with credit and favor, as heretofore, will be regarded with a degree of suspicion, and are likely to be discredited. If the legislature intended this consequence—and they must have intended it if they intended that the act should receive the construction contended for by plaintiff—it seems strange that they left their intent to be ascertained as a matter of doubtful inference; it seems strange that they still left to banks the power of certifying checks, without any clear suggestion that such power was so greatly limited. "If the legislature intended the consequences claimed, we should expect it to say so": *Press Co. v. City Bank*, 58 Fed. 321, 7 C. C. A. 249.

It is suggested, rather than urged, by plaintiff's counsel, that on the authority of *Spitzer v. Village of Blanchard*, 82 Mich. 234, 46 N. W. 400, the statute under consideration should be construed as denying to the teller authority to bind his principal, the bank, by the certificate under consideration. In *Spitzer v. Village of Blanchard*, 82 Mich. 234, 46

N. W. 400, it was held that bonds issued by a village in excess of the amount authorized by its incorporation act are void in the hands of a bona fide holder, the court saying (page 246):
475 "The amount of the bonds to be issued was known, and appears upon the face of the bonds. The assessed valuation and the vote of the electors are matters of public record, and are open to all the world for inspection and ascertainment, and are as accessible to intending purchasers as other persons. The limitation of power upon the common council appears in the public statute, and is presumed to be known by all dealing with corporate authorities or in corporate bonds."

To show the distinction between that case and the case at bar, we quote from other language in that opinion (page 244): "Where there is a total want of power, under the law, in the officers or board who issue the bonds, then the bonds will be void in the hands of innocent holders, the distinction being between questions of fact and questions of law. If it is a question of fact, and the board or officers are authorized by law to determine the fact, then their determination is final and conclusive."

If it were necessary to further distinguish that case from the case at bar, we cannot do better than quote the language of distinguished jurists. Said Mr. Justice Selden in *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 16 N. Y. 125, 69 Am. Dec. 678: "It is, I think, a sound rule that where the party dealing with an agent has ascertained that the act of the agent corresponds in every particular in regard to which such party has, or is presumed to have, any knowledge, with the terms of the power, he may take the representation of the agent as to any extrinsic fact which rests peculiarly within the knowledge of the agent, and which cannot be ascertained by a comparison of the power with the act done under it."

Said Justice Davis in *New York etc. R. Co. v. Schuyler*, 34 N. Y. 73: "Where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with
476 such agent in entire good faith pursuant to the apparent power may rely upon the representation."

If authority is needed for the proposition, which seems obvious, that the certification in question related to an act peculiarly within the teller's knowledge, we refer to *Oakland County Sav. Bank v. State Bank of Carson City*, 113 Mich. 284, 67 Am. St. Rep. 463, 71 N. W. 453.

It is also urged that it was the intention of the framers of the general banking act to follow generally the provisions of the national banking law, and that we are warranted in inferring an intent to avoid a check falsely certified, in the hands of a bona fide holder, from certain changes—particularly from the fact that, when section 19 (2 Comp. Laws, sec. 6108) was framed, language was omitted which in the corresponding section of the national banking law, viz., section 5208 of the Revised Statutes of the United States, clearly indicated the purpose of Congress to make such checks valid. This contention deserves attention. Section 5208 of the Revised Statutes of the United States makes it unlawful to certify any check, not, as provided in section 19, unless the amount actually stands to the credit of the drawer on the books of the bank, but unless the drawer "has on deposit . . . an amount of money equal to the amount specified in such check." Then follows the provision omitted from section 19: "Any check so certified by duly authorized officers shall be a good and valid obligation against the association." It will be observed that the language omitted in framing section 19, in form, at least, and possibly in reality (see 1 Morse on Banks and Banking, 4th ed., sec. 414), makes the prohibited check valid, even though not in the hands of a bona fide holder. The omission of this sentence, therefore, in section 19, may well be attributed to some other purpose than the intent to make such checks void in the hands of a bona fide purchaser. We can well understand the reluctance of a legislature to use language which, even by inference, made such checks valid in whosoever hands they might be.

⁴⁷⁷ It results from these views that the trial court erred in denying defendant the right to prove that it received this check after certification, on the day it was drawn, in the usual course of business, and paid full value therefor, without notice or knowledge of any infirmity, or of the fact that the account of the drawer was overdrawn.

The court has received unusual aid from the excellent arguments and briefs of counsel representing the parties inter-

ested in this litigation. Without such aid, we could not have reached so speedy a decision.

Judgment reversed, and new trial ordered.

Moore, C. J., Montgomery and Hooker, JJ., concurred.

Grant, J., did not sit.

By the Certification of a Check a Bank enters into an absolute undertaking to pay it when presented at any time within the period of limitations: *Metropolitan Nat. Bank v. Jones*, 137 Ill. 164, 31 Am. St. Rep. 403.

A Negotiable Instrument is valid in the hands of a bona fide holder, no matter how illegal or immoral its consideration may be, except where some statute makes it absolutely void: *Irwin v. Marquett*, 26 Ind. App. 383, 84 Am. St. Rep. 297, and cases cited in the cross-reference note thereto; *Higginbotham v. McGready*, 183 Mo. 96, 105 Am. St. Rep. 461.

McLANE, SWIFT & CO. v. BOTSFORD ELEVATOR COMPANY.

[136 Mich. 664, 99 N. W. 875.]

NEGLIGENCE—Proximate Cause.—Where an Elevator Company neglects to clip and ship oats at the time agreed upon with the owner, as a result of which they remain in its elevator, where they are destroyed by the accidental burning of the building, the negligence of the company in failing to ship the grain promptly is not the proximate cause of its loss. (p. 385.)

ELEVATOR COMPANY—Liability for Destruction of Grain. Where an elevator company contracts to clip oats at its elevator and reship them in the same cars in which they are received, but instead of so doing uses the cars for other purposes and keeps the grain in the elevator, where it is destroyed by the burning of the building, the use of the cars for another purpose is not the proximate cause of the loss of the grain, nor does it amount to conversion thereof. (p. 387.)

Phillips & Jenks, for the appellant.

Arthur B. Williams and Avery & Walsh, for the appellee.

664 CARPENTER, J. In the fall of 1901 the plaintiff shipped certain oats from Battle Creek, Michigan, to the eastern cities. It arranged with defendant to clip these oats at its elevator in the city of Port Huron, and to reship them on their original bills of lading. While these oats were in defendant's elevator, and before they were clipped, the 665 building and the oats were accidentally destroyed by fire.

It is affirmed by plaintiff, and denied by defendant, that, if the latter had faithfully performed its obligations, the oats would have been shipped from the elevator before the fire occurred. Assuming plaintiff's claim to be sound, the question arises whether the failure of defendant to perform this obligation was a proximate cause of the loss of the oats. The trial court decided that it was, and this decision resulted in a verdict and judgment for the plaintiff.

We think this decision erroneous. Defendant's neglect to clip and ship the oats had no direct relation to their destruction. It simply resulted in leaving them where they were burned by a fire for which defendant was not responsible. Defendant's neglect was therefore, at most, the remote cause, while the accidental fire was the proximate cause, of plaintiff's loss; and it is authoritatively settled, as we shall show, that the law does not look beyond the proximate cause. In *Lewis v. Flint Ry. Co.*, 54 Mich. 55, 52 Am. Rep. 790, 19 N. W. 744, plaintiff, a passenger on defendant's railway, was wrongfully carried past his station, and, on leaving the train, was misinformed as to his location. He soon discovered his whereabouts and started home. He knew the neighborhood and the location of certain cattle-guards and culverts; but he was deceived by his eyes, his foot slipped, and he fell into a culvert, and was seriously injured. It was held that this injury was not a proximate result of defendant's wrong. In deciding the case, the court said (page 66): "If lightning had chanced to strike the plaintiff at that place, the fault of the defendant and its relation to the injury would have been the same as now, and the injury could have been charged to the defendant with precisely the same reason as now. If the accidental discharge of a gun in the hands of some third person had wounded the plaintiff as he approached the cattle-guard, the connection of defendant's wrong and the injury would have been precisely the same which appears here. But the proximate cause of injury in the one case would have been the act of God; in the other, inevitable accident, but not more plainly ~~acc~~ accident than was the proximate cause here. Back of that cause in this case were many others, all conducing to bring the plaintiff to the place of the danger and the injury; the act of the defendant was the last of a long sequence; but, as between the causes which precede the proximate cause, the

law cannot select one, rather than any other, as that to which the final consequence shall be attributed, and it stops at the proximate cause, because to go back of it would be to enter upon an investigation which would be both endless and useless."

No argument is necessary to prove that the principle applied in the foregoing case applies to the case at bar: See, also, *Michigan Cent. R. Co. v. Burrows*, 33 Mich. 6; *Morrison v. Davis*, 20 Pa. St. 171, 57 Am. Dec. 695; *Denny v. New York etc. R. R. Co.*, 13 Gray, 481, 74 Am. Dec. 645; *Hoadley v. Northern Transp. Co.*, 115 Mass. 304, 15 Am. Rep. 106; *Railroad Co. v. Reeves*, 10 Wall. 176, 19 L. ed. 909; *Daniels v. Ballantine*, 23 Ohio St. 532, 13 Am. Rep. 264; and *Ashe v. De Rossett*, 50 N. C. 299, 72 Am. Dec. 552. The last is a case almost precisely like that at bar.

It is true that in this case the property was lost while it was still in defendant's custody, and in many of the cases above cited the loss did not occur until after it had left the custody of the defendant charged with negligence. Plaintiff insists that this distinction makes the rule declared in the above cases inapplicable. According to this argument, defendant would not be responsible for an accidental destruction of the goods after its negligent delay, provided they had been shipped, but would be responsible if they had not been. We are unable to see any sound basis for this distinction. Defendant's wrong has precisely the same relation to the loss in the one case as in the other. If authority is needed to show that this distinction is unsound, we refer to *Hoadley v. Northern Transp. Co.*, 115 Mass. 304, 15 Am. Rep. 106, and *Ashe v. De Rossett*, 50 N. C. 299, 72 Am. Dec. 552.

Many of the cases above cited were actions on the case, like that brought by plaintiff, and therefore we cannot accept plaintiff's contention that the rule does not apply to an action on the case.

⁶⁶⁷ There is authority for saying (see *Michaels v. New York etc. R. R. Co.*, 30 N. Y. 564, 86 Am. Dec. 415; *Read v. Spaulding*, 30 N. Y. 630, 86 Am. Dec. 426) that if defendant had had the custody of these oats as a common carrier, it would have been responsible for their loss, under the circumstances disclosed by this record. There is no occasion in this case either to approve or to disapprove these decisions, though they are opposed to *Morrison v.*

Davis, 20 Pa. St. 171, 57 Am. Dec. 695, Denny v. New York etc. R. R. Co., 13 Gray, 481, 74 Am. Dec. 645, and Hoadley v. Northern Transp. Co., 115 Mass. 304, 15 Am. Rep. 106. as well as the reasoning of this court in Michigan Cent. R. Co. v. Burrows, 33 Mich. 6. They are based on the extraordinary obligation of a common carrier (an obligation not imposed upon the defendant), who is responsible for loss of goods in his custody unless excused by an act of God or of the public enemy. Their reasoning, if sound, has no application to the case at bar.

It is the claim of the plaintiff that some of the oats destroyed by fire were to have been reshipped in the same cars which brought them to the defendant's elevator; that defendant is responsible for the loss of these oats, because it used said cars for another purpose. Plaintiff's right to recover on this theory was denied by the trial judge. We approve that decision. Under the foregoing reasoning, the use of the cars for another purpose, though a wrong to plaintiff, was not the proximate cause of the destruction of the oats. Neither can it be said that it was a conversion of the oats. A conversion of the oats can only arise from some improper dealing with the oats themselves. It cannot arise from an improper use of the cars of the railroad company, from which they have been taken.

It results from this reasoning that defendant was entitled to have a verdict directed in its favor.

Judgment reversed; and a new trial ordered.

The other justices concurred.

The Doctrine of Proximate Cause is discussed in the monographic note to Gilson v. Delaware etc. Canal Co., 36 Am. St. Rep. 807-861. The failure of the owner of a gin to perform his contract to gin the cotton of another within a specified time is not the proximate cause of its subsequent loss by fire while at the gin: James v. James, 58 Ark. 157, 41 Am. St. Rep. 95.

KIBLER v. CAPLIS.

[140 Mich. 28, 103 N. W. 531.]

OPTION—Evidence of Acceptance.—Where a buyer claims that he mailed a letter and also sent a telegram to the seller accepting an option to purchase hides, both of which should, in due course of the transmission of such messages, have reached their destination before the expiration of the option, but the seller testifies that neither of them did reach him before that time, the evidence presents a question of fact for the jury as to when the letter and telegram were received. (p. 390.)

OPTION—Evidence of Acceptance.—The Mere Sending of a telegram and a letter accepting an option to buy hides is not a sufficient acceptance, unless the seller is actually notified of the acceptance within the time limited therefor. (p. 390.)

OPTION—Parol to Show Manner of Payment.—If an option to buy hides is unambiguous, though it is silent as to the time and manner of payment, parol evidence is not admissible to show that at the time the option was given it was agreed that a down payment of a certain amount should be made. (p. 390.)

OPTION—Performance of Conditions by Seller—Payment.—If an option to purchase hides requires that they shall be banked overnight, trimmed of meats, cleaned of manure, and shaken over barrels and swept, and thus made ready for weighing and delivery, the buyer is not required to pay the purchase price in advance of the doing of these acts by the seller. (p. 391.)

OPTION—Evidence of Market Value of Hides.—In an action for the breach of an option for the sale of hides in Detroit, a trade paper containing the market value of hides in Chicago is admissible in evidence. (p. 391.)

Adolph Sloman and Edmund M. Sloman, for the appellants.

James H. Pound, for the appellee.

29 MOORE, C. J. Plaintiffs sued to recover for breach of contract for the sale of a quantity of hides, for which defendant gave them an option reading:

“Detroit, Michigan, October 5, 1901.

“I this day give Samuel J. Kibler & Brother an option on my hides, at ten cents per pound flat; hides to be banked overnight, trimmed of meats, and manure to be removed. Option to expire Tuesday noon, October 8, 1901. Hides to be shaken over barrels and swept.

“MICHAEL CAPLIS.”

At the same time, and in consideration therefor, plaintiffs gave defendant an option for the same hides on the same terms, at nine and three-quarters cents, flat, per pound.

Plaintiffs gave testimony tending to show that they sent from New Washington, Ohio, a telegram as follows:

"October 7, 1901.

"Mr. Caplis, Care Caplis & Co., Detroit, Michigan:

"Will take your hides, as per your option on hand.

"SAMUEL J. KIBLER & BROTHER."

And on the same day a letter as follows:

"Dear Sir: We wired you today, accepting your hides as per price and option you gave us October 5, and which we now confirm, prices and conditions as follows: Price ten cents, flat; hides to be banked overnight, trimmed of meats, manure to be removed, hides to be shaken over barrels and swept. Would advise later when we will commence to take up. This is an extreme price and you have made a very good sale.

"Yours truly,

"SAMUEL J. KIBLER & BROTHER."

³⁰ It was the claim of the plaintiff that the defendant refused to deliver him the hides, and this suit was brought to recover the damages. It was tried before a jury, which returned a verdict for defendant. The case is brought here by writ of error.

The assignments of error are discussed under the following heads: 1. Had plaintiffs accepted the option in time? 2. Was the sending of the telegram and letter a sufficient acceptance, whether received by the defendant or not? 3. Could defendant, by his testimony, vary the contract by showing that at the time the option was given there was an oral understanding that one thousand dollars was to be paid down on its acceptance? 4. Under the terms of this option, were plaintiffs required to pay the purchase price to secure the same in advance of the doing of the things called for by the option, and more particularly the ascertainment of the number of pounds from which the total of the purchase price could only be determined? 5. Could plaintiffs show the value of these hides by proof of the Chicago market if the Chicago market in a measure controlled the Detroit market?

We will take up the assignments of error in the order presented by counsel.

1. It was the claim of plaintiffs that the telegram sent on the 7th of October would, in the regular order of busi-

ness, reach defendant on the 7th. Except the evidence that the telegram was sent, and the presumptions arising therefrom, there was no evidence that it was delivered to the defendant. He testified that he never received it. It was also the claim of the plaintiffs that the letter was mailed between 6 o'clock and 7:15 o'clock on the afternoon of the 7th, and by due course of mail should have been received by the defendant by noon of the 8th. The defendant testified he did not receive it until later than noon of the 8th. In *People v. Hammond*, 132 Mich. 422, 93 N. W. 1034, it was held that there is a presumption that those in charge of receiving and transmitting mail perform the duty intrusted to ³¹ them; that there is a presumption that when a telegram has been delivered to a telegraph company, and accepted by the operator for transmission, it is duly forwarded and received by the addressee: See, also, 1 Greenleaf on Evidence, 16th ed., p. 137. In view of this presumption* and the testimony, a question of fact was presented as to when the option was received.

2. Was the sending of the telegram and letter a sufficient acceptance, whether received by the defendant or not? Plaintiffs claim it was, but cite no authorities in support of the proposition. If the sending of a letter from New Washington, Ohio, before noon of the 8th would be sufficient, would the sending of one from the state of Washington by noon of the 8th be sufficient? It is evident the parties had in mind that the offer to sell would be good only until noon of the 8th. Unless actually notified by that time of its acceptance, we do not think defendant could be held: See notes to *Litz v. Goosling*, 93 Ky. 185, 19 S. W. 527, 21 L. R. A. 127.

3. The defendant was permitted to show by parol that, at the time the option was given, it was agreed a down payment of one thousand dollars should be made. Plaintiffs denied such an agreement was made. The option was not ambiguous. It is true, it is silent about the time and manner of payment. Where nothing is said about it, delivery and payment are concurrent acts: 2 Mechem on Sales, sec. 1119. If there was an agreement about the time and manner of payment, it should have been put in the option. The parties are presumed to have put their agreement in writing. The oral testimony was incompetent: *McCray Refrigerator etc. Co. v. Woods & Zent*, 99 Mich. 269, 41 Am. St. Rep. 599, 58

N. W. 320, 81 N. W. 112; Cohen v. Jackoboice, 101 Mich. 409, 59 N. W. 665; Grashaw v. Wilson, 123 Mich. 364, 82 N. W. 73; Mouat v. Montague, 122 Mich. 334; Hallett v. Gordon, 122 Mich. 567, 81 N. W. 556, 82 N. W. 827; Althouse v. McMillan, 132 Mich. 145, 92 N. W. 941.

4. By the terms of the option the hides were to be banked overnight, trimmed of meats, and manure to be removed, and were to be shaken over the barrels and swept. ³² When this was done they would be ready for weighing and delivery, and, as before stated, delivery and payment would be concurrent acts: See, also, 2 Mechem on Sales, sec. 1115.

5. Was it error to exclude a trade paper containing the market value of hides in Chicago? One of the witnesses testified: "Chicago being the great butchering center, the class of hides such as the plaintiffs purchased from defendant are more taken off in Chicago than in any other city of the United States, perhaps in the world, and that is the market for that class of goods; that when they come here to purchase hides they are governed by the Chicago market."

We think this feature of the case is ruled by Aulls v. Young, 98 Mich. 231, 57 N. W. 119, and the cases cited therein, and that the testimony should have been admitted.

The case is reversed and new trial ordered.

Carpenter, McAlvay, Grant, and Blair, JJ., concurred.

An Option to Sell, if made upon a proper consideration, cannot be revoked by the vendor within the time granted for its exercise: Frank v. Stratford-Handcock, 13 Wyo. 37, 110 Am. St. Rep. 963; Cummins v. Beavers, 103 Va. 230, 106 Am. St. Rep. 881. But while an option may bind the vendor during the period given for acceptance, it is not a contract of purchase until accepted; and if not accepted within the time limited therefor, it terminates: Tilton v. Sterling etc. Coke Co., 28 Utah, 173, 107 Am. St. Rep. 689.

Contracts by Telegraph are discussed at length in the recent note to Cobb v. Glenn Boom etc. Co., 110 Am. St. Rep. 742-771.

TEMBY v. CITY OF ISHPEMING.

[140 Mich. 146, 103 N. W. 588.]

MUNICIPAL CORPORATION—Liability for Billboard on Private Property.—If the owner of an opera-house maintains a billboard on his own land between the building and the street, and the wind blows the board against a person who is passing, the city is not answerable for his injuries. (p. 397.)

W. T. Potter, for the appellant.

Button & Hefferman, for the appellee.

147 **HOOKEER, J.** The plaintiff was injured by a billboard which Butler was in the habit of using in front of the doors of his opera-house, in the city of Ishpeming, to advertise prospective attractions. This billboard was eighty-eight inches in length, forty-four inches in width, and weighed over forty pounds. On each edge, about a foot from the top of the board, a screw hook was placed to fasten into eyes or staples on the beam over the double doors. The lower end rested upon the sidewalk eighteen inches or two feet from the building. The building is three feet back from the street line, but the walk extends to the door. The plaintiff, while passing, was hit and injured by the board, which was blown by the wind against him. There was some testimony indicating that it was not fastened on this occasion. A verdict and judgment for the plaintiff resulted from the trial, and the defendant has appealed. The only question arises over the refusal of the circuit judge to direct a verdict for the defendant.

The undisputed evidence in this case shows that the billboard was wholly outside of the highway and upon private ground. Before the defendant can be held liable to pay for this injury, it must be shown that it "neglected to keep its sidewalk in reasonable repair and in condition reasonably safe and fit for travel." No complaint is made that the street or sidewalk was not in proper condition and in a reasonably safe and fit condition for travel, so far as the same was dependent upon the condition of the street itself. Plaintiff's claim rests on the proposition that, to avoid liability under the statute, the municipality must protect the traveler

against dangers from beyond the limits of the highway which make traveling unsafe.

The only theories upon which defendant can be held liable in this case are: 1. That all of the sidewalk was a portion of the highway; or 2. That the billboard was a nuisance, which the city might and should have abated.

There is no testimony tending to show that the three feet of ground upon which the billboard stood was a part of the highway or that the city so treated it. Nothing indicates ¹⁴⁸ that it exercised any control over it, or that said three feet was covered by any walk that it built or ordered. This area in front of the opera-house appears to have been an exception, other buildings extending to the line of the highway. It is not unreasonable to suppose that it was left for the accommodation of the owner's patrons, and it is shown that the owner exercised dominion over it by the use made of the billboard, if in no other way. The city had no lawful right to require its use for a street, or to prevent the owner from using it in connection with his opera-house in any lawful way. We cannot say from the record that the city should be estopped from denying that this strip was a part of its sidewalk, to be kept in repair, etc., by it.

We must then inquire whether the liability can be sustained upon the ground that it failed to abate a nuisance. In its construction of the statute (1 Comp. Laws, sec. 3441), which has been somewhat liberal, this court has never gone so far as to hold that it requires the municipality to protect a traveler against dangers which result entirely from the use made of abutting premises by their owners, and which cannot be avoided by barriers or some other effective mode of construction of the highway. It may be reasonably said that a highway is not reasonably safe which has no barriers separating it from a pit or cellar on adjoining premises, and in such a case the liability rests, not on a failure to abate a nuisance, but an inadequate highway. The city may, and should, perhaps, build the barrier, but it has no authority to trespass upon the abutter and fill up his cellar.

In *Hixon v. City of Lowell*, 13 Gray (Mass.), 59, this subject is discussed by Mr. Justice Hoar. The statute provided that "all highways, town ways, causeways and bridges within the bounds of any town" are required to "be kept in repair at the expense of such town, so that the same may be

safe and convenient to travelers, with their horses, teams and carriages, at all seasons of the year." That was a case where snow and ice fell from a ¹⁴⁹ building, having gathered there until it overhung the street. The court distinguished the case from the fall of an awning projecting over the street and supported by posts resting upon the sidewalk. The learned jurist said:

"It may not be easy to perceive and state distinctly the difference between the two cases in regard to the liability of the town, but we are all of opinion that there is such a distinction, and that the facts which were proved on the trial will not sustain this action.

"In most cases the town has discharged its duty when it has made the surface of the ground over which the traveler passes sufficiently smooth, level, and guarded by railings to enable him to travel with safety and convenience by the exercise of ordinary care on his own part. There may be many causes of injury to which he might be exposed in traveling upon such a way, which would not constitute any defect or want of repair in the way itself. In *Vinal v. Inhabitants of Dorchester*, 7 Gray (Mass.), 421, it was held that a town was not responsible for an injury caused to the plaintiff by the running of the cars of a railroad company across a public highway, although the railroad was constructed in a manner not allowed by law, and the trains run thereon in a manner dangerous to the travelers on the highway. The town, if it has done its duty in making the way safe and convenient in all the proper attributes of a way, is not obliged to insure the safety of those who use it.

"The traveler may be subjected to inconvenience and hazard from various sources, none of which would constitute a 'defect or want of repair,' in the way, for which the town would be responsible. He might be annoyed by the action of the elements—by a hailstorm, by a drenching rain, by piercing sleet, by a cutting and icy wind—against which, however long continued, a town would be under no obligation to furnish him protection; he might be obstructed by a concourse of people, by a crowd of carriages; his horse might be frightened by the discharge of guns, the explosion of fireworks, by military music, by the presence of wild animals; his health might be endangered by pestilential vapors or by the contagion of disease; and these sources of discomfort and danger might be found within the limits of the

highway, and continue for more than twenty-four hours, and yet the highway not be, in any legal sense, defective or out of repair. It is obvious that ¹⁵⁰ there may be nuisances upon traveled ways for which there is no remedy against the town which is bound by law to construct and maintain the way. If the owner of a distillery, for example, or of a manufactory, adjoining the street of a city, should discharge continuously from a pipe or orifice opening toward the street a quantity of steam or hot water, to the nuisance and injury of passersby, they must certainly seek redress in some other mode than by an action for a defective way. If the walls of a house adjoining a street in a city were erected in so insecure a manner as to be liable to fall upon persons passing by, or if the eavestrough or water conductor was so arranged as to throw a stream from the roof upon the sidewalk, there being in either case no structure erected within or above the traveled way, it would not constitute a defect in the way.

"It is true that the present case finds that the snow had slid from the eaves, so that for more than twenty-four hours before it fell it hung above the sidewalk; but we can see no good reason why the plaintiff should therefore have a claim against the city, any more than if it had fallen directly from the roof without the intermediate suspension.

"The liability of towns for injuries caused by defective ways is created by statute, and is not to be extended, by construction, beyond the limits which a reasonable interpretation of the statute establishes. We are of the opinion that in *Drake v. City of Lowell*, 13 Met. (Mass.) 292, one of those limits was reached, and that where there is no structure, such as, if inconsistent with the safety of travelers, would be an encroachment upon the street, and the way itself is properly constructed, the descent of snow or water from the roof of a building, whether sudden or gradual, does not give a right of action against the town to recover compensation for the injury which it may occasion. It is not, within the meaning of the law, a 'defect or want of repair in the highway.' "

It is doubtless true that a municipality, having the control of the highways and the duty of keeping them in repair, must at its peril remove or guard against perils growing out of defects and obstructions within the highway limits. It has the necessary authority and possession to sum-

marily remove obstructions and other public nuisances therefrom, and the statute imposes a liability for a ¹⁵¹ failure to do so. It has, however, neither the possession nor the authority to invade private premises to summarily remove such things belonging to the proprietor which may be thought dangerous. If nuisances exist on private premises, it is, in most cases, necessary that legal proceedings be instituted to abate them, and we are of the opinion that meantime the city cannot be held liable for the consequences of their maintenance. Redress in such cases must be sought against the owner. In the present case it may be that the land owner is liable. Certainly, if there is any actionable negligence, it is his, and no good reason suggests itself for bringing this action against the city rather than against him.

We are cited to several cases which are supposed to support plaintiff's contention. The one most relied on was *Cason v. City of Ottumwa*, 102 Iowa, 99, 71 N. W. 192. In that case there is nothing to indicate that the billboard was upon private property. Apparently it was in the street, as it clearly was in the case of *Village Oak Harbor v. Kallagher*, 52 Ohio St. 183, 39 N. E. 144. *Grove v. City of Fort Wayne*, 45 Ind. 429, 15 Am. Rep. 262, was where a cornice overhanging the street fell. It apparently rests upon a statute making it a municipal duty to abate nuisances. It is recognized as an extreme case, if not discredited, in the case of *City of Anderson v. East*, 117 Ind. 126, 10 Am. St. Rep. 35, 19 N. E. 726, 2 L. R. A. 712. It cites the case of *Parker v. Mayor etc. of Macon*, 39 Ga. 725, 99 Am. Dec. 486, where a liability was predicated on a failure of the city to remove a dangerous ruin upon private property, but on the line of the street—a duty imposed by statute. Another case (a billboard by the way) is found in *Langan v. City of Atchison*, 35 Kan. 318, 57 Am. Rep. 165, 11 Pac. 38. This also rests upon a statute, quoted in the opinion, which made it a municipal duty to take down and remove dangerous structures. It distinguished the case of *Taylor v. Peckham*, 8 R. I. 349, 91 Am. Dec. 235, 5 Am. Rep. 578, which held the contrary, upon the grounds, first, that the city had no such authority, and, second, that the liability was statutory only in Rhode Island. The same distinction may be made in the present case. In *McLoughlin v.* ¹⁵² *Philadelphia*, 142 Pa. St. 80, 21 Atl. 754, a city was held not liable for injury occasioned by the falling

of screens upon child, although left habitually upon the sidewalk.

We are of the opinion that this cause is not within the statute, the accident, resulting from no default of the city in keeping its highway in a condition reasonably safe and fit for travel. We think that it was not the legislative intention to impose upon municipalities the duty of supervising the use of abutting premises by their owners, and that sufferers from the negligence of such must look to them for redress, where such negligence has been confined to private premises and not previously affected the physical condition of the highway in such a way as to give notice and require action by the officials of the city.

The judgment is reversed and a new trial ordered.

Moore, C. J., McAlvay, Grant, and Montgomery, JJ., concurred.

A City is Liable, according to *Langan v. Atchison*, 35 Kan. 318, 57 Am. Rep. 165, where a billboard defectively constructed on a lot near the sidewalk is blown down so as to injure a person passing along on the sidewalk. But it is affirmed in *Anderson v. East*, 117 Ind. 126, 10 Am. St. Rep. 35, that a municipal corporation is not charged with the duty of protecting the private property of a citizen from injury from the walls of an adjacent building belonging to a citizen, which the owner's negligence has permitted to become dangerous.

PEOPLE v. STISON.

[140 Mich. 216, 103 N. W. 542.]

INCEST—Dying Declarations of Woman.—In a prosecution for incest the dying declarations of the woman that the accused was responsible for her pregnancy are not admissible. (p. 398.)

INCEST—Evidence Against Accused.—If, in the prosecution of a man for incest, it is shown that the woman went to a distant hospital under an assumed name, and that he corresponded with her, while denying to her parents that he knew her whereabouts, evidence of her pregnancy and of his sending her money is admissible. (p. 399.)

Davis & Bramley, for the appellant.

John E. Bird, attorney general, Frank L. Covert, prosecuting attorney, and K. P. Rockwell, for the appellee.

217 GRANT, J. Respondent was convicted of the crime of incest with his niece, nineteen years of age. She was pregnant, and died in a lying-in hospital soon after the birth of the child. Respondent's wife had left him, and his niece lived at his house, doing the household work and attending school. She left and went to a lying-in hospital at a distant city under an assumed name. She corresponded with the respondent while there under this assumed name. In view of impending death, she stated to her attendants that the respondent was responsible for her condition. Evidence of these dying declarations was admitted under objection and exception.

1. This ruling presents the main question we need to consider. The decisions of courts are nearly unanimous in holding that dying declarations—the exception to the rule of evidence excluding hearsay testimony—are confined to cases of homicide. The attorney general relies upon the reasoning in *People v. Lonsdale*, 122 Mich. 388, 81 N. W. 277, as applicable to a case of this character. That was a case of homicide alleged to have been produced by abortion. But we there said: “The admission of dying declarations forms an exception to the law of evidence, and is now confined to cases of homicide.”

The only case cited on behalf of the people to the contrary is the case of *McFarland v. Shaw*, 4 N. C. 200, **218** decided in 1816. We do not consider the reasoning in that case sound, and it does not appear to have been followed by any court since: See 10 Am. & Eng. Ency. of Law, 2d ed., p. 370, par. 9, note 9. A rule so long and so universally recognized by the wisdom of judicial decisions should not now be set aside.

2. Complaint is made of the admission of evidence of the pregnancy of the deceased girl and the birth of the child. As independent facts, this might be incompetent: *Commonwealth v. O'Connor*, 107 Mass. 219; *State v. Pruett*, 144 Mo. 92, 95 N. W. 1114. The charge against the respondent was that of sexual intercourse with his niece. It was impracticable to separate these facts from others connected therewith, which, if true, tended strongly to show the act of intercourse. She went to a distant city to a hospital under an assumed name, in order, if possible, that she might hide her shame. She and the respondent were in correspondence under this assumed name. He deceived her parents, informing them that he did not know where their daughter was. Any

testimony tending to show that he had had intercourse with her was competent. Her pregnancy, and the fact, if it be a fact, that he gave her money and assisted in secreting her until the child was born, are some evidence tending to show that he recognized himself as the parent of the child. Under the facts of the case, there was no error in admitting this testimony.

Conviction reversed and new trial ordered.

Moore, C. J., and Blair, Montgomery, and Ostrander, JJ., concurred.

The Admissibility of Dying Declarations in evidence is discussed in the monographic note to State v. Meyer, 86 Am. St. Rep. 637-668. The admissibility of declarations by a mother in travail is discussed in the recent note to Johnson v. Walker, 109 Am. St. Rep. 741-745.

The Crime of Incest is the subject of a recent note to Tagert v. State, 111 Am. St. Rep. 19-31.

SANDERS v. DODGE.

[140 Mich. 236, 103 N. W. 597.]

ADMINISTRATOR—Liability for His Debt to Estate.—There is no liability on the bond of an administrator for a debt owing from him to his intestate, if he was insolvent at the time of his appointment and has so continued throughout his administration, and if the statutes provide that "no executor or administrator shall be accountable for any debts due to the deceased, if it shall appear that they remain uncollected without his fault." (p. 406.)

John F. Lawrence, Arthur Brown and Edson R. Sunderland, for the appellant.

B. M. Thompson and John P. Kirk, for the appellee.

237 MOORE, C. J. Susan S. Dodge died, leaving a husband and two minor children as her only heirs at law. S. Eugene Dodge, the husband, was appointed administrator of his wife's estate on June 24, 1901, gave a bond, and entered upon the duties of his trust. Among the items in the inventory which he filed as such administrator was his own note for four thousand two hundred and twenty-four dollars and fifty cents, and payable to his wife one year from its date, December 4, 1899. The final account of the administrator

was allowed March 13, 1903, and the administrator was allowed to report said note as uncollectible. From this order of the probate court an appeal was taken. The case was tried before the circuit judge, who found, as a matter of fact, that at the time when S. Eugene Dodge was appointed administrator he was pecuniarily irresponsible; that at no time since his appointment could this note, or any part of it, have been collected; and that during all of that period he was wholly insolvent. He further found, as a matter of law, that the order of the probate court should be affirmed. The case is brought here by writ of error.

The finding of the circuit judge that during the entire time of his administration the administrator was insolvent is abundantly borne out by the record. It discloses that the note was given for money borrowed by Mr. Dodge to enable him to purchase an interest in the business of his father, which business was afterward conducted in the name of S. H. Dodge & Son. S. Eugene Dodge owed this firm a large sum of money, and the firm itself failed January 1, 1903. The claim of appellants is: "We contend, on principle as well as on authority, that, when a debtor is appointed the administrator of his creditor, the debt at once becomes realized assets in his hands, to be duly administered by him, and this irrespective of his own financial condition, or of the efforts he may or may not have made to collect it."

²³⁸ It is their claim that, though Mr. Dodge had no means with which to pay his debt, because of the condition of the law the moment he became administrator he must be treated as having actually received the money, and, if he does not account for it, the sureties upon the administrator's bond are liable. And they cite as sustaining that position, *Kinney v. Ensign*, 18 Pick. (Mass.) 232; *Stevens v. Gaylord*, 11 Mass. 256; *Chapin v. Waters*, 110 Mass. 195; *Tarbell v. Jewett*, 129 Mass. 457; *Kelsey v. Smith*, 1 How. (Miss.) 68; *Judge of Probate v. Sulloway*, 68 N. H. 511, 73 Am. St. Rep. 619, 44 Atl. 720, 49 L. R. A. 347; and many other cases. It may be said of many of the cases cited by counsel for appellant that they sustain the position for which they contend. We do not think, however, this is true of the case of *Crow v. Conant*, 90 Mich. 247, 30 Am. St. Rep. 427, 51 N. W. 450, upon which they place great reliance, making therefrom a quotation contained in the opinion from *Kinney v. Ensign*, 18 Pick. 232. Justice Grant, who wrote the opinion,

quoted all he deemed necessary for the purposes of that case, but for the purposes of this case it may be better to quote more at length. Justice Shaw wrote, among other things, as follows:

“The point mainly relied on for the defendant is that Austin Kinney, the plaintiff, being himself debtor on the personal security for which this mortgage was given, when he became administrator of the estate of his creditor he became liable to account for this debt in his administration account; that the sureties on his administration bond, being responsible for his whole administration account, would be responsible for such debt, and so the debt was to be considered as absolutely paid and extinguished, and the mortgage thereby de facto discharged.

“But in equity this ground cannot be maintained. . . . On technical grounds, as well as on considerations of policy, an administrator is not permitted to show that he could not collect a debt due from himself. But this is in the nature of an estoppel, and it is a well-settled rule of strict law that, although a party is bound by an estoppel as of a fact proved, or admitted, yet it shall not be taken as a substantial fact, from which other facts can ²³⁹ be inferred: Proprietors of Monumoi Great Beach v. Rogers, 1 Mass. 159. So, in pleading, a party is held to admit all facts not traversed, but it is only for the determination of the issue in which such pleadings terminate. Such admission cannot be used elsewhere as a fact from which other facts may be inferred. Or the holding the fact of a debtor taking administration upon the estate of his creditor to be a payment may be deemed a legal fiction, adopted for purposes of justice and convenience, as well as from considerations of policy, and calculated generally to promote justice, but such a legal fiction will never be allowed to go so far as to work wrong and injustice.

“In the present case there is no necessity to consider Austin Kinney's debt to Parley as paid by his taking administration. Even though it might be a right on the part of the creditors and heirs of Parley to require Austin, the administrator, to credit his debt in his administration account, they were not bound to do so. It was a right they might waive. In point of fact, it has not been so accounted for. Indeed, it would have been highly inequitable to do so, when the effect would probably be to charge the sureties of the administrator

with the amount, and to give the whole benefit to the respondent, who had purchased the equity of redemption at a sheriff's sale subject to this very mortgage."

In the case of *Crow v. Conant*, 90 Mich. 247, 30 Am. St. Rep. 427, 51 N. E. 450, it was claimed, as it is claimed here, that the debt of the executor, Nichols, must be treated as cash in his hands, and as such accounted for by him; and it was claimed this had the effect of discharging the mortgage, the foreclosing of which it was sought to enjoin. The court declined to take that view, and held the mortgage might be foreclosed. So far as the case is an authority upon the question here involved, it is not in favor of the appellant.

We have a statute which indicates what shall be done by an administrator after his appointment. He must give a bond: 3 Comp. Laws, sec. 9311. He must return into the probate court an inventory: 3 Comp. Laws, sec. 9348. He must have the property appraised: 3 Comp. Laws, sec. 9349. The statute provides with what property he shall be chargeable. Section 9433 reads: ²⁴⁰ "No executor or administrator shall be accountable for any debts due to the deceased, if it shall appear that they remain uncollected without his fault."

If the note in question had been given by a third party, it would not be claimed, under the facts disclosed by the record, that the administrator would be required to account for the amount thereof. Because of the fact that the administrator is the debtor, shall we read into the statute a provision which shall make him accountable? The precise question has never been before this court. It has, however, been presented in other courts. In Nebraska, there is a provision of the statute reading like our own. In construing this statute in *Howell v. Anderson*, 66 Neb. 575, 92 N. W. 575, 61 L. R. A. 313, Justice Barnes, writing for the court, said:

"The Massachusetts rule, as we will call it for convenience, is based on a legal fiction, and the presumption that all men are solvent and able to pay their obligations. It was but a short cut to say that one who was an administrator could not sue himself, and therefore he would be required to account to the estate for his individual debt as so much cash. It was an easy way of solving a difficult problem, and one which we fully approve of, where the fact of insolvency is not satisfactorily made to appear. In case the administrator was solvent at the time of his appointment, or any

time during the administration of his office, and before his final settlement and discharge, he should be required to pay over in cash the amount of his antecedent debt. In such a case the rule contended for by plaintiffs is a salutary one. It results in no hardship to anyone, and for that reason should be invoked and enforced. But it seems to us that this rule should have no application where it is made to appear that the administrator was wholly insolvent when appointed, while acting, and at the time of settlement. The defendant in this case filed his report in response to the citation, and brought his individual note into court, together with the other uncollectible claims due the estate, and turned them over to the county judge. As the estate had not been fully administered, it was the duty of the county judge to appoint an administrator de bonis non, into whose hands the administrator's note, as well as the others uncollected and unconverted, ²⁴¹ would go. The result to the estate would have been the same had another person than the defendant been appointed administrator. The estate has in no wise suffered by any act of his subsequent to his appointment. It appears beyond question that at the time the defendant was appointed administrator of Howell's estate he was wholly insolvent; that he remained in such insolvent condition during the entire time that he served as such administrator, and was insolvent at the time of his resignation and proposed settlement; that by reason of his condition it was at all times impossible for him to pay the antecedent debt he owed to the estate. Section 279 of chapter 23 of the Compiled Statutes [1901] provides that 'no executor or administrator shall be accountable for any debts due to the deceased if it shall appear that they remain uncollected without his fault.' There is no reason why the antecedent debt of the administrator, where it is at all times uncollectible, and it is impossible for him to pay it, should be treated any different from any other uncollectible debt due the estate. The defendant in this case delivered up to the court his own uncollectible note, which came into his possession as administrator of the estate, and asked to have credited thereupon his commissions, amounting to one hundred and thirty-four dollars and seven cents. If he had not owed the estate this antecedent debt, he would have been entitled to withdraw from the assets thereof the amount above stated. It follows that his appointment, instead of reducing the available assets of the

estate, resulted in their increase by the full amount of his commission. Instead of taking anything from the estate, he contributed his services to it gratuitously, and it was saved the expense that would otherwise have been paid to another administrator. It is unfortunate that the estate should lose the balance due upon Anderson's note, but if we should hold that this balance should be treated as cash in his hands, and make an order requiring him to pay it over, the result of such order would be to require Anderson's sureties to pay the antecedent debt he owed Howell, which could not be collected at any time during Howell's lifetime, and has at all times since that date remained absolutely uncollectible. By adhering to this legal fiction, we would require Anderson's sureties to take seven hundred dollars from their pockets and pay it over to Howell's heirs on account of an unfortunate investment made by him in his lifetime, and impose upon them a liability upon their bond which they never contracted. Their agreement was that ²⁴² Anderson was an honest, capable and upright man, and would discharge his duties as administrator of Howell's estate properly; in other words, that he would account for all of the assets thereof that came into his hands, and pay over all the moneys collected for and on behalf of the estate to his successor or other proper authority. They never covenanted that Anderson was solvent and able to pay his antecedent debts. The sureties on his bond did not agree to convert Anderson's worthless note into cash, or create something out of nothing. Legal fictions should only be resorted to for the purpose of preventing a failure of justice, and when they would result in an unjust and inequitable judgment they should never be invoked.

"The later cases hold that where the administrator or executor is shown to have been insolvent at the time of his appointment, during the incumbency of his office, and at the time of his discharge, his bondsmen are not liable for his individual debt: *Estate of Walker*, 125 Cal. 242, 73 Am. St. Rep. 40, 57 Pac. 991; *Baucus v. Stover*, 89 N. Y. 1, affirmed in *Baucus v. Barr*, 107 N. Y. 624, 13 N. E. 939; *Keegan v. Smith*, 39 N. Y. Supp. 826; *In re Georgi*, 21 Misc. Rep. 419, 47 N. Y. Supp. 1061; *McCarty v. Frazer*, 62 Mo. 263; *Harker v. Irick*, 10 N. J. Eq. 269; *Rader v. Yeargin*, 85 Tenn. 486, 3 S. W. 178; *State v. Gregory*, 119 Ind. 503, 22 N. E. 1; *Condit v. Winslow*, 106 Ind. 142, 5 N. E. 751.

"In *State v. Gregory*, 119 Ind. 503, 22 N. E. 1, the court uses the following language: 'One question which seems to have been overlooked on the trial of the cause was the financial condition of Levin T. Miller, the administrator, during the period of his administration. The money collected by him while professing to act as the agent of the administrator in Missouri, and for which he had not accounted when he became administrator, was a claim in favor of his trust, which he should have inventoried and charged himself with; and if, by the use of due diligence, all or any part of the claim could have been saved to the estate, his sureties are therewith chargeable, but if he was hopelessly insolvent, they do not become liable therefor, the burden as to the question of insolvency being on the administrator and his sureties.'

"Further on in the opinion the court says: 'The debt of the administrator is to be accounted for as other debts or assets and he may show his insolvency during the period of administration in discharge of his official liability.'

243 "Citing 2 *Woerner on American Law of Administration*, p. 654, sec. 311; *Griffith v. Chew*, 8 Serg. & R. 17, 11 Am. Dec. 556; *Eichelberger v. Morris*, 6 Watts (Pa.), 42; *Tarbell v. Jewett*, 129 Mass. 457; *McCarty v. Frazer*, 62 Mo. 263. There being no direct statutory provision upon the question in this state, there seems to be no reason why the above rule should not be adopted. The recent text-writers recognize this rule to be in force generally at this time. *Croswell on Executors and Administrators*, page 243, says: 'In most states, however, by statutory provision, it is enacted that the appointment of a debtor as executor or administrator does not operate as an extinguishment of the debt, but it is treated as any other debt owing to the estate, and if it can be collected (i. e., if the executor or administrator is solvent), then he is held to account for it as part of the assets. In other states the statutes, while not extinguishing the debt, treat it as cash in the hands of the executor or administrator, just as the equitable rule above stated does. In such a case, if the executor or administrator is insolvent during the period of administration, the debt is not charged as assets, but considered as an ordinary uncollectible debt.'

"In *Dame on Administration*, section 189, we find the following: 'It is a well-established rule of law, running back even before the Revolution, that an executor or administrator is considered as having paid the debts due from him

to the estate, and as actually having in his possession that much more cash. If the personal representative is insolvent, the courts, in the interests of all concerned, modify this rule somewhat. He still charges himself with the amount of his debt, but it does not make it actually money. The law does not require impossibilities, and there is no more reason why he should be considered as having paid what he was utterly unable to pay, than any other creditor. He is held liable to the estate to the extent of his ability to pay the same at any time during administration.'

"The text above quoted is supported by the case of *Lyon v. Osgood*, 58 Vt. 707, 7 Atl. 5. We think this is the better rule, and we therefore hold that where one is indebted to a deceased person, and is afterward appointed administrator of his estate, and the fact is shown that when so appointed he was hopelessly insolvent, was so during all of the time of his administration, and remained in that condition up to and including the date of his settlement as administrator, he should be permitted to turn over the evidence of his uncollectible debt to his successor or other ²⁴⁴ proper authority, and be discharged from his official liability therefor."

This opinion cites a long list of very respectable authorities. Others are gathered in the note to the case. A like ruling was rendered in *Buckel v. Smith's Admr.*, 26 Ky. Law Rep. 991, 82 S. W. 1001, in which several cases are cited. These cases are well reasoned and appeal to our sense of justice. We prefer to follow them instead of the other line of cases.

Judgment is affirmed.

Carpenter, McAlvay, Grant, and Hooker, JJ., concurred.

LIABILITY FOR THE DEBT OF AN EXECUTOR OR ADMINISTRATOR OWING TO THE ESTATE.

I. Liability of Executor or Administrator.

- a. Rule of Liability as for Money in Hand, 407.
- b. Illustration of Rule, 407.
- c. Modification of Rule.
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II. Liability of Sureties on Bond.

- a. In General, 409.
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- c. In Case of Insolvency of Principal, 409.

III. Determination of Existence of Debt, 413.

IV. Action on Debt, 413.

I. Liability of Executor or Administrator.

a. Rule of Liability as for Money in Hand.—At the common law the appointment by a testator of his debtor as executor operated as a discharge or extinguishment of the debt, except in the event of a deficiency of assets to satisfy the claims of creditors: *Judge of Probate v. Sulloway*, 68 N. H. 511, 73 Am. St. Rep. 619, 44 Atl. 720, 49 L. R. A. 327; *Anderson v. Anderson*, 183 Pa. St. 480, 38 Atl. 1007. This rule, it has been thought, was not applicable in favor of a debtor who was appointed administrator of his creditor's estate: *Utterback v. Cooper*, 28 Gratt. 233. But this question is now of little practical importance, for the common law on this subject has become generally obsolete, and an executor or administrator is now held at least as accountable for the payment and accounting of his own debts to the estate as he is for the collection and accounting of the debts of third persons owing to it, and in perhaps most of the states he is held liable for his debt as for so much money in his hands at the time of its maturity, on the fiction that he has collected the debt and paid it into the funds of the estate. Moreover, he cannot escape liability by failing to charge himself with the debt in his inventory: *Davenport v. Richards*, 16 Conn. 310; *Hickman v. Kamp's Admr.*, 66 Ky. (3 Bush) 205; *Boyce v. Davis*, 13 La. Ann. 554; *Stevens v. Gaylord*, 11 Mass. 256; *Tarbell v. Jewett*, 129 Mass. 457; *Norris v. Towle*, 54 N. H. 290; *In re Daggett*, 1 Misc. Rep. 248, 22 N. Y. Supp. 911; *Jones v. Willis*, 72 Ohio St. 189, 74 N. E. 166; *Mason's Estate*, 42 Or. 177, 95 Am. St. Rep. 734, 70 Pac. 507; *Robinson's Estate v. Hodgkin*, 99 Wis. 327, 74 N. W. 791; *Ward v. Ward*, 144 Fed. 308.

b. Illustration of Rule.—The appointment of an executor does not discharge his liability on a judgment against him in favor of the testator: *Anderson v. Anderson*, 183 Pa. St. 480, 38 Atl. 1007. And an administratrix of her husband's estate must be charged on the final settlement of her accounts with a judgment by confession rendered against her in the supreme court in his favor; *In re Griffith's Estate*, 100 N. Y. Supp. 215. A special administrator is, upon the settlement of his account, properly charged with the amount of his indebtedness to the deceased: *Estate of Armstrong*, 69 Cal. 239, 10 Pac. 335.

A purchaser at a partition sale who qualifies as executor of one of the heirs to whom a part of the proceeds are due is assumed to have paid the debt to himself as executor, so that the distributees should proceed against him as executor rather than by motion for a resale under the partition decree: *Newman v. Clyburn*, 41 S. C. 34, 19 S. E. 913.

If a mortgagor of land is the executor of the will of the mortgagee and charges himself with the mortgage debt as assets in his hands as executor, this operates as a payment of the debt and a discharge of the mortgage: *Martin v. Smith*, 124 Mass. 111. See, however,

“Preservation of Lien of Debt,” post. But where a mortgage given by an executor to his testator is the only asset of the estate, and the executor refuses to pay it, a judgment creditor may maintain an action to compel the sale of the mortgaged premises and the payment of his debt from the proceeds: *Raynor v. Gordon*, 16 How, 126.

c. Modification of Rule.

1. To Prevent Wrong or Injustice.—The legal fiction that a debt due from an executor or administrator is to be treated as so much money in hand has been adopted for purposes of justice and convenience and should not be given an effect which will work injustice or wrong. While the debt may be treated as money on hand for the purpose of administration, it will not for all purposes stand on the same footing as if the executor or administrator had actually received so much money: *Estate of Walker*, 125 Cal. 242, 73 Am. St. Rep. 40, 57 Pac. 991; *Kinney v. Ensign*, 35 Mass. (18 Pick.) 232.

2. To Avoid Liability for Contempt, etc.—Therefore, if an executor or administrator is insolvent and wholly unable to pay the money in pursuance of an order or decree of the court, he cannot be attached and punished for contempt as he could be if the money had actually been received from some other creditor, nor can he be convicted of embezzlement: *Estate of Walker*, 125 Cal. 242, 73 Am. St. Rep. 40, 57 Pac. 991; *In re Rugg*, 3 N. Y. St. Rep. 224; *Baucus v. Stover*, 89 N. Y. 1. But if he has the ability to pay, his failure to comply with a decree charging himself with the debt is punishable by fine and imprisonment: *In re David's Estate*, 44 Misc. Rep. 337, 89 N. Y. Supp. 927. According to *Culbreth v. Smith*, 124 N. C. 289, 32 S. E. 714, an executor is not guilty of fraudulent misapplication of funds by failing to pay over the amount of a note executed by him in favor of his testator.

3. To Preserve Lien of Debt.—On the other hand, the fiction of law that the debt of an executor or administrator is to be regarded as paid to him in his official capacity and as money in his hands will not be carried so far as to discharge the lien or mortgage by which the debt is secured, at least if the estate or those interested in it will thereby suffer or their rights be prejudiced by the loss of the security: *Kinney v. Ensign*, 35 Mass. (18 Pick.) 232; *Crow v. Conant*, 90 Mich. 247, 30 Am. St. Rep. 427, 51 N. W. 450; *Soverhill v. Suydam*, 59 N. Y. 140; *Murray v. Luna*, 86 Tenn. 326, 6 S. W. 603; *Utterback's Admr. v. Cooper*, 28 Gratt. 233.

“Where a debtor becomes the executor or administrator of his creditor, the debt is presumed to be paid from the time of its maturity, and the executor or administrator is chargeable with the amount as realized assets; and when there is an official bond the sureties are likewise responsible. The parties interested in the administration, such as creditors or distributees, not having consented to such extinguishment, are not bound by such rule of presumption,

but may elect to treat the debt as unpaid, if not actually paid, so as to reach any security by way of mortgage, pledge, or lien by the creditor for its payment. . . . There is some uncertainty in the language of the cases as to whether the original debt of the administrator may be treated as so far existing after the debtor has become administrator of his creditor, and such administration has terminated, that an action may be brought upon it by parties interested in the estate for other purposes than upholding a security given for such debt. This question, however, is of no great importance as regards the administrator himself, for his estate may be pursued without resorting to such obligation as the foundation of the proceeding; nor can it be made available as against personal securities for the debt. But the cases fully support the idea that, if any mortgage, lien, or collateral security, is held for the debt, it may be pursued and made available in behalf of those interested in the estate": *Chick v. Farr*, 31 S. C. 473, 10 S. E. 176, 390; *Newman v. Clyburn*, 41 S. C. 534, 19 S. E. 913.

II. Liability of Sureties on Bond.

a. **In General.**—The bond of an executor or administrator given for the faithful discharge of his duties usually covers his obligation to pay or account for his debt to the estate: *Wright v. Lang*, 66 Ala. 389; *Winship v. Bass*, 12 Mass. 199; *Harker v. Irick*, 10 N. J. Eq. 269; *Piper's Estate*, 15 Pa. St. 533; *Chick v. Farr*, 31 S. C. 473, 10 S. E. 176, 390; *Wilson v. Rose*, 3 Cranch C. C. 371, Fed. Cas. No. 17,831.

b. **In Case of Partnership Debt.**—The surety on an executor's bond is liable in Massachusetts for the full amount due the testator from an insolvent firm of which the executor was a member, although the firm and the executor were insolvent at the time of the testator's death: *Bassett v. Fidelity and Deposit Co.*, 184 Mass. 210, 100 Am. St. Rep. 552, 68 N. E. 205. But in Ohio debts owing to the estate of a decedent by a firm of which the administrator is a member, are not chargeable to him as money in his hands: *James v. West*, 67 Ohio St. 28, 65 N. E. 156. The court in this case said: "While under the rule of decision of this court debts owing by an administrator to the estate are to be regarded and treated as assets in his hands, the rule is so far unsatisfactory that it should not be extended, but should be confined to cases in which the administrator owes the debt individually and unconditionally." In Georgia, an administrator who is a debtor to the intestate individually or as a surviving copartner is chargeable as administrator with the amount of the debt: *Thompson v. Thompson*, 77 Ga. 692, 3 S. E. 261.

c. **In Case of Insolvency of Principal.**—The insolvency of an executor or administrator presents a serious and perplexing question as to the liability of his sureties in case he is wholly unable to ac-

count for or pay a debt owing from him to the decedent or the estate. Some authorities have adopted the view taken by the supreme court of Michigan in the principal case (*ante*, p. 399) to the effect that where an executor or administrator is insolvent at the time of his qualification, and so continues throughout the period of his administration, the sureties on his bond are not liable for a debt which he owes to the decedent or the estate and which he has no ability to pay: *State v. Gregory*, 119 Ind. 503, 22 N. E. 1; *McCarty v. Frazer*, 62 Mo. 263; *Howell v. Anderson*, 66 Neb. 575, 92 N. W. 760, 61 L. R. A. 313; *Terhune v. Oldis*, 44 N. J. Eq. 146, 14 Atl. 638; *Baucus v. Barr*, 45 Hun, 582, affirmed in 107 N. Y. 624, 13 N. E. 939; *In re Georgi*, 21 Misc. Rep. 419, 47 N. Y. Supp. 1061; *Keegan v. Smith*, 33 Misc. Rep. 74, 67 N. Y. Supp. 281, affirmed in 60 App. Div. 168, 70 N. Y. Supp. 260; *Garber v. Commonwealth*, 7 Pa. St. 265; *Spurlock v. Earles*, 67 Tenn. (8 Baxt.) 437; *Rader v. Yeargin*, 85 Tenn. 486, 3 S. W. 178.

“The extension of the legal fiction of payment so as to make the surety liable for the executor’s debt beyond his means to pay, when not guilty of laches, would often work great injustice to the surety. The surety ought not to be required to contribute from his own funds to make up an estate for the deceased which he in fact was not possessed of at the time of his death. It is true the executor is bound to use vigilance and diligence in pursuing and collecting all claims due the estate, and any unnecessary delay which results in the loss of a claim against another person, or in the loss of his own indebtedness, is a violation of his duty for which the surety is responsible; but, in the absence of laches, we think the surety is liable upon his bond for the executor’s debt only to the extent of the executor’s ability to pay it. When the executor is unable to pay his debt, it is his duty, in rendering his administration account, to claim credit for his lack of means to pay his debt, for the protection of his surety, and on his failure to do so, relief will be granted by the proper tribunal”: *Lyon v. Osgood*, 58 Vt. 707, 7 Atl. 5.

“If a person becomes surety for one as administrator who at the time is a debtor to the estate and is insolvent, and is never able to discharge such indebtedness, such surety is not bound for such delinquency of his principal. He is bound for the faithful performance of his duties as administrator. It would be no breach of trust or delinquency in duty for the administrator not to do what is beyond his power and control to perform. If, under such circumstances, the administrator should, in the settlement of his accounts with the court, charge himself with the debt, and the accounts should be passed in such a shape as to bind the surety for the debt, the surety would be relieved, upon application to the proper tribunal, from such responsibility”: *Harker v. Irick*, 10 N. J. Eq. 269.

“A debt owing by an executor or administrator to the decedent’s estate is regarded, so far as the liabilities of the sureties

is concerned, as if the debt were owing by a third person. If the personal representative actually pays his debt, the sureties are of course liable for its proper application, as for other assets coming to his hands. Or where he was solvent and the debt could have been collected, there being nobody else capable of suing to recover it, he ought to have paid it. His failure to account for it should, in that case, be treated as would his failure to collect a debt owing the estate by any other solvent debtor. But where he was always insolvent and unable to pay, the liability of his sureties upon their undertaking for his faithful performance of his duties should not be enlarged by a mere fiction of law to such an unreasonable extent as to mulct them for something that no amount of diligence and no degree of honesty on the part of the administrator could have guarded against. Men sometimes cannot pay their debts. Their sureties, as administrators, do not undertake more than that they will diligently and honestly do what can be done in the administration of the estate committed to them": *Buckel v. Smith's Admr.*, 26 Ky. Law Rep. 991, 82 S. W. 1001.

The doctrine of the foregoing authorities appeals to us as being sound and reasonable. In truth, we find it difficult to understand how courts could arrive at a different conclusion. However, there are quite a number of authorities which affirm that the sureties of an executor are liable for his failure to pay or account for his debt to the testator, notwithstanding he has been insolvent and unable to pay it during the term of his office: *Arnold v. Arnold*, 124 Ala. 550, 82 Am. St. Rep. 199, 27 South. 465; *Treweek v. Howard*, 105 Cal. 434, 39 Pac. 20; *Lambrecht v. State*, 57 Md. 240; *Bassett v. Fidelity and Deposit Co.*, 184 Mass. 210, 100 Am. St. Rep. 552, 68 N. E. 205; *Judge of Probate v. Sulloway*, 68 N. H. 511, 73 Am. St. Rep. 619, 44 Atl. 720, 49 L. R. A. 327; *McGaughey v. Jacoby*, 54 Ohio St. 487, 44 N. E. 231; *Mason's Estate*, 42 Or. 177, 95 Am. St. Rep. 734, 70 Pac. 507.

"The single question on this appeal," to quote from a recent Oregon decision, "is whether the sureties on an executor's bond who executed the same without knowledge of his indebtedness or his insolvency are liable under the decree of final distribution for the amount of his personal debt to the estate. In our opinion there can be but one answer to the question. It is common learning that the liability of the sureties of an executor is coextensive with that of the principal, and a decree of the county or probate court which binds the principal will, in the absence of fraud or collusion, bind them. It follows that when an executor has been charged upon the settlement of his accounts with a personal debt which he owed the deceased, whether by virtue of statute, as in this state, or without a statute, as in other jurisdictions, the sureties on his bond are bound for the payment thereof, and the executor's insolvency or inability to pay is no defense": *United Brethren v. Akin*, 45 Or. 247, 77 Pac. 748, 66 L. R. A. 654.

In *Bassett v. Fidelity and Deposit Co.*, 184 Mass. 210, 100 Am. St. Rep. 552, 68 N. E. 205, the court said: "The defendant in the case at bar asks us to hold that, although an insolvent executor is to be charged with the debt due from him, the sureties on his bond are not to be held liable therefor. But this is out of the question. That contention flies directly in the face of the elementary principles governing the effect of a decree allowing a probate account and the elementary principles as to the obligation of a surety on a probate bond. In the first place, the decree of a probate court allowing an account of an executor or other official is binding on all interested in the estate, including sureties on the bond of the accountant. . . . In the second place, the obligation of a surety on a probate bond is the obligation of the principal. The bond is a joint bond, and the judgment necessarily must be the same against both. This is more than a technical rule of law; it is a place where the true character of a surety's liability comes to the surface."

Some of the states—California and Oregon, for example—have statutes expressly declaring that an executor shall be liable for his debt to the estate as for so much money in his hands when it becomes due and payable (section 1447 of the Code of Civil Procedure of California; section 1117 of Hill's Annotated Laws of Oregon), and undoubtedly these legislative declarations have not been without influence on the courts of those states in inducing them to hold the sureties of an insolvent executor liable for his debt to the estate. And yet it may well be doubted whether the legislature intended to create such a liability and thus swell the assets of the decedent's estate. The courts of New York have declined to place such a construction on a similar statute in that state, and have held, notwithstanding the statute, that the sureties of an insolvent executor are not answerable for his debt which he has no ability to pay: *Baucus v. Barr*, 45 Hun, 582, affirmed in 107 N. Y. 624, 13 N. E. 939; *In re Georgi*, 21 Misc. Rep. 419, 47 N. Y. Supp. 1061; *Keegan v. Smith*, 33 Misc. Rep. 74, 67 N. Y. Supp. 281, affirmed in 60 App. Div. 168, 70 N. Y. Supp. 260.

The supreme court of California appears to be not entirely satisfied with its decision in *Treweek v. Howard*, 105 Cal. 434, 39 Pac. 20, to the effect that the sureties of an executor are liable for his failure to account for his debt to the estate when he is unable to pay it because of his insolvency, and has declined to apply that rule to the sureties of an insolvent administrator: *Estate of Walker*, 125 Cal. 242, 73 Am. St. Rep. 40, 57 Pac. 591; *Sanchez v. Foster*, 133 Cal. 614, 65 Pac. 1077. And the supreme court of Ohio, while holding the rule applicable to the sureties of an insolvent administrator, regards the doctrine so unsatisfactory that it has refused to extend it further than to cases where the administrator owes the debt individually and unconditionally: *James v. West*, 67 Ohio St. 28, 65 N. E. 156. The supreme court of Massachusetts, however,

apparently without any statutory encouragement, has carried the fiction that the debt of an executor to his testator shall be regarded as realized assets or money in his hands, to the extent of holding that the surety on the bond of an executor is answerable for the full amount due the testator from an insolvent firm of which the executor is a member, although the firm and the executor were insolvent at the time of the testator's death: *Bassett v. Fidelity and Deposit Co.*, 184 Mass. 210, 100 Am. St. Rep. 552, 68 N. E. 205.

In case an executor or administrator is solvent when he assumes the duties of his office and the debt becomes due, he cannot, afterward, upon becoming insolvent, return the debt as uncollectible and thereby relieve his sureties from responsibility: *Condit v. Winslow*, 106 Ind. 142, 5 N. E. 751; *Howell v. Anderson*, 66 Neb. 575, 92 N. W. 760, 61 L. R. A. 313.

III. Determination of Existence of Debt.

When an executor is sought to be charged with a debt owing from him to the estate, it is competent for him to show that the debt is unfounded or unjust: *Everts v. Everts*, 62 Barb. 577; *Ruth v. Owens*, 2 Rand. 507. Even though he has included in his inventory commercial paper and other claims against himself, he is not necessarily estopped to deny his indebtedness thereon; but to overcome the presumption from so solemn an admission of liability, the evidence must be clear and satisfactory: *Tiehnor v. Tiehnor*, 45 N. J. Eq. 303, 17 Atl. 631; *Lynch v. Divan*, 66 Wis. 490, 29 N. W. 413. The fact that an executor or administrator has come into possession of notes which he executed to the decedent in his lifetime raises no presumption of payment: *Arnold v. Arnold*, 124 Ala. 550, 82 Am. St. Rep. 199, 27 South. 465; *Speed's Exrs. v. Nelson's Exr.*, 47 Ky. (8 B. Mon.) 499; *Love v. Dilley*, 64 Md. 238, 1 Atl. 59, 4 Atl. 290. As to the proper practice or mode of procedure for determining the validity, amount, and date of maturity of claims against executors, see *May v. Leighty*, 36 Ill. App. 17; *Phillips v. Duckett*, 112 Ill. App. 587; *Emerick v. Hileman*, 177 Ill. 368, 52 N. E. 311; *Hodge v. Hodge*, 90 Me. 505, 60 Am. St. Rep. 285, 38 Atl. 535, 40 L. R. A. 33; *Everts v. Everts*, 62 Barb. 577; *Lynch v. Divan*, 66 Wis. 490, 29 N. W. 413.

IV. Action on Debt.

If the debt of an executor or administrator to the estate is regarded as converted into assets or money in his hands, then it would seem that an action thereon cannot be maintained: *Ward v. Ward*, 144 Fed. 308. Moreover, upon his death or removal it would not be revived so as to support an action by an administrator de bonis non or an administrator with the will annexed: *Hodge v. Hodge*, 90 Me. 505, 60 Am. St. Rep. 285, 38 Atl. 535, 40 L. R. A. 33; *Tarbell v. Jewett*, 129 Mass. 457. It has been held, however, upon the theory

that the appointment and qualification of an administrator do not work a conversion of his debt into money in his hands, that the administrator de bonis non can recover the debt: *Utterback's Admr. v. Cooper*, 28 Gratt. 233. To the same effect is *Kelsey v. Smith*, 2 Miss. (1 How.) 68.

CO-OPERATIVE TELEPHONE COMPANY v. KATUS.

[140 Mich. 367, 103 N. W. 814.]

STATUTE OF FRAUDS.—An Agreement to Rent a Telephone for a term of three years at a stipulated rental is within the statute of frauds, and, if signed by the telephone company only, is unenforceable for want of mutuality. (p. 416.)

CONTRACT Invalid in Part.—A Subscription to the Stock of a telephone company is unenforceable, if an essential part of the agreement is a lease of a telephone to the subscriber for a term of years, which lease is unenforceable for want of mutuality. (p. 416.)

James F. Hill and James Swan, for the appellant.

Jasper C. Gates and Louis J. Rosenberg, for the appellee.

368 McALVAY, J. Plaintiff, a Michigan corporation, sued defendant in assumpsit to recover upon two certain contracts in writing signed by defendant. Under the general issue, defendant gave notice that the contracts were void for want of mutuality, and that the defendant was induced to enter into said contracts by certain false representations of plaintiff, upon which defendant relied. The trial court instructed a verdict for plaintiff for the amount claimed. Defendant appeals, and assigns error upon such instruction of the court, and upon the refusal of the court to instruct a verdict for defendant and to give certain requests to charge.

The contracts are identical in form, except that one includes an agreement to rent a business telephone for the period of three years, and the other a residence telephone for the same period. The following is a copy of one of the contracts:

“RESIDENCE TELEPHONE.

“I do hereby subscribe for one fifty dollar share of the capital stock of the Co-operative Telephone Company of

Detroit, to be paid for in monthly installments of ten dollars each as called in by the board of directors of said company; with the understanding that I am to be paid interest at current savings bank rates upon all moneys so paid in by me until said company shall actually commence the construction of its plant, and thereafter at the rate of 5 per cent per annum until its telephone exchange shall be actually opened for business.

³⁶⁹ "This agreement is subject to the provisions of sections 2 and 3 of article 1, and of section 1 of article 3 of the by-laws of said company, copies of which sections are printed on this agreement.

"And I do further agree that I will rent one residence telephone of said company for the period of three years, from the time when the said exchange shall be so opened for business, at the rate of \$24 per year, payable quarterly.

"Dated this 29th day of January, 1902.

"(Sgd.) PETER KATUS.

"Witness:

_____.

"ARTICLE 1.

"Section 2. Every subscription to each share of the stock of the company shall also embody a contract for the rental of at least one telephone at the current rate for the term of at least three years."

Section 3, relative to depositing all certificates of stock with city controller, is not material to this case.

Article 3, section 1, relative to issue and transfer of certificates of stock, is not material to this case.

The principal assignment of error relied upon by defendant is the refusal of the court to instruct a verdict for defendant, for the reason that the contracts are void under the statute of frauds for want of mutuality. It will be noted that the contract is made subject to the provisions of section 2 of article 1 of plaintiff's by-laws, which section is printed upon the contract, and is as follows: "Every subscription to each share of the stock of the company shall also embody a contract for the rental of at least one telephone at the current rate for the term of at least three years."

Each of these contracts embodies such an agreement for

the rent of a telephone for three years at the annual rental therein specified. These contracts are not signed by the plaintiff. By the requirement of plaintiff this agreement is made an essential part of the subscription for the stock, 370 and the evidence in the case shows without dispute that defendant made this contract for the purpose of securing a telephone, and that no contract for subscription of stock would have been accepted without it. It is clear that the agreement to rent a telephone for the term of three years at the stipulated rental is within the statute of frauds, and cannot be enforced for want of mutuality, for the reason that it is not signed by the plaintiff, and could not be enforced against it: *Wilkinson v. Heavenrich*, 58 Mich. 574, 55 Am. Rep. 708, 26 N. W. 139.

The clause in the contract which contains the subscription of defendant for one share of stock cannot be said to be a separate and independent agreement upon which defendant may be held liable, notwithstanding the clear invalidity of the contract already pointed out. This contract must be considered in its entirety. It is in terms as drawn and required by the plaintiff. Its invalidity goes to the whole contract, and neither party could enforce it, or any part of it, against the other.

For the reasons above stated, a verdict should have been directed by the trial judge in favor of defendant. As this disposes of the case, there is no necessity for considering the other errors assigned, or ordering a new trial.

The judgment of the circuit court is reversed, and a judgment entered in this court in favor of defendant.

Moore, C. J., and Carpenter, Blair, and Hooker, JJ., concurred.

An Agreement not to be performed within one year is within the statute of frauds: Chase v. Hinckley, 126 Wis. 75, 110 Am. St. Rep. 896; *Seamans v. Barensten*, 180 N. Y. 333, 105 Am. St. Rep. 759. Only the party to be charged, however, need sign the memorandum in writing which the statute requires: *Charlton v. Columbia Real Estate Co.*, 67 N. J. L. 629, 110 Am. St. Rep. 495. As to the necessity of mutuality of obligation and remedy where the specific performance of a contract is sought, see *Frank v. Stratford-Handcock*, 13 Wyo. 37, 110 Am. St. Rep. 963.

ALEXANDER v. HILLEBRAND.

[140 Mich. 490, 103 N. W. 849.]

DE FACTO GUARDIAN—Right to Compensation.—If the eldest son in a family, who is the only child of age, is appointed guardian of his brothers and sisters upon the death of their parents and takes charge of their persons and property, he will, notwithstanding he never qualifies because unable to procure a bond, be regarded in equity as their guardian, and therefore be entitled to a reasonable allowance for their support and maintenance. (p. 418.)

GUARDIAN—Settlement with Infant Ward.—While a settlement by a guardian with his minor ward is not binding on her, it may be given weight as evidence of the state of their accounts and of the amount justly chargeable to her for her support. (p. 419.)

Lehmann & Riggs, for the complainant.

Edward McNamara, for the defendant.

⁴⁹⁰ CARPENTER, J. Johanna Bayer, formerly Johanna Hillebrand, a resident of the city of Detroit, died intestate in May, 1875. At that time she owned certain personal property and certain real estate situated in said city of Detroit. This property, subject to the payment of debts, ⁴⁹¹ descended to her children. There were six of these children. Defendant's intestate was the oldest of these children, and was at that time twenty-four years of age, and complainant was the youngest, eight years of age. The ages of the other children ranged from eleven to eighteen years. Letters of administration were granted to Joseph Bayer, Johanna's second husband—not the father of her children—but he, instead of administering the estate, turned the same over to the oldest son, Frank, defendant's intestate. Frank was also appointed guardian of his minor brothers and sisters, but he was unable to file a bond, and never qualified. He did, however, assume control of his mother's property, and, as the head of his mother's family, assumed to control and maintain his minor brothers and sisters, with the exception of his sister Elizabeth. Complainant became an inmate of his family, and was supported and sent to school by him from the time she was eight until she was fourteen years of age. In 1887, when complainant was about twenty years of age, she made a settlement with Frank, and quitclaimed to him her interest in her mother's estate in consideration

of the sum of one hundred and twenty-five dollars, which he paid to her at that time. In 1896, eight years after complainant had reach her majority, and after Frank had sold the real estate to a bona fide purchaser, complainant filed this bill against her brother Frank, who was then living, for the purpose of obtaining an accounting for her share of her mother's estate. The case was heard by Judge Steere, acting as one of the Wayne circuit judges, who, on the eighth day of April, 1897, rendered a decree adjudging "that said defendant held one-sixth of the estate of Johanna Bayer in trust for said complainant," and referred the cause to a circuit court commissioner "to take account of the doings of said defendant as trustee, and report the same to the court." For some reason immaterial to this case, this account was not taken until 1903. In the meantime the complainant had moved to the state of Wisconsin, and defendant Frank had died.

492 The testimony taken on said accounting convinced the trial judge who rendered the decree appealed from that Frank Hillebrand had, by caring for and maintaining complainant, already paid her all that was her due, and he accordingly entered a decree dismissing her bill of complaint. Complainant asks us to reverse that decree. She insists that the estate of Frank Hillebrand had no right to make any charge for the maintenance of his sister during the time that she was an inmate of his family. We are convinced by the testimony that Frank Hillebrand intended to make a charge for this support and maintenance, and the circumstances were such that this intention should have been inferred by anyone familiar with the situation. When the settlement was made in 1887, complainant, then twenty years of age, undertook and agreed to compensate her brother for this care and maintenance. Under these circumstances, it would be inequitable to deny compensation. It is clear under our decisions, that Frank, had he qualified as guardian, would have been entitled to compensation: See *Chubb v. Bradley*, 58 Mich. 268, 25 N. W. 186; *In re Ward's Estate*, 13 Mich. 220, 41 N. W. 431; *Jacobia v. Terry*, 92 Mich. 275, 52 N. W. 629. Though, strictly speaking, Frank was not complainant's legal guardian, he was most clearly her natural guardian. It may also be said that, as Frank was the only one of the children of full age, it was proper for him to assume control of the property jointly owned by them. In

everything except in the failure to observe a legal formality, Frank was complainant's guardian. According to the principles of equity invoked by complainant, he should be regarded as her guardian, and is therefore entitled to a reasonable allowance for her support and maintenance: See *Hovell v. Noll*, 10 Misc. Rep. 546, 31 N. Y. Supp. 440.

Complainant also insists that the decree appealed from is erroneous, in that it allows the estate of Frank Hillebrand an excessive amount for the care, maintenance and support of his sister. It is difficult, on this record, to say precisely what amount Frank did expend for his sister. I think, however, that the settlement made between them ⁴⁹³ in 1887 affords satisfactory evidence of the state of the account at that time. It is true that, as complainant was then a minor, she was not bound by said settlement; but she was old enough to give evidence, and therefore the settlement she made may be given weight as evidence. The weight of that settlement as evidence of the state of account is materially increased by the circumstance that Frank made a similar settlement with his other brothers and sisters, some of whom were of full age. In each of those settlements what he had furnished in the way of care and maintenance was taken into consideration. No one of the other children received more than one hundred dollars. On this record, we cannot say that Frank spent less in caring for complainant than for any other of his brothers and sisters. I am satisfied that, under these circumstances, we may assume that, on a fair settlement at that time, Frank owed complainant only the amount paid her. The only ground, then, upon which complainant is entitled to a decree, is that she is entitled to be paid a second time this balance due her. Complainant does not ask that. On the contrary, her counsel conceded in their brief in this court that defendant's intestate should have credit for that payment.

I conclude, therefore, that the decree appealed from should be affirmed, with costs.

Moore, C. J., and McAlvay, Blair, and Hooker, JJ., concurred.

The Right of a Guardian to an allowance for the support or maintenance of his ward is discussed in the note to *Guion v. Guion*, 57 Am. Dec. 226-229. He will not be entitled to an allowance when, at the time he took the ward into his family and furnished the support, he had no intention of charging therefor: *State v. Slevin*, 93 Mo. 253, 3 Am. St. Rep. 526.

HUNT v. RIVERSIDE CO-OPERATIVE CLUB.

[140 Mich. 538, 104 N. W. 40.]

MONOPOLY—Agreement Legal in Part.—Parts of an agreement, legal when considered by themselves, are illegal if they are merely steps to accomplish an illegal monopoly. (pp. 423, 424.)

MONOPOLY—Change in Agreement to Avoid Suit.—The parties to an unlawful monopoly cannot defeat an action against the association which they have organized in furtherance of their undertaking by eliminating, on the eve of the action, some of the objectionable features of their agreement, if the illegal object or purpose remains. (p. 426.)

MONOPOLY—Decrease of Prices.—It is no answer to the illegality of a monopoly that it has lowered prices. (p. 427.)

MONOPOLY—Incomplete or Imperfect Monopoly.—To vitiate a contract or arrangement as creating a monopoly, it is not necessary that the monopoly should be complete or perfect. (p. 427.)

MONOPOLY—Agreement to Fix Prices.—An agreement between dealers to keep the selling price of their commodities at a fixed or graduated figure is void at common law as against public policy. (p. 428.)

MONOPOLY.—If All the Wholesale Dealers in plumbers' supplies and the great majority of the master plumbers in a city organize a club, the rules of which provide that the wholesalers shall sell to master plumbers only, and charge members a fixed scale of prices and nonmembers higher prices, and that the master plumber members shall purchase all their supplies from the wholesale members of the club, and be governed, in making estimates on jobs, by price lists furnished by the club, and submit their estimates to the secretary before putting in bids, a monopoly is thereby created which violates the anti-trust statutes of Michigan. (p. 428.)

MONOPOLY—Fixing Price of Labor.—An agreement fixing and regulating the price of labor is not prohibited by the anti-trust statutes of Michigan. (p. 429.)

MONOPOLY—Action by Prosecuting Attorney.—Where a prosecuting attorney institutes an action to enjoin the violation of an anti-trust law, the objection that he does so without authority, or without proving his authority, is a formal objection only, which cannot be made for the first time on appeal. (p. 430.)

Ormand F. Hunt, in propria persona.

J. J. and R. T. Speed, for the defendants.

540 CARPENTER, J. Section 1, Act No. 255, Public Acts of 1899, reads as follows:

“That a trust is a combination of capital, skill or arts by two or more persons, firms, partnerships, corporations or associations of persons, or of any two or more of them, for either, any or all of the following purposes:

"1. To create or carry out restrictions in trade or commerce.

"2. To limit or reduce the production, or increase or reduce the price of, merchandise or any commodity.

"3. To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity.

"4. To fix any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this state.

"5. It shall hereafter be unlawful for two or more persons, firms, partnerships, corporations or associations of persons, or of any two or more of them to enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they shall bind or have bound themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure or fixed value, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article, commodity or transportation between them or themselves and others, so as to directly or indirectly preclude a free and unrestricted competition among themselves, or any purchasers or consumers, in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected. Every such trust as is defined herein is declared to be unlawful, against public policy and void."

Under the claim that the purpose of the organization of the first two named defendants was to violate the above-quoted ⁵⁴¹ section, relator filed this information in equity asking a decree restraining their further operation. Defendants answered, and the case was heard in the court below on pleadings and proof. A decree was granted in conformity with the prayer of the bill. Defendants appeal to this court.

Each of said first two named defendants is an unincorporated association. The Master Plumbers' Exchange was organized in January, 1902. The Riverside Co-operative Club was organized in the following July. The members of the exchange are master plumbers doing business in the city of Detroit and its vicinity. The importance of that organization is shown by the fact that, of the one hundred and sixty-eight master plumbers doing business in Detroit, one hundred and thirty-one—and these "the most reputable," modestly states one of defendant's witnesses—are members of the exchange. The membership of the Riverside club consists of the master plumbers belonging to the exchange and seven wholesale dealers and manufacturers in plumbers' supplies. (These seven comprise all the manufacturers and dealers in plumbers' supplies in the city of Detroit.) According to the rules and regulations of the Riverside Co-operative Club (these rules and regulations constitute an agreement between the members of said club), the price of plumbers' supplies is to be fixed by a committee consisting of one wholesaler and one master plumber. At this price the wholesale members agree to sell without discrimination to the master plumber members, and the master plumber members agree to buy their entire supplies, distributing their trade equitably, from the wholesale members. The wholesalers agree to sell only to qualified master plumbers (this includes plumbers who are not, as well as those who are, members of the club) whose names appear on a list approved by the officers of the club. They also agree to charge non-members fifteen to thirty per cent more than members. The master plumber members agree that they will not sell labor or material at prices below those fixed by a schedule approved by the club. The master plumbers ⁵⁴² agree to do no contract work for, and the wholesale members agree to furnish no supplies to, one who has failed to make a satisfactory settlement with any member of the club. According to the rules and regulations of the Master Plumbers' Exchange, each member agrees—and a heavy penalty is provided for the failure to perform this agreement—that in bidding for contract work he will estimate materials according to the cost price fixed by said Riverside club, and labor at wages specified in said rules; that he will add to these prices at least thirty per cent for plumbers' and helpers' time, add to this total five per cent to be paid to the

exchange, and then add to this total at least twenty-five per cent for profit. Each member also agreed to submit such estimate to the clerk of the exchange, who was also clerk of the Riverside club. While defendants claim that the object of submitting these estimates was to correct errors of computation, there was a more important object, viz., to prevent competition and to enhance the plumbers' profit. This is shown by the following letters from the clerk to one of the members:

October 27, 1902: "I am quite anxious to have the estimates on that Penberthy Injector Company job thoroughly examined. . . . The estimates as they now stand seem to indicate that if the job had been figured fairly by all the competitors on it, you could just as well have secured it at an advance of from \$250 to \$400 over the price at which you did secure it. . . . In this connection I may also state that some time ago we compared the estimate of the Forrester and Cheney job. Two of these estimates were low and yours the lowest of all, seemed to be very low. We felt at the time these estimates were examined that the cost figures on the job should have been from \$100 to \$150 higher than your cost figure which would have given you a profit of from \$120 to \$180 more than you are now making on the job."

May 7, 1903. (Another letter from the clerk to the same member): "Referring again to the letting of that Ford job, I beg to advise you that I am sure that if I could have told Mr. ⁵⁴³Harrigan that his figure was much too low compared with your figure and the figures of Mr. Dickson and Mr. Ryan, he would have 'pulled' his bid and have let the job go to one of the other three men."

There are other agreements between the members of these two associations, but it may be said of them that they are either inconsequential or that they are designed to further the object shown by the agreements herein stated. The business of the various members was carried on under this agreement for more than a year, or until the filing of this bill, in December, 1903. Was this agreement forbidden by the statute?

In determining the legality of defendants' undertaking it would be confusing, rather than helpful, to examine and determine the legality of each specific agreement. If it may be said that many of these agreements, considered by themselves, are legal, it may also be said (and this will be made

to appear hereafter) that these agreements are merely steps to effect the accomplishment of an illegal object, and for that reason they are also illegal: See *Pacific Factor Co. v. Adler*, 90 Cal. 110, 25 Am. St. Rep. 102, 27 Pac. 36. The legality of defendants' undertaking is to be determined by ascertaining their central and controlling object. We cannot determine this object by looking at either organization as an entity apart from the other. The two organizations are intimately connected—so intimately that their common clerk testifies that he does not know whether the fund derived from the five per cent addition to contracts by master plumbers, which aggregates eleven thousand dollars, belongs to the one or to the other. The two organizations co-operate, and were intended to co-operate. As members of the Riverside club the plumbers arrange to purchase their supplies. Under that arrangement each member secures the same prices, and prices more favorable than competing nonmembers can secure. As members of the Master Plumber's Exchange, these plumbers fix the price at which they will sell these supplies. It is scarcely necessary to say that this agreement restricts, if it does not destroy, competition ⁵⁴⁴ between these members. The advantage that this arrangement gives the plumber members over the plumber nonmembers is obvious. The latter must buy their supplies either in the local markets at excessive prices, or abroad at a great disadvantage. It is scarcely necessary to say that this arrangement was designed to create, and tends to create, a practical, though possibly incomplete, monopoly in favor of the plumber members. As members of the Master Plumbers' Exchange, the plumbers fixed the prices—thereby restricting competition among themselves—at which they will sell the supplies, of which they had a practical monopoly. The manifest purpose of the two organizations, then, is to give to the master plumber members a monopoly of selling plumbers' supplies in the city of Detroit, and at the same time to restrict competition among themselves in effecting such sales.

Much stress is placed on the fact that on December 22, 1903, the day before this bill was filed, defendants' trustees, acting on the advice of their attorney, abrogated the provision which obligated wholesalers to discriminate against nonmember plumbers, and the provision which obligated master plumbers not to sell labor and material below a schedule rate. It is insisted that with these provisions elimi-

nated nothing objectionable remains. As a matter of fact, the trustees had, under the by-laws, no authority to abrogate these provisions. Their action in undertaking to abrogate them was utterly ineffectual until approved at a meeting of defendants' members. This approval did not take place until January 5, 1904, and therefore, at the time this suit was instituted, the objectionable provisions were in full force. If the public authorities had the right to institute this suit and obtain a decree enjoining defendants from enforcing those objectionable provisions, it is difficult to believe that they were bound to dismiss their suit the moment defendants eliminated them from their plan of organization. It may well be said in such a case that the public has a right to some other security than defendants' ⁵⁴⁵ statement that they would thereafter desist from their illegal undertaking. But we do not base our decision upon that proposition, for, as I shall endeavor to show, the elimination of these objectionable provisions did not materially change the character of defendants' undertaking. The master plumbers, though no longer obligated to refrain from competition in selling supplies and labor, remained obligated to refrain from free and unrestricted competition when they installed plumbers' supplies on contracts. In other words, the elimination of the objectionable provisions did not restore freedom of competition. It merely limited the field of restricted competition. After the elimination of the provision expressly obligating wholesalers to discriminate against nonmembers, they still remained bound to sell only to such nonmembers as should be approved by the joint representatives of the wholesalers and the master plumbers, and they also remained bound to sell to the master plumbers at prices fixed by such joint representatives.

It is obvious that by these remaining provisions the parties to the contract may, if they choose, insure discrimination in favor of the plumber members against the plumber nonmembers. Is it the purpose of the parties to use these provisions to secure discriminations? This may be determined by considering their financial advantages and desires. Discrimination is certainly to their financial advantage. Only by such discrimination can the plumber members control the business of selling plumbers' supplies in the city of Detroit. By controlling that business, both the wholesalers and their associates, the master plumbers, may hope to in-

crease their trade and their profits. Do the parties desire discrimination? If we have not answered this by showing that discrimination was to their financial advantage (and the object of the contract was to secure financial advantage to the parties), additional evidence is furnished by the original provision requiring discrimination. It is true that by the advice of their counsel they ⁵⁴⁶ have eliminated that provision, but we may still, under the circumstances of this case, look to it as evidence of their purpose: See *Detroit Salt Co. v. National Salt Co.*, 134 Mich. 103, 96 N. W. 1. Indeed, one must be blind if he does not see that the essential object of the parties in organizing the Riverside club was to secure such discrimination. When they struck from their rules the provision requiring discrimination they did not change that object. Their purpose remained unchanged. The only effect of eliminating the provision expressly requiring discrimination was to make discrimination an implied, instead of an expressed, part of the contract. We are warranted, therefore, in declaring that the parties now intend, by means of appropriate provisions still remaining in their contract, to secure discrimination. It should be construed in accordance with that intention. I conclude, therefore, that by the agreement between defendants they have attempted to create a monopoly in the business of selling plumbers' supplies in the city of Detroit and restricted competition among themselves.

It is insisted that agreements restricting competition "for contract work—that is to say, to work for which work is to be done and materials furnished for a certain lump sum—are not within the statute of 1899." It is true that a plumber who, under contract, installs his supplies in a building, furnishes the labor which installs said supplies; but it is also true that by the performance of his contract the title of such supplies passes from him to the owner or occupant of the building. These supplies are thus either sold or disposed of. It is unnecessary to determine whether or not the statute prohibits contracts fixing and regulating the price of labor employed in installing the supplies sold, for it certainly does prohibit contracts which restrict competition by fixing the price of the supplies installed; and the statute was therefore violated when defendants agreed to restrict competition in contract work, for the effect and intent of that agreement was "to keep the price" of their supplies "at a fixed or graduated

figure ⁵⁴⁷ so as to preclude a free and unrestricted competition among themselves.”

Nor is the agreement of the master plumbers unobjectionable because it leaves some opportunity for competition between them. They have agreed “not to sell an article of merchandise below a common standard figure or fixed value, so as to preclude a free and unrestricted competition among themselves”; and this the statute in express terms forbids. Moreover, this record warrants our saying that it is the aim and purpose of defendants (and this purpose may be accomplished by their contract) to altogether abolish competition between themselves. But the justification for enjoining the further prosecution of defendants’ undertaking does not rest upon the narrow ground that the agreement restricting competition among the master plumbers was unlawful. As heretofore indicated, that rests upon the ground that defendants have undertaken, by means forbidden by the statute, viz., by agreeing to keep the selling price for both wholesale and retail dealers at a fixed or graduated figure, to create a monopoly in the business of selling plumbers’ supplies in the city of Detroit, and to secure to themselves the profits of that monopoly.

Defendants’ testimony tends to prove that, instead of raising, they have lowered, prices. It is our duty to disregard that testimony. “It is no answer to say that this monopoly has in fact reduced the price. . . . That policy may have been necessary to crush competition. The fact exists that it rests in the discretion of this company at any time to raise the price to an exorbitant degree. Such combinations have frequently been condemned by courts as unlawful and against public policy”: *Richardson v. Buhl*, 77 Mich. 632, 43 N. W. 1102, 6 L. R. A. 457. See, also, *People v. Sheldon*, 139 N. Y. 251, 36 Am. St. Rep. 690, 34 N. E. 785, 23 L. R. A. 221. Neither is it an answer to say that the monopoly created, or attempted to be created, is not a complete and perfect monopoly.

⁵⁴⁸ “All the authorities agree that in order to vitiate a contract or combination it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition”: *United States v. E. C. Knight Co.*, 156 U. S. 16, 15 Sup. Ct. Rep. 249, 39 L. ed. 325.

Did defendants violate the statute of 1899 when, by agreeing to keep the selling price—both the wholesale and retail selling price—at a fixed or graduated figure, they undertook to create a monopoly of the business of selling plumbers' supplies in the city of Detroit, and to secure to themselves the profits of that monopoly? To answer this question we are not required to enter into a critical examination of the statute. At common law such an agreement was against public policy, and between the parties thereto was void: See *Richardson v. Buhl*, 77 Mich. 632, 43 N. W. 1102; *Detroit Salt Co. v. National Salt Co.*, 134 Mich. 103, 96 N. W. 1; *Bailey v. Master Plumbers*, 103 Tenn. 99, 52 S. W. 853, 46 L. R. A. 561. If the statute of 1899 is constitutional—and its constitutionality is not questioned—it was violated by defendants when they made the arrangement set forth in this opinion. Decisions from other courts based upon statutes either precisely like or similar to our own may be cited to sustain this conclusion: See *San Antonio Gas Co. v. Texas*, 22 Tex. Civ. App. 118, 54 S. W. 289; *State v. Laredo Ice Co.*, 96 Tex. 461, 73 S. W. 951; *Harding v. American Glucose Co.*, 182 Ill. 551, 74 Am. St. Rep. 139, 55 N. E. 577, 64 L. R. A. 738; *State v. Armour Packing Co.*, 173 Mo. 356, 96 Am. St. Rep. 515, 73 S. W. 1132, 61 L. R. A. 464; *Walsh v. Association of Master Plumbers*, 97 Mo. App. 280, 71 S. W. 455.

The decree in this case not only enjoined defendants from continuing the undertaking heretofore described and all similar undertakings, but it also enjoined them "from fixing and regulating, or attempting to fix and regulate, the price of labor employed in installing plumbing supplies and goods in the City of Detroit and its vicinity." This provision goes further than to enjoin defendants from fixing and regulating the price of labor employed in executing a contract for the instalment of supplies unlawfully sold by them. Indeed, if it did not go further than that, ⁵⁴⁹ it was unnecessary to insert it in the decree, because such regulation of the price of labor is sufficiently enjoined by other provisions, viz., provisions which have the effect of enjoining defendants from proceeding with their undertaking and with all similar undertakings. The provision in question prevents defendants, as employers of labor, from making an agreement fixing the wages they will pay their employés for installing supplies. I think it clear

that prior to the enactment of the statute of 1899 courts had no authority, at the instance of a representative of the people, to enjoin the making of such agreements: See *Beck v. Railway Teamsters Protective Union*, 118 Mich. 497, 74 Am. St. Rep. 421, 77 N. W. 13, 42 L. R. A. 407. They have now, then, no such authority unless such agreements are forbidden by that statute. If that statute forbids such agreements it follows that it forbids all agreements fixing and regulating the price of labor, and that associations, whether of employes or employers, when endeavoring to fix and regulate the price of labor, are engaged in a criminal undertaking. Does that statute forbid such agreements? In general, it may be said that the statute forbids certain contracts and certain defined trusts. An agreement fixing and regulating the price of labor is not one of these contracts, nor one of these trusts: See *Cleland v. Anderson*, 66 Neb. 252, 92 N. W. 306, 96 N. W. 212, 98 N. W. 1075. If it may be said that an agreement fixing the price of labor violates the statute when it forms part of an undertaking which the statute forbids, it must also be said that it does not violate the statute unless it does form part of some undertaking forbidden by the statute. As defendants are, by the provision under consideration, enjoined from fixing or regulating the price of labor when it does not form a part of an undertaking forbidden by the statute, they are entitled to have that provision eliminated from the decree.

This suit is brought "by Ormond F. Hunt, prosecuting attorney in and for the county of Wayne, state of Michigan, who sues for the people of the state of Michigan." Defendants insist that the prosecuting attorney has no right to maintain this suit. They insist that he had no ⁵⁵⁰ such right before the statute of 1899 was enacted, and that section 2 of that act gives him such right only in cases where the law is violated by some association incorporated under the laws of this state. If we assume that defendants are right in this contention, it by no means follows that the decree should be reversed. The real complainant in this case is the people of the state of Michigan. The prosecuting attorney of Wayne county is merely the representative of the people. Except in form, this is a suit by the people of the state of Michigan, by Ormond F. Hunt, their attorney. The complaint, then, of defendants is this: That the prosecuting attorney who instituted this

suit did not have authority or did not prove his authority to institute it. Had this objection been made in the lower court, it may be assumed that it would have been obviated either by an amendment or by an exhibition of proof of authority. No such objection was made until the case was heard in this court. It may therefore be said that, as the objection is only a formal one, raised for the first time in this court, it should be disregarded: *Wright v. Wright*, 37 Mich. 55.

The decree appealed from will be modified as heretofore indicated, and, as so modified, it will be affirmed.

Moore, C. J., and McAlvay, Grant, and Hooker, JJ., concurred.

Unlawful Trusts, monopolies and combinations in restraint of trade are discussed in the monographic note to *Harding v. American Glucose Co.*, 74 Am. St. Rep. 235-273. The true test of the validity of a contract or combination to fix the price and control the supply of a commodity is whether it affords only a fair and just protection to the parties, or whether it is so broad as to interfere with the interests of the public. If the former, it is valid; if the latter, it is void: *Fink v. Schneider Granite Co.*, 187 Mo. 244, 106 Am. St. Rep. 452, and see the recent cases cited in the cross-reference note thereto.

WIPFLER v. DETROIT PATTERN WORKS.

[140 Mich. 677, 104 N. W. 545.]

GIFT OF BANK DEPOSIT by Husband to Wife.—If a man deposits his money in the name of his wife, and the bank-book is placed in her keeping, and all checks on the fund are signed by her, a gift to her is thereby effected which he cannot revoke, although his purpose in making the gift was to place the money beyond the reach of his creditors. (p. 433.)

FRAUDULENT TRANSFER—Relief of Parties.—A court of equity will refuse to interfere in behalf of a man who, in order to place his property beyond the reach of creditors, consents to the transfer of a business in which perhaps he has an interest, but which his wife assumes to own, to a corporation the stock in which is practically all owned by her. (p. 433.)

Charles R. Robertson and Jasper Gages, for the complainant.

Fred H. Warren, for the defendants.

677 CARPENTER, J. Defendant Lucy is the wife of complainant, and defendant Charles E. is their eldest son. In September, 1898, complainant commenced the manufacture **678** of patterns. This business was carried on under the name of the Detroit Pattern Works. The capital invested in that business was one thousand and fifty dollars in cash, the ownership of which is in dispute, and other property of inconsiderable value. In January, 1899, it was found that additional capital was needed, and defendant Lucy advanced fifteen hundred dollars, which she obtained by mortgaging land which had formerly been conveyed to her by complainant. This mortgage was subsequently paid, in part by defendant Lucy, from moneys earned by her in keeping boarders, and in part—and this constituted the larger part—from the profits of said business. At the time this fifteen hundred dollars was put in the business, defendant Charles E. assumed its financial management. Since that time he has not only managed its finances, but has exercised the power of employing and discharging men. In October, 1900, defendant Lucy, assuming to be the owner thereof, transferred all the assets of said business to a corporation then organized, also called the Detroit Pattern Works. The incorporators in said corporation were the three individual defendants in this case. Defendant Horn, one of the employés in said business, subscribed for only one share of stock, which he subsequently transferred to defendant Lucy. The stock subscribed by defendant Charles E., with the exception of one share, was also subsequently transferred to defendant Lucy. From its inception the business has been a financial success. This success has been due, not only to the efforts of complainant, but also to the efforts of defendant Charles E. Said Charles E. had devoted his time and energy to the business upon the assumption that it belonged to his mother, defendant Lucy, expecting that through her kindness it would ultimately come to him. Complainant contends that he contributed the original capital to said business, that the corporation was formed without his knowledge and consent, and that the property and business of said corporation therefore belongs to him; and he filed a bill in the court below to enforce his rights **679** as such owner. From a degree granting him partial relief, both parties appeal to this court.

To sustain complainant's claim that from the beginning he has owned the property and business of the Detroit Pat-

tern Works, it is necessary that we should find that he owned the same at its inception, and that he did not consent to the corporation, in which he had no interest. In my judgment this record warrants our saying that from the beginning the property and business belonged to the defendant Lucy, and that complainant consented to its transfer to the corporation. I will proceed to state briefly my reasons for each of these conclusions.

Respecting the ownership of the business at its inception: Ordinarily, we may determine the ownership of a business by looking at some distinct arrangement between the parties interested. In this case, no such distinct arrangement appears to have been made. We must infer that ownership from the ownership of the capital contributed, and this is the test complainant asks us to apply. The governing question is this: Who owned the one thousand and fifty dollars which constituted substantially all the original capital? This one thousand and fifty dollars, which unquestionably had once belonged to complainant, was at the time this business was started deposited by him in the City Savings Bank to the credit of defendant Lucy. The book which evidenced this deposit was placed in her keeping. She signed all the checks by which the deposit was withdrawn. Complainant testified that this deposit was made in his wife's name in order to secure her for the fifteen hundred dollar loan heretofore referred to. I am forced to discredit this testimony. I am satisfied that the fifteen hundred dollar loan was not made or contemplated at the time complainant made this deposit in his wife's name.

Complainant insists that, notwithstanding his making this deposit in his wife's name, the money still remained his under the authority of *Peninsular Sav. Bank v. Wineman*, 123 Mich. 257, 81 N. W. 1091. That decision holds "that a mere deposit in the name of another, unaccompanied by acts or declarations indicating an intention to donate the ⁶⁸⁰ fund, is not alone sufficient to prove a gift," and is inapplicable to this case, where there was also a delivery of the bank-book and a full recognition of the wife's ownership of the fund deposited. This case is governed by *Blasdel v. Locke*, 52 N. H. 238, cited with approval and distinguished in *Peninsular Sav. Bank v. Wineman*, 123 Mich. 257, 81 N. W. 1091, and compels us to hold that there was a gift. See, also, *Camp's Appeal*, 36 Conn. 88, 4 Am. Rep. 39; *Guinan's Appeal*, 70 Conn. 342,

39 Atl. 482; Hill v. Stevenson, 63 Me. 364, 18 Am. Rep. 234. The only ground upon which we could hold that complainant continued to have an interest in the deposited fund is that suggested by his wife's testimony, viz., that he had transferred it to her for the purpose of placing it beyond the reach of creditors. This is corroborated by other testimony in this case, and it is established to my satisfaction that complainant wished his wife to appear as the owner of the property and business of the Detroit Pattern Works, so that no property of his might be taken by creditors.

I think it may also be said that, actuated by this same motive, viz., the motive of placing his property beyond the reach of creditors, complainant later not only consented, but advised, that the property should be transferred to a corporation in which it should clearly appear that he had no interest. It is true that he testifies that he knew nothing of this transfer. I discredit this testimony, not only because it is contradicted by the testimony of his wife and son, but because it seems to me highly improbable that the circumstance happened without his knowledge.

For these reasons I think, as I have heretofore stated, that complainant never owned the property and business in controversy, and that he consented to its transfer to a corporation in which he had no interest. I have no doubt that there was an understanding, as there always is when a husband transfers to his wife property to defraud creditors, that he should continue to have an interest in said property and participate in the profits of the business. If we could enforce this understanding, complainant would be entitled to relief; otherwise, he would not. No principle ⁶⁸¹ of law is better settled than that we cannot compel a confederate in such an illegal scheme to carry out his contract. Courts refuse to interfere, not because they approve the reprehensible conduct of the confederate, but because they will not aid the other party in an illegal undertaking.

It results from this reasoning that, in my judgment, the decree of the court below should be reversed, and a decree entered here dismissing complainant's bill, with costs of both courts.

Moore, C. J., and McAlvay, Grant, and Blair, JJ., concurred.

On What Amounts to a Gift of a Bank Deposit, see the recent cases of Winslow v. McHenry, 93 Minn. 507, 106 Am. St. Rep. 448; Shugart v. Shugart, 111 Tenn. 179, 102 Am. St. Rep. 777; Matter of Barefield, 177 N. Y. 387, 101 Am. St. Rep. 814.

A Conveyance to Defraud Creditors is binding between the parties; and the law provides no remedy to either of them, if in *pari delicto*, either to disturb or enforce it: Kirby v. Raynes, 138 Ala. 194, 100 Am. St. Rep. 39; Brady v. Haber, 197 Ill. 291, 90 Am. St. Rep. 161.

ANTRIM IRON WORKS v. ANDERSON.

[140 Mich. 702, 104 N. W. 319.]

STATUTE OF FRAUDS—Parol Sale of Timber.—Although a parol agreement to sell timber is invalid as a contract, it is good as a license, and timber cut before a revocation thereof becomes the property of the licensee. (p. 435.)

STATUTE OF FRAUDS—Written Authority of Agent.—It is not necessary that an agent in giving a license to cut standing timber should have written authority. (p. 435.)

AGENCY.—A Principal is Bound by the Apparent, and not the actual or express, authority given his agent, where third persons have in good faith relied thereon, whether the agency is a general or special one. (p. 435.)

AGENCY.—An Instruction to the Jury that they may find that a principal has ratified his agent's act, when there is no evidence justifying such a charge, is not erroneous, if the authority of the agent in the premises is established by undisputed testimony. (p. 436.)

Nelson C. Weter and T. J. O'Brien, for the appellant.

W. S. Mesick, for the appellee.

703 CARPENTER, J. Plaintiff brings this action of replevin to recover timber cut from section 31, Star Township, Antrim county, Michigan, by one Elgie Dow, and by Dow sold to defendant. On the 10th of September, 1902, plaintiff, the owner of said timber, acting through its agent, Charles L. Bolio, entered into a contract with Dow, whereby Dow agreed to cut, skid, draw, and load on cars the timber in question and the timber standing on four other sections belonging to plaintiff. In February, 1903, this contract was rescinded, and a new and oral contract made, by which Dow purchased from the plaintiff, through said Bolio, its agent, certain timber standing on the land covered by the former written contract. There is a dispute as to what standing timber was embraced in this new oral contract. Plaintiff's

testimony tends to prove that it covered all the standing timber embraced in the written contract, except that on section 31. Defendant's testimony tends to prove that it covered the standing timber on all the land embraced within the written contract, including that on section 31. At the time this oral contract was made it was contemplated by Bolio and Dow that it should be put in writing; and that in the meantime, according to the testimony of the defendant, Dow might enter upon the lands, and commence cutting and removing the timber. Bolio testifies that he subsequently did execute a writing, and mail it to Dow, and that in this writing the timber standing on section 31 was not included. Dow testifies ⁷⁰⁴ that this writing was never received by him, and that before he was interfered with he had cut the timber in question. It is conceded that the consideration paid by Dow was actually received by the plaintiff. Plaintiff never gave Bolio any written authority to act for it, nor any express verbal authority to sell the timber standing on section 31. The issue was submitted to a jury, who rendered a verdict for the defendant. Plaintiff brings the case to this court, and urges many reasons why the judgment entered on said verdict should be reversed.

We answer many of those reasons by saying: 1. Though the contract to sell the standing timber was invalid as a contract because not in writing (see *Russell v. Myers*, 32 Mich. 522), it was good as a license, and the timber, having been cut before the license was revoked, became the property of Dow; 2. It was not necessary that the agent who gave the license should have written authority. *Spaulding v. Archibald*, 52 Mich. 365, 50 Am. Rep. 253, 17 N. W. 940, is authority for each of the foregoing propositions.

Plaintiff contends that there was no evidence tending to prove that Bolio had even verbal authority to sell this timber to Dow. The undisputed evidence shows that Bolio did have authority to contract with Dow for the lumbering of all this timber, and that he also had authority to sell Dow all the standing timber covered by said contract except that on section 31. There was also evidence that Dow bought the timber believing Bolio had authority to sell it. The legal rule applicable in this case is correctly stated by Mr. Mechem in his work on Agency (section 283) as follows: "The principal is bound to third persons who have relied thereon in good faith and in ignorance of any limitations or restrictions by

the apparent authority he has given to the agent, and not by the actual or express authority, where that differs from the apparent; and this too, whether the agency be a general or a special one."

Under this rule it cannot be said that Bolio did not have verbal authority to make the contract in question.

⁷⁰⁵ The court charged, in effect, that the jury might find that plaintiff ratified the action of its agent, Bolio. Plaintiff contends that there was no evidence justifying this charge. If so, the charge was not erroneous, because it bore upon the question of Bolio's authority, and under the rule we have just stated the undisputed testimony established that authority.

Many complaints of plaintiff relate to rulings admitting testimony introduced by defendant. We have carefully examined each of these complaints. It would be of no service to the profession to detail them. It is sufficient to say that all this testimony was properly admitted. Some of that testimony tended to prove the contract, some of it tended to prove Bolio's authority, and some of it had a legitimate tendency to discredit plaintiff's witnesses.

Complaint is made of improper language used by defendant's counsel in his argument to the jury. We think it sufficient to say that under the authority of *Cameron Lumber Company v. Somerville*, 129 Mich. 552, 89 N. W. 346, this language was not reversible error.

No other complaint demands discussion. The judgment is therefore affirmed.

Moore, C. J., and McAlvay, Grant, and Montgomery, JJ., concurred.

A Parol Sale of Standing Timber is generally regarded as only a license to enter, cut and remove it, which may be revoked so that acts done thereafter on the land by the licensee may constitute a trespass: *Hodson v. Kennett*, 73 N. H. 225, 111 Am. St. Rep. 607, and see the cases cited in the cross-reference note thereto.

CASES
IN THE
SUPREME COURT
OF
MISSISSIPPI.

HART v. STATE.

[87 Miss. 171, 39 South. 523.]

CONSTITUTIONAL LAW.—No statute can be condemned as unconstitutional, unless in palpable conflict with some constitutional provision, state or national, and such conflict is not to be implied. (p. 438.)

CONSTITUTIONAL LAW—Sale of Intoxicating Liquor.—A statute making it a misdemeanor to act as the agent of either the purchaser or seller in effecting a sale of intoxicating liquor in any territory in which a sale thereof is prohibited is constitutional and valid. (p. 438.)

INTOXICATING LIQUORS—Prohibiting Sale of.—The legislative department of the state, in the exercise of the police power, is vested with plenary power to regulate or absolutely prohibit the sale of intoxicating liquor within the state. (p. 438.)

INTOXICATING LIQUOR—Sale of by Agent.—The state, in the exercise of its police power, has authority to prohibit absolutely the sale of intoxicating liquor within its limits, and to make any violation of such prohibition a criminal offense. It may also forbid anyone to assist in the commission of such offense and provide for the punishment of those who so aid or assist. (p. 439.)

CONSTITUTIONAL LAW—Sale of Intoxicating Liquor—Interstate Commerce.—A statute making it a misdemeanor to act as the agent of either the seller or purchaser in effecting a sale of intoxicating liquor in any territory in which such sale is prohibited is not a violation of the interstate commerce clause of the constitution of the United States, nor does it create a discrimination between the citizens of the state and those of any other state. (p. 440.)

INTOXICATING LIQUOR—Illegal Sale.—If a person engaged in the liquor business in one state takes orders for whisky in another, where its sale is prohibited under penalty imposed by statute, collecting the purchase price at the time, and subsequently delivering the whisky in such other state to an express company to be by it delivered to the purchaser, the sale is illegal and the seller guilty of a violation of such statute. (p. 442.)

Indictment and conviction of a violation of the following statute: "If any person shall act as the agent or assistant of either the seller or purchaser in effecting the sale of any liquor, bitters or drink, the sale of which, without license,

is unlawful under the provisions of this chapter, in any county, district, territory or municipality, in which the sale of such liquors, bitters or drink is prohibited by law, he shall be guilty of a misdemeanor and on conviction shall be punished," etc.

Brennan & Hannah, for the appellant.

J. N. Flowers, assistant attorney general, for the state.

176 TRULY, J. We experience no difficulty in arriving at the conclusion that Code of 1892, section 1604, is a legitimate and valid expression of legislative will. It is the universally accepted rule of statutory construction that no act of the legislature will be condemned as violative of or repugnant to the fundamental law unless it manifestly be in palpable conflict with some plain provision of the state or federal constitution; and as such conflict is not to be implied, it is the duty of the court, whenever possible, to give every expression of legislative will such construction as will enable the statute to have effect. "Whenever an act of the legislature can be so construed and applied as to avoid conflict with the constitution and give it the force of law, such construction will be adopted by the courts. An inquiry into the validity of an act, on the ground that it is unconstitutional, is an inquiry whether the will of the representative, as expressed in the law, is or is not in conflict with the will of the people as expressed in the constitution; and unless it be clear that the legislature has transcended its authority, the courts will not interfere. Acts of the legislature constitutionally organized are presumed to be **177** constitutional, and it is only where they manifestly infringe some of the provisions of the constitution, or violate the rights of the citizen, that their operation and effect can be impeded by the judicial power": *Burnham v. Sumner*, 50 Miss. 517. Tested by the rule of construction as thus enunciated, it is manifest that the statute under review does not "violate the rights of the citizen"; nor does it contravene any provision of the state constitution.

That the legislative department of the state, in the exercise of police power, is vested with plenary power to regulate or prohibit the sale of intoxicating liquor, if ever debatable, is no longer with us an open question. Says this court in *Rohrbacher v. City of Jackson*, 51 Miss. 735: "It would seem that it ought hardly to be questioned at this day that it belongs to

the police power of the state to regulate the retail dealing in, and sale of, intoxicating liquors. Perhaps all the states have legislated on the subject, some by total prohibition and others by dealing with the subject under rules and regulations. Such legislation rests on the popular conviction that it is to the interests of morals, sobriety, industry and good order that the state should hold the traffic under surveillance. The state may deal with the subject by absolute prohibition or by regulations. . . . The police power extends to wholesome restrictions on property and individuals, in order to secure the general health, comfort and prosperity of the state. The power of the legislature cannot be questioned": *Schulherr v. Bordeaux*, 64 Miss. 59, 8 South. 201. If, therefore, the legislature has the power to prohibit absolutely the sale of intoxicating liquors, and make any violation of such prohibitory law a criminal offense, obviously it may also forbid anyone to assist in the commission of such offense and provide for the punishment of those who aid or assist. It is true, as stated by counsel for appellant, that generally there is no agency in crime. It is also true that all who participate in the commission of a misdemeanor are principals. ¹⁷⁸ But this does not prevent the legislature, in the exercise of its unquestionable power, from making criminal other acts which, in its judgment, militate against the "general health, comfort and prosperity of the state." Nor does it prevent the fixing of gradations in the punishment of crimes. Far from being the exercise of a doubtful power, we think the statute here assailed falls clearly within the well-defined and recognized line of legislative authority.

But the validity of the statute is also challenged as infringing the provisions of the federal constitution. Is this contention sound? Clearly the statute does not by its terms, nor by any rational intendment, discriminate between citizens of this and any other state. "Any person," says the statute, who may "act as agent or assistant of either the seller or purchaser in effecting the sale" of intoxicating liquor in a place where such sale "is prohibited by law" shall be guilty of a misdemeanor. The penalty is imposed upon every person who commits the offense therein defined. Regardless of citizenship, "any person" who violates the law must suffer the punishment prescribed thereby. The legislature, in its wisdom and in the exercise of an undoubted power, has made the commission of certain acts a crime. It punishes the act when

committed by our own citizens; surely the transient nonresident is not entitled to more lenient treatment.

Nor do we think the statute in conflict with the interstate commerce clause of the federal constitution. It imposes no burdèn upon the nonresident dealer by reason of his citizenship, nor does it place any limitation or restriction upon free commerce between the states. It may be conceded, as contended, that to the extent that this statute tends to reduce the consumption of intoxicating liquors, it to that extent decreases their importation, and therefore, in directly, at least, it impedes free interstate commerce. The same argument is equally applicable and more forceful when applied to absolute prohibitory laws, yet ¹⁷⁹ we have already seen that such are uniformly upheld. "It may be that the effect of the law is to prevent the importation of liquors from other states, but the distinction between state restrictions upon the importation and state restrictions upon the sale of a commodity when within the state is clearly recognized and well defined": *Lang v. Lynch* (C. C.), 38 Fed. 489, 4 L. R. A. 831; *License Cases*, 5 How. 504, 12 L. ed. 256; *State v. Delamator* (S. Dak.), 104 N. W. 537; *Mugler v. State of Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273, 31 L. ed. 205. The suggestion, even if well founded, that under a certain hypothetical state of facts the enforcement of the statute under consideration would operate as a regulation of interstate commerce, affords no ground on which to base an attack upon the validity of the law as an expression of legislative will: *Vance v. Vandercook*, 170 U. S. 439, 18 Sup. Ct. Rep. 674, 42 L. ed. 1100; *Tiernan v. Rinker*, 102 U. S. 123, 26 L. ed. 103; *In re Rahrer*, 140 U. S. 545, 11 Sup. Ct. Rep. 865, 35 L. ed. 572.

The inquiry whether in the instant case the appellant has or has not, under the facts of the record, violated the law sheds no light on the other question as to the constitutionality of the law itself. The statute must be construed as written, and, so construing it, we uphold it as not infringing upon any of the provisions of the fundamental law, either state or national. The authorities relied upon by appellant on this point all fall within the category of cases dealt with by this court in *Overton v. City of Vicksburg*, 70 Miss. 558, 13 South. 226—cases in which the commodity dealt with was not only a legitimate subject of interstate commerce, but one the sale of which was permitted by the law of the state. In such cases this court, following the decision of the supreme court of the United

States—*Robbins v. Shelby County*, 120 U. S. 489, 7 Sup. Ct. Rep. 592, 30 L. ed. 694—of the federal question involved, held that the imposition of a privilege tax was invalid, because it operated as a regulation of interstate commerce, and hence was within the inhibition of the federal constitution.

¹⁸⁰ But there are two reasons why those authorities are not controlling in the case at bar: 1. Because this statute is not an attempt to require any license or payment of privilege tax as a condition precedent to following a certain lawful occupation or calling. It does not attach any conditions, limitations, burdens or restrictions upon the doing of a lawful act, but undertakes to prevent the doing of an unlawful one. 2. Because the article or commodity dealt with, while a recognized subject of interstate commerce, so that its importation cannot lawfully be prevented—constrained to follow doubtfully the authoritative utterance of the majority of the court in *Bowman v. Chicago etc. R. R. Co.*, 125 U. S. 465, 8 Sup. Ct. Rep. 689, 1062, 31 L. ed. 700, and *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. Rep. 681, 34 L. ed. 128—is an article the sale of which, after importation, may be legally forbidden. Since the enactment by Congress of the act of August 8, 1890, commonly called the “Wilson act,” intoxicating liquor imported into a state becomes, immediately upon arrival, subject to the law of such state, so that the sale there, if forbidden by the law of such state, is unlawful, though made by the importer and in the original package: *Judson on Internal Commerce*, 18. “Congress has now spoken, and declared that imported liquors or liquids shall, upon arrival in a state, fall within the category of domestic articles of a similar nature”: *In re Rahrer*, 140 U. S. 545, 11 Sup. Ct. Rep. 865, 35 L. ed. 572. “Congress did not use terms of permission to the state to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the state not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction”: *In re Rahrer*, 140 U. S. 545, 11 Sup. Ct. Rep. 865, 35 L. ed. 572. “It has been settled that the effect of the act of Congress is to allow the statutes of the several states to operate upon packages of imported liquor before sale”: *Rhodes v. State of Iowa*, 170 U. S. 419, 18 Sup. Ct. Rep. 664, 42 L. ed. 1088. Hence, all sales of intoxicating liquors are governed by ¹⁸¹ the state law. If in

the particular place the sale be permitted, the seller must comply with the requirements of the law; if forbidden, the sale is unlawful, no matter by whom made, under what circumstances, or whether the liquor be imported or domestic.

The only question remaining for consideration is whether, under the facts of the case, appellant is guilty of the offense charged. Did he, acting as agent in a place where all such sales were prohibited, assist in effecting sale of whisky? There are no controverted facts. The proof is this: Appellant is a citizen of Louisiana, and, either as partner or employé, conducts a retail whisky business in that state. In the prosecution of his business he visits frequently the city of Brookhaven, in this state, in which, being in Lincoln county, the sale of intoxicating liquors is prohibited by law. He solicits and takes orders for whisky, which is delivered in Louisiana to an express company for transportation and delivery to the purchaser. Appellant agrees with the purchaser as to quantity, quality and price of whisky ordered, and collects the purchase price thereof in money before the whisky is delivered, and even before the order is forwarded. It will be noted that the entire transaction is closed in this state and at the time of the receipt of the order, save only the actual delivery of the whisky. Undoubtedly this is acting as agent of the seller in effecting a sale. Without his active intervention no sale could be consummated. He acts without any submission of orders for approval, but conducts all negotiations, collects the purchase price, and directs the delivery. It is idle to quibble over where the delivery in a strict legal sense occurred, whether in this state or Louisiana. The question of appellant's guilt under this statute is not affected by that point. He is not indicted for making a sale, but for acting as agent of the seller and assisting in effecting a sale: See, as shedding light on this branch of the subject, *State v. Cullins*, 53 Kan. 105, 36 Pac. 56, 24 L. R. A. 212; *State v. 182 Ascher*, 54 Conn. 299, 7 Atl. 822; *State v. Delamator* (S. Dak.), 104 N. W. 537; *Starace v. Rossi*, 69 Vt. 303, 37 Atl. 1109; *Backman v. Wright*, 27 Vt. 187, 65 Am. Dec. 187; *Westheimer v. Weisman*, 60 Kan. 753, 57 Pac. 969; *Taylor v. Pickett*, 52 Iowa, 467, 3 N. W. 514.

A sale of intoxicating liquor was made. Appellant assisted in effecting that sale, and acted as agent of the seller in this state at a place "in which the sale of such liquor is prohibited by law." This constitutes the specific offense dealt with by

this particular statute, and every element of appellant's guilt is plainly shown. The argument made in behalf of appellant, that his conviction cannot be upheld, because the sale was incomplete until delivery and that delivery was made beyond the borders of the state, was, under slightly different circumstances, successfully interposed in *Pearson v. State*, 66 Miss. 512, 6 South. 243, 4 L. R. A. 835, decided in April, 1889. But as a remedy for this evil, and to supply the omission in the law thus called to its attention, the legislature in February, 1890, passed Laws of 1890, chapter 62, page 71, which now constitutes Code of 1892, section 1604, thus closing effectually this avenue of escape.

Affirmed.

The Regulation of the Sale of Intoxicating Liquors is wholly within the police power of the state to be exercised in such manner as it deems proper, as such sale is not one of the privileges or immunities of citizenship guaranteed by constitutional provisions: *Council of Farmville v. Walker*, 101 Va. 323, 99 Am. St. Rep. 870; *Wallace v. Mayor etc. of Reno*, 27 Nev. 71, 103 Am. St. Rep. 747. The validity of such regulations as violating the commerce clause of the federal constitution is discussed in *Harrell v. Speed*, 113 Tenn. 224, 106 Am. St. Rep. 814; *Cook v. Marshall County*, 119 Iowa, 384, 104 Am. St. Rep. 283; *Tredway v. Riley*, 32 Neb. 495, 29 Am. St. Rep. 447.

The Place of an Illegal Sale of Intoxicating Liquors is a question discussed in *Bollinger v. Wilson*, 76 Minn. 262, 77 Am. St. Rep. 646, and cases cited in the cross-reference note thereto; *Graves v. Johnson*, 179 Mass. 53, 88 Am. St. Rep. 355; *Commonwealth v. Hess*, 148 Pa. St. 98, 33 Am. St. Rep. 810.

ENOCHS v. MISSISSIPPI BANK AND TRUST CO

[87 Miss. 325, 39 South. 529.]

EQUITY JURISDICTION—Discovery—Bills and Notes.—If, after the note of an applicant for insurance in payment of his premium is rejected by the insurer, a written agreement is entered into between the applicant and the insurance agent, whereby the note is reinstated as valid and forwarded by the insurer to his agent for collection, who, as president of a bank, buys the note for it, the directors of which have no knowledge of any equities against the note arising by reason of the agreement, equity has jurisdiction of a suit by the bank against such applicant, agent and insurer for a discovery of the contents of such agreement and for a

decree for the amount of the note, when the applicant denies liability thereon, on the ground of the wrongful and fraudulent conduct of the insurer and his agent, after the making and execution of the agreement. (p. 445.)

Green & Green, for the appellant.

Harper & Potter, for the appellee.

327 WHITFIELD, C. J. The case made by the amended bill is substantially this: That Enochs took out a life insurance policy in the New York Life Insurance Company; that he had at the time a previous policy in said company; that the defendant Mims negotiated this contract of insurance, and received a premium note of nine hundred and three dollars for the same, and transmitted the same to the home office of the company at New York; that upon its reception it was discovered that there was a discrepancy between the application in this case and the previous application as to the age of Enochs; that thereupon the company sent the policy to Mims, with instructions not to consummate the contract until this discrepancy should be explained; that there ensued a conference between Mims and Enochs touching this and other matters, and that thereupon a written agreement was entered into between Mims, as agent for the company, and Enochs, fixing and settling the liability of Enochs; that this written agreement reinstated the note as a valid note upon the execution of the written agreement which is averred to be the real basis of the action; that thereafter the note was forwarded from the home office at New York to Mims for collection; that Mims was both agent for the New York Life Insurance Company and the president of the Mississippi Bank and Trust Company; that Mims, as president of the bank, bought from himself as agent of the insurance company the note; that the directors of the bank had no knowledge of any equities against the note that might arise out of the contents of said written agreement; that the note was made payable by Enochs to his own order, and indorsed by him in blank—all this being done, however, prior to the written agreement; that the bank notified Enochs that it was the owner of the paper and demanded payment, whereupon Enochs denied all liability, placing **328** his nonliability upon the alleged wrongful conduct of the other defendants subsequent to said written agreement; that Mims' action in buying the note for the bank as agent of the insurance company was unlawful, he having a personal inter-

est in the commissions accruing from said note; that a discovery of the contents of said written instrument was essential to the ends of justice and necessary in the cause, to enable the complainant to fix the liability where it was placed by the terms of said written agreement; that by virtue of these dealings between the three parties—Enochs, and Mims as agent of the insurance company, on the one hand, and Mims as president of the bank, on the other—the whole uncertainty and confusion as to where the liability lawfully belonged had been directly created by the said conduct of the three defendants themselves, and that the remedy, if any, at law was thereby made wholly inadequate. Wherefore the bill prayed primarily for discovery, and, upon discovery, for a decree for the amount of the note. The bill was demurred to on the ground of want of jurisdiction, the insistence being that the remedy was at law. The court below overruled the demurrer. Mims and the New York Life Insurance Company declined to appeal, but Enoch's prosecuted this appeal alone.

The argument chiefly insisted upon for appellant is that, since the note was not within our anti-commercial statute, no equities which Enoch's had against the note could be set up, and hence that a discovery, the object of which was to disclose such equities, would be immaterial. This view fails to take in the full scope and breadth of the case made by the bill. It is to be observed, first, that this note is still in the hands of a bank of which Mims is president; that the averment is, not that the bank did not know of these equities, but that the directors did know that the purchase was unlawful, and the question as to whether notice to Mims, the president, would be notice to the bank, was left open; and, finally, that the suit proceeds for its main basis, not upon the note originally given, as a piece of ³²⁹ commercial paper, payable to bearer, practically, but upon the liability upon said note growing out of a subsequent written agreement, which was necessary to adjust the differences in dispute between the parties and reinstate the note as a binding obligation, and that the dealing with this note had been by Mims, agent both for the insurance company and the bank and the negotiator of the insurance, with Enoch's. It is easily conceivable upon this state of case that Enoch's might prevail in a suit at law and that the life insurance company might prevail in a second suit at law. Learned counsel for appellant frankly admit that "the ar-

gument for appellee might have been sound under a different state of case, but not where the discovery sought is irrelevant and immaterial"—that is to say, counsel admit that the argument that both Enochs and the New York Life Insurance Company might successfully defeat actions at law might be sound argument but for the fact that the one piece of paper, the note, looked at by itself, is practically payable to bearer, and therefore would ordinarily cut off equities. But this view takes in only half of the case made by the bill. Looking at the whole case as we have stated it, we think it a case peculiarly for equity jurisdiction, because of the manifest confusion and uncertainty which the defendants themselves, by their conduct in the matter, have created, and because, as corollary of this, of the utter inadequacy of the remedy at law. The case falls within the principles announced in *Mississippi Compress Co. v. Levy*, 83 Miss. 774, 36 South. 281.

Therefore the decree is affirmed and the cause remanded, with leave to answer within thirty days from the filing of the mandate in the court below.

Bills for Discovery are favored in equity, and will be sustained in all cases where some well-founded objection does not exist against the exercise of the jurisdiction: *Howell v. Ashmore*, 9 N. J. Eq. 82, 57 Am. Dec. 371; *Reynolds v. Burgess Sulphate Fibre Co.*, 71 N. H. 332, 93 Am. St. Rep. 535; *Lancy v. Randlett*, 80 Me. 169, 6 Am. St. Rep. 169.

SINCLAIR v. STATE.

[87 Miss. 330, 39 South. 522.]

HOMICIDE—Uncommunicated Threats as Evidence.—In doubt as to who was the aggressor in cases of homicide, or to throw light on the significance of the acts of the deceased, and what from them would be reasonable apprehension on the part of the accused, uncommunicated threats of the deceased against the accused are admissible in evidence. (pp. 447, 448.)

EVIDENCE of Character—Competency of Witness.—A witness who testifies that he knows the general reputation of an accused in the community for peace or violence, but that he has never heard it discussed, is competent to testify as to what such reputation is. (p. 448.)

Mixon & Butler and J. W. Cassedy, for the appellant.

J. N. Flowers, assistant attorney general, J. H. Price, J. B. Holden and J. J. Cassedy, for the state.

³³² CALHOON, J. Appellant was indicted for manslaughter and convicted. He was a peace officer of McComb City, and the homicide occurred while he was in the effort to arrest Johnson, the man killed, for a misdemeanor being committed in his presence, which arrest was, as it is said, being resisted by the deceased. The offense being committed was profane swearing in the presence of others, some of them ladies, on a public sidewalk of the city. In the effort to arrest and the resistance of it, there was, at some period of it, a grappling of the two, and at some period of the altercation each drew a pistol. As to which was the aggressor in the grappling, or which first drew or began to draw his pistol the testimony conflicts. Certain it seems to be, however, that the accused "got the drop" on deceased and made him throw down his pistol, and that accused, still holding his own weapon on deceased, stooped and picked up the pistol which had been dropped and put it in his pocket. There was another grappling after this, and, according to some of the testimony for the prosecution, the fatal shot was fired after this, while the two were apart and deceased was making no hostile demonstration; but, according to evidence for the defense, the firing of the fatal shot was while they were clinched, the deceased being the aggressor. There was evidence also that this shot was fired while deceased was trying to get hold of the pistol on the person of the ³³³ accused; and the accused himself testifies that he had no design to shoot, but that his weapon fired accidentally in the tussle. This is a general view of the prominent features of the evidence in this record. From this and the details, all of which we have examined with care, it appears that appellant was entitled, if he could, in order to establish his right to an acquittal, to awaken a reasonable doubt in the minds of the jury that the killing was (1) in self-defense or (2) purely accidental in attempting arrest and without culpable negligence on his part.

In the matter of self-defense, as to the danger, real or reasonably apparent, in the light of testimony of Johnson's acts and probable purpose, the defendant had the right not only to show the bad character of Johnson for peace, which was properly allowed by the learned judge below, but also to show threats by him against defendant, which was refused. It is rare, indeed, if it is ever the case, where evidence of the bad character of deceased is admissible and that of threats is not. In cases of doubt as to who was the aggressor, or to

throw light on the significance of the acts of deceased and what from them would be reasonable apprehension on the part of accused, we think uncommunicated threats admissible: B. & A.'s Dig., p. 321, et seq., sec. 233 et seq. See particularly *Moriarity v. State*, 62 Miss. 654; *Foster v. State*, 70 Miss. 755, 12 South. 822; *Prine v. State*, 73 Miss. 838, 19 South. 711; *Holly v. State*, 55 Miss. 424. The threat was that he intended to take Sinclair's pistol away from him and beat him to death with it.

In the progress of the trial the accused offered the testimony of his own good character for peace of a former city marshal, of the sheriff, and of a prominent physician, and it was properly allowed. He then offered the testimony of a justice of the peace of the city where the death occurred—Mr. Harrell—who said he knew Sinclair's general reputation in that community for peace or violence, and that it was good. On cross-examination it was elicited that he had "never heard it discussed at all," and the ³³⁴ court thereupon, on the state's motion, excluded the testimony. This was fatal error. Good character of citizens is the essential base upon which alone can rest any solid social superstructure. Without it law is a mere empty phrase, because it cannot be put in force, in a government by the people, over a corrupt population. In criminal trials it is sometimes the only safe refuge of innocence, and often it can be established only by proof, from those who ought to know, that they had never heard it questioned or discussed. There are bishops in Mississippi eminent for erudition, wisdom and piety. All know their general reputation for peace and quiet; all would, we suppose, so testify; and yet none could say that it had ever been discussed. The character of good men is rarely, if ever, discussed for peace or violence or integrity. Are they to be denied, for this reason, any resort to their reputation in the face of a criminal charge? Is a woman to be denied it in defense of her chastity? The questions expose the absurdity and injustice of such denial. When a witness says he knows the general reputation of an accused for peace or violence, it must go to the jury, weakened with them, if it may be, by cross-examination as to the basis of his knowledge. On what has been said in reference to the introduction of evidence of good character, we refer to *Hussey v. State* (Ala.), 6 South. 423; *Coleman v. State*, 59 Miss. 484; *French v. Sale*,

63 Miss. 386; *Pickens v. State*, 61 Miss. 563; *State v. Grate*, 68 Mo. 22; 1 *Wigmore on Evidence*, 55 et seq.

We purposely refrain from particularizing instructions and passing upon the propriety of giving or refusing them, since a new trial will be had, and if the facts are the same, charges will now conform to the principles announced in this opinion. The accused is entitled to have the jury so instructed as to give him his rights under the law of self-defense and reasonable apprehension of great hurt from overt acts, according to what they may believe of the evidence, and also under his defense of accidental, unintentional discharge of the pistol, if he was proceeding to ³³⁵ make a lawful arrest in a lawful way and the discharge was accidental in a struggle in which he was not in fault.

Reversed and remanded.

The Admissibility of Uncommunicated Threats in evidence in prosecutions for homicide is discussed in the monographic note to State v. Nelson, 89 Am. St. Rep. 705.

GREENE v. VILLAGE OF RIENZI.

[87 Miss. 463, 40 South. 17.]

OFFICERS DE FACTO.—The acts of de facto municipal officers are valid. (p. 450.)

MUNICIPAL BONDS—Issuance—Election—Qualification of Voters.—The word “elector,” when used in a statute relating to the issuance of bonds by municipal corporations and providing that they shall not be issued unless authorized by a majority of the “electors,” means voters who have registered so as to entitle them to vote at municipal elections, or at any election held in pursuance of the constitution and laws of the state. (p. 452.)

MUNICIPAL BONDS.—*Bona Fide Holders* of municipal bonds, relying upon the face of the record, will be protected against any informalities or irregularities in the proceedings authorizing their issuance, or from mistakes or lack of wisdom on the part of the authorities issuing and negotiating them. (p. 453.)

Candler & Candler, for the appellants.

W. J. Lamb, for the appellees.

⁴⁶⁵ **TRULY, J.** The case made by the bill and exhibits on the only points we deem it necessary to discuss is this: The village of Rienzi is governed by the code chapter on
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"Municipalities." The de facto board of mayor and aldermen of the village decided to issue municipal bonds to the amount of fifteen hundred dollars for the purpose of purchasing land and erecting a schoolhouse. A petition signed by a sufficient number of taxpayers having been presented, protesting ⁴⁶⁶ against the issuance, an election was ordered, submitting the question to a vote. The election commissioners reported that thirteen votes were cast in favor of the issue and eight against it. Thereupon the board advertised for proposals to purchase the bonds; but before the bonds were actually negotiated, issued and delivered, injunction was issued on the bill of complaint herein, and the sale and delivery of the bonds restrained. The bill states two grounds on which appellants seek to prevent the issuance of the bonds: 1. That the board of mayor and aldermen of the village of Rienzi are not a legal board, because they were never elected according to law, and hence all their actions in the premises were illegal and void; 2. That at the election at which the question of the issuance of the bonds was submitted "none of those voting were registered voters of said village, and some of those who voted were not qualified voters of the county of Alcorn, state of Mississippi, being delinquent for taxes due state and county, and some had not resided in said village for twelve months." The bill further charges that prior to said election no registration was ever had of the qualified voters of said village. A demurrer to the bill was sustained, the injunction dissolved, and the bill dismissed; and upon appeal this action of the court is assigned as error.

As to the first ground relied on by appellants, we content ourselves by reaffirming the established doctrine that the law attaches validity to the acts of de facto officers: *Powers v. State*, 83 Miss. 691, 36 South. 6. It is admitted that the board of mayor and aldermen are actually clothed with the insignia of office and exercising its powers and functions. Their official acts are therefore valid and binding, however questionable their legal title to the office may be: *Norton v. Shelby County*, 118 U. S. 425, 6 Sup. Ct. Rep. 1121, 30 L. ed. 178.

The second ground on which the bill of complaint seeks to prevent the issuance of the bonds is that there was no duly qualified electorate in the village of Rienzi, and that none of those who ⁴⁶⁷ participated in the bond election were registered voters. To this it is replied by appellees that no regis-

tration is necessary for such election; that it is, in truth, not an election at all, in the sense in which that term is used in the constitutional and statutory provisions dealing with registration and elections generally, but is merely a special device for ascertaining the will of the taxpayers with regard to a purely local question. An isolated expression in the opinion of the court in *Bew v. State*, 71 Miss. 1, 13 South. 868, is relied on as authority. We think the contention unsound. The very case relied on by appellees is conclusive against their position. In the *Bew* case, although the election was merely a legislatively established special device for ascertaining the will of the people on a question submitted to their decision, the court held that previous registration was essential to the exercise of the right of suffrage at such election. Says the court: "One is not qualified to vote if not duly registered; but being duly registered does not entitle him to vote. It is an essential prerequisite, but does not quality to vote. It is that without which all other qualifications to be an elector go for nothing; but it is not sufficient to entitle one to vote. Registration is not made by the constitution or law even *prima facie* evidence of the right to vote. That is to be passed on by the officers holding the election, who are made 'judges of the qualifications of electors.' They would reject the ballot of one who had not been registered, and should not receive the ballot merely because the person offering it had been registered. They must judge of the qualification of electors offering to vote, 'of which one necessary thing is registration.' There cannot be any qualified elector not registered. It is that without which one cannot be a qualified elector—an essential prerequisite—and yet not conferring the right": *Ferguson v. Monroe County*, 71 Miss. 524, 14 South. 81. Code of 1892, sections 3028, 3029, prescribing the conditions precedent to the lawful exercise of the right of suffrage by electors of a municipality, provides: 1. ⁴⁶⁸ The person must be a qualified elector of the county, and this carries with it by necessary legal implication that he must be not only registered in the county as required by law, but that he must also possess the other necessary qualifications authorizing any person to vote; 2. He must have resided within the corporate limits for one year next before he offers to register; 3. He must not be in default for taxes due the municipality for the two preceding years. If he possess all these qualifications, then he shall be entitled to reg-

ister and vote at municipal elections; but in municipal elections, as those dealt with by the constitution and the general laws, registration is a prerequisite to the exercise of the right of suffrage. This being so, and the bill of complaint expressly charging, and the averment being admitted by demurrer, that there were no registered voters in the village of Rienzi, it follows necessarily and inevitably that there was no one qualified to vote at the election.

The contention that, because this is simply the submission of the question of the issuance of municipal bonds to be voted on, it is not, properly speaking, an election within the purview of the law, but merely "a special device for determining" the will of the people interested with reference thereto, and that therefore it is not necessary for those participating therein to possess the prescribed constitutional and statutory qualifications of electors, is unsound. It is true, as before stated, that the general law applicable to elections does not include legislative plans specially devised for ascertaining the will of the people; it is also true that it is within the province of the legislature to devise any other of many different schemes by which the issuance of municipal bonds or the determination of other local questions might be had, and that in some instances bonds may lawfully be issued without reference to the method here under review. But this does not change the rule that when the assent of a majority of the participating electors is required, and that assent is to be signified by votes cast at an election held for that specific purpose, as provided ⁴⁶⁹ by Code of 1892, section 3016, the word "elector," as employed in that section, must be given its generally accepted meaning; and the term as judicially defined in the Bew case means "those who would be entitled to vote at any election held in pursuance of the constitution and laws of the state." The reasoning of that case is controlling in this. "The code is to be considered as a whole and with reference to the constitution." So considering it, the conclusion is inescapable that when section 3016 requires the affirmative authorization of "a majority of the electors" to be evidenced by their "voting in an election to be ordered for that purpose," it means those who would be qualified as "electors" in an election contemplated by the constitution and laws. To the same effect see *Town of Clarksdale v. Broadus*, 77 Miss. 667, 28 South. 954.

It is no answer to this to say that the legislature might have authorized the majority of the taxpayers to determine the question, or that the issuance of bonds under any and all circumstances might have been submitted solely to the discretion of the board of mayor and aldermen of the municipality. Granting this, the fact remains that the legislature did not so decide, but required, as a condition precedent to the lawful issuance of municipal bonds under the case made by this record, the authorization by "a majority of the electors voting in an election to be ordered for that purpose": Code 1892, sec. 3016. The argument based on the familiar and immutably fixed doctrine that bona fide holders of bonds, relying upon the face of the record, will be protected against any informalities or irregularities in the proceedings authorizing the issuance of the bonds, or from mistakes or lack of wisdom on the part of the authorities issuing and negotiating the bonds, is, of course, perfectly sound: *Town of Lexington v. Union Nat. Bank*, 75 Miss. 1, 22 South. 291. But it is foreign to this case, for the reason that the bonds have never been issued or negotiated, and the rights of third persons are in no wise involved. It being admitted, therefore, by the demurrer that ⁴⁷⁰ there was no lawful electorate in the village of Rienzi, and that, consequently, no legal voters participated in the election, it follows that the board of mayor and aldermen of that municipality were not legally authorized to issue the bonds in question.

The decree is reversed, the demurrer overruled, the injunction reinstated, and the cause remanded for answer within thirty days after filing of mandate in the court below.

The Acts of De Facto Officers are, as a rule, valid as to the public and third persons, whether serving alone or as members of a governing or legislative body: *Oliver v. Jersey City*, 63 N. J. L. 634, 76 Am. St. Rep. 228; *King v. Philadelphia Co.*, 154 Pa. St. 160, 35 Am. St. Rep. 817; *Magneau v. Fremont*, 30 Neb. 843, 27 Am. St. Rep. 436. Compare, however, *State v. District Court*, 72 Minn. 226, 71 Am. St. Rep. 480.

Irregularities in Elections as affecting their validity are discussed in the monographic note to *Jones v. Camden*, 51 Am. St. Rep. 822-861.

Irregularities in Elections as affecting their validity are discussed in the monographic note to *Patton v. Watkins*, 90 Am. St. Rep. 46-92.

TISHOMINGO SAVINGS INSTITUTION v. YOUNG.

[87 Miss. 473, 40 South. 9.]

EXEMPTIONS.—Two Horses used by a debtor in driving to and from his home to his place of business and devoted solely to the convenience and pleasure of the owner and his family cannot be denominated “work horses,” and are not exempt from seizure on execution. (p. 458.)

Boone & Curlee, for the appellant.

Lamb, Johnson & Warringer, for the appellee.

476 **TRULY, J.** Appellant, having a judgment against appellee, had an execution issued thereon. The execution was levied on two horses. Appellee claimed that they were exempt by law from the levy of an execution. This was the sole issue presented, and the case was submitted to the judge, a jury being waived, on an agreed statement of facts. The statement is as follows:

“It is agreed that the two horses levied on as shown by sheriff’s return are the only horses owned by the defendant, and that the defendant is the head of a family, and that his family consists of a wife and two children, the elder of whom is four and one-half years old, and that defendant is a citizen of Mississippi. One of the said horses is a male horse, fourteen years old, named ‘Red Bird,’ and is defendant’s regular buggy horse, and is safe for his wife to drive. The other of the said horses is a mare, seven years old, named ‘Nell Buttons,’ and is a high-bred mare, safe for defendant himself to drive, but not safe for a woman to drive alone. Defendant does not use Nell Buttons regularly for his family buggy horse, nor does defendant’s wife ever drive her alone; but the defendant, interchangeably with his other horse, drives his wife and children behind Nell Buttons, but so drives Nell Buttons less than he does his other horse. Defendant is vice-president of the Corinth Clothing Manufacturing Company, and interchangeably with his other horse, but less than he does his other horse, uses Nell Buttons to drive to and from his business, which is ten city blocks from his residence, being about one-half mile; but his custom is to drive Red Bird or some other horse. Nell Buttons is used occasionally to make business trips for the W. T. Adams Ma-

chine Company, having made two such trips. Defendant has several times, at ⁴⁷⁷ the request of his father in law, W. T. Adams, gone to Mr. Adams' farm, about one and one-half miles from town, to look after Mr. Adams' interests, and has driven Nell Buttons and Red Bird interchangeably on such trips. Defendant drives Nell Buttons alone to a two-wheel racing sulky cart more than he drives her in any other way. Defendant paid \$250 for Nell Buttons, and says that there is no valuation on her now, for the reason that she is not for sale. Defendant states that he bought Nell Buttons to take the place of Red Bird. He bought Nell Buttons more than two years ago. Neither of said horses is ever used, except as aforesaid."

Upon this agreed statement of facts the trial court held the two horses to be exempt as "work horses," under Code of 1892, section 1963, paragraph 9 (a).

The exemption laws of the state were enacted to prevent the unfortunate citizen having all the necessities of life swept away and to preserve for him certain things reasonably necessary to enable him to earn a livelihood for himself and family. The sole purpose of all exemption laws is to protect the citizens of the state from being reduced by financial misfortune to absolute want, and to encourage industry and thrift and the building up of homes by placing beyond the reach of creditors the homestead and such tools, implements or appliances as an honest, industrious man may require to prosecute his business, whatever his walk in life or his occupation may be. "Looking to the general scope and policy of our legislation on this subject, it seems to us reasonably apparent that it was intended to save the head of a family his instruments of productive labor": *Burgess v. Everett*, 9 Ohio St. 425. This is, to our minds, made absolutely manifest from a careful analysis of the chapter treating of "exempt property." The tools of a mechanic, the agricultural implements of a farmer, the implements of a laborer, the books of a student, the wearing apparel of every person, the libraries of all persons, and the instruments of surgeons and dentists, within a ⁴⁷⁸ stated value; the globes and maps of teachers—in each of these exemptions the same underlying principle is apparent. This is to secure to the citizen the implements, whatever they may be, necessary for him to have in the further prosecution of his daily occupation. So the other property specially reserved to each head of a family

shows by the enumeration of the articles specified that it is intended to secure only those things which are reasonably necessary for the support and sustenance of the family. Work stock, domestic animals and provender, wagon and buggy and harness, seed of different kinds for planting, provisions for the family, household and kitchen furniture to a certain amount—the articles exempted all properly fall within the category of the ordinary necessities of a comfortable home life.

If it be asked why the owners of these special objects should be singled out for legislative favor and an exemption granted them which does not apply to every class of property, we answer in the language of the supreme court of Ohio in a discussion of a similar subject: "But one reason can be found for it, as it seems to us, and that reason is readily deducible from an inspection of the entire statute, and of the statutes then and still in force in relation to the same subject matter. It was to enable the mechanic, the teamster, or the farmer, or whosoever else had these specified articles of property, and was using, or in good faith was intending to use, them as instruments of labor, as means of support for himself and the family of which he was the head, to do so": *Burgess v. Everett*, 9 Ohio St. 425. It must be noted that the statute does not exempt two horses of every character and description, but only "work horses." The language of the clause is: "Two work horses or mules and one yoke of oxen," the plain intendment being that it is a work team which is exempted. This appears from the association of ideas and the collocation of words. Only "work horses" are exempted, because it is well known that there are other kinds of horses—
479 race horses and the like. The exemption of two "mules," without any other descriptive words, is stated broadly, because all mules are recognized as work animals. The same idea was expressed in our former statutes, where the exemption was of a "plough horse." From this point of view it would appear that the head of a family, whether a farmer, liveryman, drayman, teamster, or engaged in any other of many similar occupations, would be entitled to hold as exempt "two work horses," used in the prosecution of his daily business and assisting him in earning a support for his family.

We recognize the generally accepted canon that, on account of their beneficent intent, all exemption laws are to be liberally construed, with the view of effectuating the legislative

intent evidenced by the statute. The extent and effect of this general principle of construction is well stated in *Hickok v. Thayer*, 49 Vt. 372: "The statute in question in this case should be given effect according to its true intent and meaning. It should not be enlarged nor diminished in its scope and effect beyond that by judicial construction. When it is said that such statutes should be liberally construed in favor of the debtor, it should not be meant nor understood that the debtor has any more claim to have it extended in his favor to cases that were not contemplated by the legislature than the creditor has to have it extended in like manner in his own favor. The province of the court is exhausted when it has made an application of the law to the given case, answerable to the real meaning and intent of the law. Such is the idea in all that has been said on the subject in the cases." We are willing to give the very broadest possible construction compatible with reason and justice to all statutes devised and intended to protect the unfortunate from the rapacity of their creditors, and to insure the citizens of our state from being reduced to abject poverty or deprived of the things reasonably necessary to be used for the successful prosecution of their varying occupations. Nevertheless we can by no fair construction ⁴⁸⁰ of this statute persuade ourselves that it was the purpose of the legislature to enable a debtor, situated as is the appellee in this case, to screen himself behind a beneficent statute and to convert that statute into a refuge by which he can defeat the payment of his just debts by investing his money in horses used solely for the convenience of his family and his own personal pleasure. We must conclude that the legislature employed the term "work horse" advisedly. We must give force to the law as written.

By no fair construction can it be held that the term "work horses" embraces animals of the description and employed in the manner of those involved in this controversy. The exemption laws were intended to give the unfortunate man an opportunity to make an honest livelihood, but they were not intended to allow anyone to defraud his creditors by devoting his money to the purchase of high-bred horses used for speeding or racing purpose. "If a contrary construction of this provision were to prevail, a farmer in failing circumstances might invest his whole estate in two valuable stallions or race horses, worth ten thousand dollars or twenty

thousand dollars each, and with no intention whatever to use them for farming purposes, and by claiming them as exempt from execution might defraud his creditors, under color of law, to a large amount. The benevolent design of the statute might thus be diverted to purposes of the grossest fraud." So said the supreme court of California in *Robert v. Adams*, 38 Cal. 383, 99 Am. Dec. 413, in construing a statute which exempted "two horses," without descriptive or limiting words. "The intent of this was, not to give an absolute or unqualified right to all persons to keep two horses for every purpose, and thereby to allow, under cover of such exemption, hundreds and thousands of dollars to be invested in fast or sporting horses, but to limit the exemption of horses to such persons as kept and used them for a team, and with a limitation as to value": *Mundell v. Hammond*, 40 Vt. 641; *Burgess v. Everett*, 9 Ohio St. 425; *Murphy v. Harris*, 77 Cal. 194, 19 Pac. 377. The expression "work horses" was used in the statute in ⁴⁸¹ its ordinary and accepted meaning, and must be given a reasonable, but fair, construction. As strikingly applicable to the instant case, we quote from a case where a similar statute was under review: "'Team work' means work done by a team as a substantial part of a man's business, as in farming, staging, express carrying, drawing of freight, peddling, the transportation of material used or dealt in as a business. This is clearly distinguishable from what is circumstantial to one's business, as a matter of convenience in getting to and from it, or as a means of going from place to place to solicit patronage, or to settle or make collections, or to see persons for business purposes. It is plainly distinguishable from family use and convenience, pleasure, exercise or recreation": *Hickok v. Thayer*, 49 Vt. 372.

It must be noted, too, that in the instant case the horses in question are used solely for the convenience or pleasure of appellee and his family, and are in no true sense employed as "work horses." They are not used to perform the common drudgery of the homestead, and seem to be employed in no useful domestic service. It would, of course, be convenient for appellee to have a fast horse to drive daily to his office, or a stylish outfit in which to drive his wife for pleasure; but those pleasures and conveniences cannot be enjoyed at the expense of his creditors. The horses in question are in no sense either necessary or in fact used to assist appellee

in earning an honest support for his family or in any way used as "work horses," and are, therefore, not exempt from execution under Code of 1892, section 1963. We are duly alive to the difficulty, if not impossibility, of framing any fixed rule which would prove invariably just in every case. Many instances may arise in which it will be difficult to mark out any well-defined line of distinction to determine the question of exemption. Such cases must be decided upon their own peculiar facts. Suffice it to state here that, if the animals in question are devoted solely to the convenience and pleasure of the owner or his family, they cannot be denominated, ⁴⁸² within the purview of the law, "work horses," and will not be exempted as such.

It must not be understood from what we have heretofore said that we intend in any wise to infringe upon the provisions of Code of 1892, section 1971, granting certain privileges to householders having a family and residing in a municipality, or to modify the construction placed upon that statute by previous adjudications of this court. We adhere to the judicial interpretation that the exemptionist dealt with by that section can make a selection according to the dictates of his own judgment. But the agreed statement of facts in this case leaves it doubtful whether appellee is entitled to the exemption provided by section 1971, and we say this much simply to avoid the possibility of misconception of our true decision.

Reversed and remanded.

For Authorities on the Exemption of horses and vehicles from execution, see Kirksey v. Rowe, 114 Ga. 893, 88 Am. St. Rep. 65; Stanton v. French, 91 Cal. 274, 25 Am. St. Rep. 174; Wilhite v. Williams, 41 Kan. 288, 13 Am. St. Rep. 281; Watson v. Lederer, 11 Colo. 577, 7 Am. St. Rep. 263; Cleveland v. Andrews, 5 Idaho, 65, 95 Am. St. Rep. 165. The general rule is that exemption statutes are liberally construed in favor of debtors: See the monographic note to Tabb v. Mallette, 102 Am. St. Rep. 102; Goodwin v. Claytor, 137 N. C. 224, 107 Am. St. Rep. 479.

WHIT v. STATE.

[87 Miss. 564, 40 South. 324.]

TRIAL—Argument of Counsel.—On a murder trial, remarks by the prosecuting attorney in his argument that every lawyer who deserves the name knows that the case was reversed by the supreme court on the merest technicality, and on account of the absence of a witness, where the record shows by affidavits on file that the witness was present at the trial, are reversible error, when properly objected to and not corrected. (p. 460.)

W. J. East, for the appellant.

R. V. Fletcher, assistant attorney general, for the state.

565 CALHOON, J. The district attorney, in his closing argument to the jury, said: "Every lawyer who deserves the name of lawyer knows that the case was reversed by the supreme court on the merest technicality." Defendant objected at once to these remarks. Thereupon the district attorney turned to defendant's attorney and said loudly: "Yes, I said it. Write it out and sign my name to it. This case, gentlemen of the jury, was reversed on account of the absence of Watt Luckett, when the record shows by affidavits on file with the record that Watt Luckett was here at the trial." This, also, was objected to, but the court remained silent, did not sustain the objection, and exception was taken.

In order to determine whether the objection to these remarks is merely technical or vital to an impartial trial, which the constitution guarantees in all cases, it is only necessary for any citizen, however innocent, to imagine himself on trial for his life, with the evidence conflicting, and this language used to the jury by the representative of the state, who would doubtless be, as in this case, a gentleman of very high character and reputation. The trial ceased to be fair when these words, seasonably objected to, were used without correction. Juries have no concern with the action of this court. The previous reversal of this case—85 Miss. 208, 37 South. 809—so far from being technical, **566** was at the very crux of an impartial trial, and made necessary by section 26 of the constitution, giving the right to accused persons "to be confronted by the witnesses against them," and for compulsory process to obtain them. The record showed that this right, which cannot be taken away by legislatures or courts, was

denied to the accused. Reversal was, therefore, inescapable by any conscientious court.

It is true that it was sought then to supply the record by the ex parte affidavit of the sheriff that the witness had, in fact, been present. This surely needs no comment. This is, by the constitution, an appellate court, with no original jurisdiction whatever, and must try by the certified records alone. They cannot be amended by oral or written testimony as to facts. Otherwise, notice must be given and testimony had on the other side, and there would be no end.

Because of the remarks recited, and because of them only, this case must be reversed and remanded.

Misconduct of Counsel in the course of a trial or in making an argument is discussed in the monographic notes to *Cleveland etc. R. R. Co. v. Pritschau*, 100 Am. St. Rep. 689-699; *McDonald v. People*, 9 Am. St. Rep. 559-570. The prosecuting attorney, in a criminal trial, represents the majesty of the people; and, having no responsibility except fairly to discharge his duty, should not go beyond the evidence or the bounds of a reasonable moderation: *People v. Fielding*, 158 N. Y. 542, 70 Am. St. Rep. 495; *State v. Blackman*, 108 La. 121, 92 Am. St. Rep. 377; *Smith v. State*, 44 Tex. Cr. Rep. 137, 100 Am. St. Rep. 849.

NEW ORLEANS AND NORTHEASTERN RAILROAD COMPANY v. SHACKELFORD.

[87 Miss. 610, 40 South. 427.]

CARRIERS—Sample Case as Baggage.—If a railroad station agent knows that property checked as baggage is in fact a sample case of goods and the railroad company has formerly accepted and carried such case as baggage, it is liable for the value of the case and contents if they are lost in transit. (p. 463.)

CARRIERS—Liability as for Baggage.—If a passenger presents to the carrier for transportation his goods and chattels and makes known what they are, or exposes them to view, or packs them in a way to give anyone concerned good reason to understand and know that they are not usually carried as baggage, and demands transportation of them as his baggage, and the carrier receives them and carries them accordingly, he will be liable for them as baggage, although he is not bound to receive and transport them as such. If he wishes to avoid responsibility for them as baggage, he must refuse to receive them as such. (p. 464.)

CARRIERS—Loss of Baggage—Penalty.—A statute providing that if a railroad company carelessly or willfully injures, or allows

to be injured or lost, any baggage, it shall be liable to the owner in a sum not less than double the amount of the actual damage, applies only to such luggage as is in a proper sense personal baggage, and does not apply to a drummer's sample case and its contents checked as baggage. (p. 465.)

Fewell, Bozeman & Fewell, for the appellant.

Miller & Baskin, for the appellee.

613 WHITFIELD, C. J. On April 22, 1905, Lee Shackelford, the appellee and cross-appellant herein, a drummer for the Melton Hardware Company, applied for and obtained from the agent of the appellant, the New Orleans and Northeastern Railroad Company, at Vossburg, Mississippi, a check for his sample case, having supplied himself with a thousand-mile ticket over said road, and, with his mileage ticket and a check for his sample case as baggage, he boarded the train of the said appellant to go from Vossburg to Pachuta. He arrived at Pachuta about 12 o'clock at night, and went afterward in search of his baggage, which had been checked, and was met by the agent of the appellant railroad company at Pachuta and informed that his baggage had been destroyed or stolen, and was asked by the agent to give him the amount of the contents of the said baggage, or sample case, which he accordingly did, and the agent forwarded said statement of the contents and value of said sample case to a superior officer of the railroad company. Not having been paid for the sample case and contents, he afterward—to wit, on September 22, 1905—instituted this suit before a justice of the peace for double the value of the property, as shown by the record. Thereupon a trial was had before said justice of the peace, and the market value of said property so lost and destroyed was shown to be seventy-eight dollars and nine cents, and he obtained a judgment for one hundred and fifty-six dollars and eighteen cents—the same being double the value of said property, as claimed, under Code of 1892, section 3569, together with all the costs expended in said cause.

From this judgment there was an appeal taken by the New Orleans and Northeastern Railroad Company to the circuit court, in which court a trial was had, in which it was shown by the testimony of the plaintiff that he was a drummer, and had traveled over the railroad for two years, and that it was customary for the railroad company to check drummers' samples; that in this particular case, the agent of the rail-

road company knew that it was a sample case at the time he gave plaintiff the check for ⁶¹⁴ the same, and plaintiff offered the check and read it to the jury, and that plaintiff had said sample case checked as baggage from Vosburg to Pachuta. The plaintiff also stated that the sample case was unlike any other receptacle used in traveling—that is, unlike a suit-case or valise; that it was heavy, and at the time that the agent gave him a check for it he spoke of the weight of it, and the agent's testimony shows that he knew it was many times heavier than a valise in which are carried personal effects. The sample case, above mentioned, was never delivered to the appellee, nor was any account ever made of it except to report its loss or destruction. Plaintiff asked the court to instruct the jury, that if they found for the plaintiff, their verdict should be for double the fair market value of the property sued for, which instruction was by the court refused, and the jury were confined, in the consideration of the damages suffered by plaintiff, to the fair market value of said property. The jury found a verdict in behalf of plaintiff, and, in accordance with the instruction of the court, gave the plaintiff a verdict for the fair market value of the property sued for. Both the railroad company and the appellee, Shackelford, made motions for a new trial, and the second ground for a new trial in behalf of the appellee, Shackelford, was failure to award double damages. This motion was by the court overruled, the court's idea being that plaintiff was not entitled to recover, in any event, any more than the fair market value of the property sued for.

The testimony makes it plain that the agent knew that Shackelford was a drummer, and that this was a sample case, and not a trunk or valise for ordinary baggage. The agent testifies that he did not know the contents of the sample case, but the jury might very fairly have inferred from his knowledge of the sample case that it was filled with some heavy samples of some sort. It also appears that the railroad company has been in the habit of checking this sample case as baggage for some two years heretofore. ⁶¹⁵ This, therefore, is a case unlike *Yazoo etc. R. Co. v. Georgia Ins. Co.*, 85 Miss. 7, 107 Am. St. Rep. 265, 37 South. 500, in which we said: "The railroad knew nothing of these memoranda being in the trunk, and it is not a case where the railroad company has consented to receive or accept these memoranda as baggage knowingly or in accordance with any usage or custom

of the railroad." This case falls precisely within the principles announced in the very able opinion of Battle, J., in *Kansas City etc. R. R. Co. v. McGahey*, 63 Ark. 344, 58 Am. St. Rep. 111, 38 S. W. 659, 36 L. R. A. 781, and in *Sloman v. Great Western Ry. Co.*, 67 N. Y. 208. In the first-named case, the court say, at page 348 of 63 Ark., page 660 of 38 S. W., page 113 of 58 Am. St. Rep. 36, L. R. A. 781: "When a passenger presents to the carrier for transportation his goods and chattels, and makes known what they are, or exposes them to view, or packs them in a way to give anyone concerned good reason to understand and know that they are not usually carried as baggage, and demands transportation of them as his luggage, and the carrier receives and carries them accordingly, he will be responsible for them as baggage, notwithstanding he was not bound to accept and transport them as such. If he wishes to avoid responsibility for them as baggage, he must refuse to receive them in that way: *Railway Co. v. Berry*, 60 Ark. 433, 46 Am. St. Rep. 212, 30 S. W. 764, 28 L. R. A. 501; *Minter v. Pacific R. R. Co.*, 41 Mo. 503, 97 Am. Dec. 288; *Sloman v. Great Western Ry. Co.*, 67 N. Y. 208; *Great Northern Ry. Co. v. Sherperd*, 8 Ex. 30; *Mauritz v. New York etc. R. R. Co. (C. C.)*, 23 Fed. 765; *Waldron v. Chicago etc. Ry. Co.*, 1 Dak. 351, 46 N. W. 456; *Oakes v. Northern Pac. Ry. Co.*, 20 Or. 392, 23 Am. St. Rep. 126, 26 Pac. 230, 12 L. R. A. 318; *Hannibal R. R. Co. v. Swift*, 12 Wall. 262, 20 L. ed. 423; *Texas etc. Ry. Co. v. Capps*, 2 Wills. Civ. Cas. Ct. App. (Tex.), sec. 33; *Hamburg-American Packet Co. v. Gattman*, 127 Ill. 598, 20 N. E. 662." In the last-named case the facts were: A boy, ⁶¹⁶ eighteen years of age, was employed as a traveling agent to sell goods by sample. He had two large trunks containing the samples, and a valise for his personal baggage. The trunks did not present the appearance of ordinary traveling trunks. They were thirty inches long, twenty-seven inches deep, and twenty-four inches wide. One was covered with oilcloth, and the other was of wood. "He delivered the trunks to a baggage-master at a railroad depot, and, when asked where he wanted them checked to, replied that he did not then know, as he had sent a dispatch to a customer at Fentonville, to know if he wanted any goods; if not, he wanted the trunks to go to Rochester, where he expected to meet some customers. Soon after he had them checked to Rochester, paying two dollars, and receiving a receipt ticket for them, headed,

'Receipt Ticket for Extra Baggage and Dogs.''' The court held that the jury were authorized by these facts to infer that the baggage-master understood that the agent was traveling for the purpose of selling goods, and that these trunks contained his wares, and that he was not entitled to have them carried as ordinary baggage, and further held that the railroad company, having this notice, was responsible for the loss of the trunks and their contents. And in *Kansas City etc. R. R. Co. v. McGahey*, 63 Ark. 344, 58 Am. St. Rep. 111, 38 S. W. 659, 36 L. R. A. 781, it is further said: "Some courts hold that where a railroad company receives for transportation property which it is not bound by its contract with the passenger to transport as personal baggage, of which it has notice, it must be considered to assume, with reference to such property, the liability of a common carrier of merchandise: *Hannibal R. R. Co. v. Swift* (U. S.), 12 Wall. 262, 20 L. ed. 423; *Sloman v. Great Western Ry. Co.*, 67 N. Y. 208, while others say that, if it receives the property under such circumstances as baggage, it will be responsible therefor as a common carrier, and will be estopped from denying that it was baggage: *Texas etc. Ry. Co. v. Capps*, 2 Wills. Civ. Cas. Ct. App. (Tex.), sec. 33; *Minter v. Pacific R. R. Co.*, 41 Mo. 503, 97 Am. Dec. 288; *Hoeger v. Chicago* ⁶¹⁷ etc. R. R. Co., 63 Wis. 100, 53 Am. St. Rep. 271, 23 N. W. 435; *Chicago etc. R. R. Co. v. Conklin*, 32 Kan. 55, 3 Pac. 762; *Butler v. Hudson River R. R. Co.*, 3 E. D. Smith (N. Y.), 571; *Railway Co. v. Berry*, 60 Ark. 433, 46 Am. St. Rep. 212, 30 S. W. 764, 28 L. R. A. 501. It seems to us the latter view is sustained by the better reason and weight of authority. But, be that as it may, the liability of the carrier for loss and damage in transportation in either case is the same."

The action of the court and the finding of the jury were correct on the direct appeal. Code of 1892, section 3569, is in the following words: "If a railroad company carelessly or willfully injure or allow to be injured or lost any trunk or baggage, either by improper handling or otherwise, it shall be liable to the owner in a sum not less than double the amount of the actual damage."

The court below refused to give a charge for double damage, and, we think, correctly. This statute is a highly penal statute, and was clearly meant to apply only to such baggage as, in a proper sense, personal baggage—articles of wearing apparel, etc.—contained in the usual trunk carried for personal

convenience as a receptacle for wearing apparel and the like. It was never in the mind of the legislature to visit this penalty upon the railroad companies in a case like this, where the articles are not, in a proper legal sense, baggage, and where the liability of the railroad company arises from the fact that it knew the character of the articles, and, consequently, that they were not strictly baggage, and yet agreed and contracted to transport them as baggage—in other words, out of the estoppel arising against the railroad company in such case to deny that the articles were baggage and to be transported as such.

The result is that the judgment of the court below is affirmed on appeal and cross-appeal.

The Liability of Carriers for the Baggage of passengers is discussed in the monographic note to *Wood v. Maine Cent. R. R. Co.*, 99 Am. St. Rep. 343-392. If a carrier accepts a package or trunk of merchandise for transportation as baggage, with knowledge of its contents, it is liable therefor as for baggage: *Illinois Cent. Ry. Co. v. Matthews*, 114 Ky. 973, 102 Am. St. Rep. 316. For recent decisions defining baggage, see *Little Rock etc. Ry. Co. v. Record*, 74 Ark. 125, 109 Am. St. Rep. 67; *Yazoo etc. R. R. Co. v. Georgia Home Ins. Co.*, 85 Miss. 7, 107 Am. St. Rep. 265.

SOUTHERN EXPRESS COMPANY v. MARKS, ROTHENBERG & CO.

[87 Miss. 656, 40 South. 65.]

CARRIERS—Negligence—Limitation of Liability—Public Policy.—Stipulations in a contract of carriage by an express company that the negligence of the railroad company carrying the package, which is the subject of the contract, shall not be imputed to such express company, is opposed to public policy and void. (p. 468.)

CARRIERS—Express Companies—Limitation of Liability—Public Policy.—A stipulation in the contract of carriage of an express company that its liability shall be limited to a nominal amount, no matter how great the value of the package lost, is opposed to public policy and void. (p. 468.)

The case was tried upon the following agreed statement of facts: "Marks, Rothenberg & Co. shipped a certain bill of goods from New York, consigning them to Marks, Rothenberg & Co. at Meridian. The goods were delivered to the Adams Express Company, and a receipt given to the agent of the

plaintiff, who did not read it, which receipt contained the following stipulation, among others: 'The care to be exercised in transporting property, and the reasonable compensation for its carriage, depends largely on its nature and value, and the company's charges for forwarding are proportioned to the value of the property delivered to it to be forwarded, and to some extent based on that value, which is an important element in fixing its charges. It is part of the consideration of this contract, and it is agreed, that the said express company are forwarders only, and are not to be held liable or responsible for any loss or damage to said property while being conveyed by the carriers to whom the same may be by said express company intrusted, or arising from the dangers of railroad, ocean, or river navigation, steam, fire in stores, depots, or in transit, leakage, or from any cause whatever, unless in every case the same be proved to have occurred from the fault or gross negligence of the express company, or their servants; nor in any event shall the holder thereof demand beyond the sum of fifty dollars, at which the above property forwarded is hereby valued, unless otherwise herein expressed, or unless specially insured by them, and so specified in this receipt, which insurance shall constitute the limit of liability of the Adams Express Company. And if the same is intrusted or delivered to any other express company or agent (which said Adams Express Company are hereby authorized to do) such company or person so selected shall be regarded exclusively as agent of the shipper or owner, and as such alone liable, and the Adams Express Company shall not be in any event responsible for the negligence or nonperformance of any such company or person, and the shipper and owner hereby severally agree that all the stipulations and conditions in this receipt contained are incident to and inure to the benefit of each and every company or person to whom the Adams Express Company may intrust or deliver the above-described property for transportation, and shall define and limit the liability therefor of said other company or person; it being understood that this company relies upon the various railroads and steamboat lines of the country for its means of forwarding property delivered to it to be forwarded.' The goods were in turn delivered to the Southern Express Company, and while being transported over the Alabama Great Southern Railway Company were destroyed in a wreck on that road."

Miller & Baskin, for the appellant.

Fewell, Boseman & Fewell, for the appellees.

659 WHITFIELD, C. J. The principles which make the action of the court below correct in this case have long been settled. The stipulations in the contract that the negligence of the railroad company could not be imputed to the express company, and that the liability of the express company should be only fifty dollars, no matter how great the value of the package lost, are both in plain violation of the public policy of this state: *Postal Tel. etc. Co. v. Wells*, 82 Miss. 733, 35 South. 190; *Hughes v. Pennsylvania R. R. Co.*, 202 Pa. St. 222, 97 Am. St. Rep. 713, and note, 51 Atl. 990, 63 L. R. A. 513; *Bank of Kentucky v. Adams Exp. Co.*, 93 U. S. 174, 23 L. ed. 872. See, specially, the note to *Chicago etc. R. R. Co. v. Calumet etc. Farm (Ill.)*, 88 Am. St. Rep. 101.

Affirmed.

A Carrier cannot Limit Its Liability by special contract so as to escape responsibility for its own negligence: *Eckert v. Pennsylvania R. R. Co.*, 211 Pa. St. 267, 107 Am. St. Rep. 571; *Fisher v. Boston etc. R. R. Co.*, 99 Me. 338, 105 Am. St. Rep. 283. As to whether a carrier may, by contract, limit the amount recoverable in case of a loss, see *Central of Georgia Ry. Co. v. Hall*, 124 Ga. 322, 110 Am. St. Rep. 170; *Nashville etc. Ry. Co. v. Stone*, 112 Tenn. 248, 105 Am. St. Rep. 955; note to *Chicago etc. Ry. Co. v. Calumet etc. Farm*, 88 Am. St. Rep. 105.

An Express Company cannot Devest itself of responsibility for the safe transportation of goods by a stipulation in the bill of lading that it is not liable for the neglect or default of the railroad or steamboat lines employed by it: See the monographic note to *Chicago etc. Ry. Co. v. Calumet etc. Farm*, 88 Am. St. Rep. 101.

BURKE v. CITY OF WATER VALLEY.

[87 Miss. 732, 40 South. 820.]

WATER AND WATERWORKS—Rules and Regulations.—A rule of a water company or owner that charges for water shall be to the owner of the property and not to the tenant, and that if the water charge is not paid the water shall be cut off and not connected again until the delinquent charge is paid, and which prevents a new tenant, on tendering water charges, from getting necessary water unless he pays a delinquent charge against the property, is void as being unreasonable. (pp. 469, 470.)

WATER AND WATERWORKS—Duty to Supply Water.—A waterworks company or owner cannot refuse to supply a new oc-

cupant of a building with necessary water, unless he pays an unpaid water bill contracted by a former occupant or owner of the building. (p. 471.)

J. T. Blount, for the appellant.

H. H. Creekmore, for the appellee.

735 WHITFIELD, C. J. The city of Water Valley owns its waterworks. Among the rules established by the city respecting the management and government of its waterworks system one was that the rentals **736** of water should be charged to the owner of the property, and not to the tenant; and a further rule was established that, if the water charge should not be paid, the water should be cut off, and no connection should be made until the delinquent charge was paid. The appellant rented a house within the water district, and tendered to the city authorities the amount due for water service, and requested that water be turned on, for his use, which service was refused him, on the ground that there were unpaid charges against the premises due from a former tenant. The reasonableness of this last rule is the sole question in this case. The circuit judge gave a peremptory charge to find for the defendant. Under the well-settled authorities on this subject this was manifestly erroneous. Among many authorities holding the true rule—that no such regulation can be established, but is necessarily void for unreasonableness—we cite but one, directly in point and conclusive of the case: *Turner v. Revere Water Co.*, 171 Mass. 329, 68 Am. St. Rep. 432, 50 N. E. 634, 40 L. R. A. 657, decided in May, 1898, and followed since by a multitude of authorities. The court in that case, speaking of a precisely similar rule, say: "It may be desirable that a water company or a gas company should have an easy way of collecting its debts; but we see no reason why it should be enabled by the court to collect a debt from one who is not a party to the contract, when it sells its commodity on credit. The legislature may give such a company a lien, as it has given one to mechanics. We have no doubt that pay may be demanded in advance, though whether the owner of the house could not have the water shut off during the year, and recover for what he had not used, may be considered an open question": See *Rockland Water Co. v. Adams*, 84 Me. 472, 30 Am. St. Rep. 368, 24 Atl. 840. In this case the owner of a house had paid bills which contained the words, "One year's rent will be required in all cases."

During a subsequent year he used the water for four months only, and was sued for a year's supply. It was held that ⁷³⁷ the regulation was unreasonable and void, and that the plaintiff could not recover unless the defendant expressly assented to the regulation, and that payment of former bills was not such assent. See, also, *Woods v. City of Auburn*, 87 Me. 287, 32 Atl. 906, 29 L. R. A. 376, where there are some strong remarks in favor of the consumer.

We have no doubt that the water company may demand a deposit, as is required by the Boston Gaslight Company, where it does not know the consumer. This was held to be reasonable in the case of a gas company in *Williams v. Mutual Gas Co.*, 52 Mich. 499, 50 Am. St. Rep. 266, 18 N. W. 236. See, also, *Shepard v. Milwaukee Gaslight Co.*, 6 Wis. 539, 70 Am. Dec. 479, 15 Wis. 318, 82 Am. Dec. 679. The right to shut off water or gas, if a bill is not paid, is undoubted, so far as the consumer is concerned: *People v. Manhattan Gaslight Co.*, 45 Barb. (N. Y.) 136; *McDaniel v. Springfield Waterworks Co.*, 48 Mo. App. 273; *Sheward v. Citizens' Water Co.*, 90 Cal. 635, 27 Pac. 439; *Shiras v. Ewing*, 48 Kan. 170, 29 Pac. 320. If gas is supplied to the owner of different houses under separate contracts, failure to pay the gas bill on one house does not authorize the cutting off of the gas from the other: *Gaslight Co. v. Colliday*, 25 Md. 1. See, also, *Lloyd v. Washington Gaslight Co.*, 1 Mackey (D. C.), 331. In *American Waterworks Co. v. State*, 46 Neb. 194, 50 Am. St. Rep. 610, 64 N. W. 711, 30 L. R. A. 447, where a consumer of water who was in default, after the water was turned off, tendered his arrears, but refused to pay one dollar, as required by regulation of the company, for turning the water on, the court by mandamus compelled the company to turn the water on, holding the regulation to be unreasonable. See, also, *Smith v. Birmingham Waterworks Co.*, 104 Ala. 315, 16 South. 123.

Water is a necessity; without it a house cannot, at the present time, be occupied in any of our cities. It must be obtained ⁷³⁸ from a water company, and to compel a man to pay another's debt in order to obtain it seems to us a result that ought not to be reached. Water is even a greater necessity than gas, for there are other means of lighting in use; and yet in the case of gas there is a decision directly in point. In *New Orleans Gaslight etc. Co. v. Paulding*, 12 Rob. (La.) 378, the plaintiff refused to supply the defendant with gas unless he paid an unpaid bill contracted by a former owner

of the building. In order to obtain the gas, defendant promised to pay the bill. Plaintiff turned on the gas, and afterward sued the owner on his promise to pay the amount due from the former owner. The court held that the promise was void, and that the plaintiff had no right to require such payment. In *Sheffield Waterworks Co. v. Wilkinson*, 4 C. P. 410, 421, 422, it is said by Bramwell, L. J.: "My judgment does not proceed upon this, that the appellants have a right to insist upon the communication with their main remaining severed until their claim for rates due from the preceding occupier is satisfied. I do not think they have such right. That was, no doubt, the notion upon which they acted; but in my opinion it is not sustainable. The learned magistrate who has stated this case has argued it extremely well, and I agree with him in thinking that it was not the intention of the legislature that the undertakers should be at liberty to withhold the supply of water from the respondent's premises until the arrears of some one else are paid. I also agree with him in thinking that ample provision is made for their security by enabling them to demand the rates in advance, without having what may be called something in the nature of a lien upon the property itself for bygone rates."

The judgment is reversed and the cause remanded.

A Water Company may adopt reasonable rules governing the supply of water to its patrons, but such rules must, in order to be valid and binding, be reasonable: *Rockland Water Co. v. Adams*, 84 Me. 472, 30 Am. St. Rep. 368; *American Water Works Co. v. State*, 46 Neb. 194, 50 Am. St. Rep. 610; *Watauga Water Co. v. Wolfe*, 99 Tenn. 429, 63 Am. St. Rep. 841; *Tacoma Hotel Co. v. Tacoma Land etc. Co.*, 3 Wash. 316, 28 Am. St. Rep. 35. A water company cannot enforce a rule that it will deal only with the owners of property for which water is required: *State v. Butte City Water Co.*, 18 Mont. 199, 56 Am. St. Rep. 574. And a rule that the water may be shut off from customers in all cases of nonpayment of water rents is unreasonable and void, if so construed as to permit the water to be shut off because a former occupant had not paid his water bill: *Turner v. Revere Water Co.*, 171 Mass. 329, 68 Am. St. Rep. 432.

CASES

IN THE

SUPREME COURT

OF

MISSOURI.

EX PARTE BERGER.

[193 Mo. 16, 90 S. W. 759.]

CONSTITUTIONAL LAW—Power of the Legislature.—The legislature of the state has power to enact any law not prohibited by the constitution of the state or that of the United States. (p. 474.)

CONSTITUTIONAL LAW—Criminal Laws, Power to Enact.—It is no objection to a criminal statute that the crime denounced was not indictable at the common law nor prohibited by any statute prior to that enacted. (pp. 474, 475.)

INTEREST.—The Right to Take Interest was Created by an act of parliament in the reign of Henry VIII, and ever since, in England and in this country, this right has existed, in legal contemplation, as a creature of statutory enactment. (pp. 475, 476.)

CONSTITUTIONAL LAW.—The Right to Regulate Interest by legislative enactment is conceded. (p. 476.)

CONSTITUTIONAL LAW, Excessive Interest, Statute Making Taking of Criminal.—A statute making the taking of interest at a greater rate than two per cent per month criminal does not conflict with the fourteenth amendment to the constitution of the United States, nor with section 30 of article 2 of the constitution of Missouri, declaring that no person shall be deprived of life, liberty or property without due process of law. (p. 476.)

CONSTITUTIONAL LAW—Interest, Class Legislation Respecting, What is not.—A statute making it criminal to take interest at a greater rate than two per cent per month is not class legislation prohibited by section 53 of article 4 of the constitution of Missouri, declaring that the legislature shall not pass any special law granting to any person any special or exclusive right, privilege or immunity. (pp. 478, 479.)

STATUTE Making Criminal the Taking of Excessive Interest, Construction of.—A statute declaring that every person who shall take or receive, by means of commission or brokerage charges or otherwise, for the forbearance of the use of money any interest at a rate greater than two per cent per month shall be guilty of a misdemeanor, is not restricted to interest taken by means of the commission or brokerage but applies to all persons taking interest above the rate specified. (p. 479.)

Reed, Yates, Mastin & Howell and Kinealy & Kinealy, for the petitioner.

Herbert S. Hadley, attorney general, and Frank Blake, assistant attorney general, for the state.

²⁴ GANTT, J. This is an original proceeding by habeas corpus for the release of the petitioner on the ground that section 2358 of the Revised Statutes of 1899 is unconstitutional, and his arrest for violation thereof, therefore, is without any legal authority or justification.

The petitioner was arrested by the constable of Central township, St. Louis county, under and by virtue of a warrant issued by I. W. Campbell, a justice of the peace within and for said township, upon an information filed before said justice of the peace by the prosecuting attorney of said county on the 11th of September, 1905, and was in the custody of said constable at the time the application for this writ was made and issued, and is now under bail awaiting the action of this court upon this application. The information upon which he was arrested charges that the petitioner on the twenty-second day of August, 1905, in said St. Louis county, did then and there receive from one Frank T. Henry interest at a greater rate than two per cent per month, for the use of one hundred dollars, loaned by the petitioner to said Henry on the 19th of July, 1905, contrary to the form of the statute in such case made and provided and against the peace and dignity of the state.

Section 2358 of the Revised Statutes of 1899 is in these words:

“Sec. 2358. Receiving greater interest than two per cent per month, etc.—Misdemeanor, when—Penalty.—Every person or persons, company, corporation or firm . . . who shall take or receive, directly or indirectly, by means of commissions or brokerage charges, or otherwise, for the forbearance or use of money or other commodities, any interest at a rate greater than ²⁵ two per cent per month, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, and by imprisonment in the county jail for a period of not less than thirty days nor more than ninety days. Nothing herein contained shall be construed as authorizing a higher rate of interest than is now provided by law.”

The constitutionality of this section is challenged on four grounds: 1. That it is in violation of section 1 of article 14 of the amendments of the constitution of the United States which prohibits any state from depriving "any person of life, liberty or property without due process of law"; 2. Because it violates section 30 of article 2 of the constitution of Missouri which provides "that no person shall be deprived of life, liberty or property without due process of law"; 3. Because it is a violation of that portion of section 1 of article 14 of the amendments to the constitution of the United States which prohibits "any state from denying to any person within its jurisdiction the equal protection of the laws"; 4. Because it violates section 53 of article 4 of the constitution of the state of Missouri which prohibits the legislature from "passing any special law granting to any corporation, association or individual any special or exclusive right, privilege or immunity."

1. Prior to the enactment of section 2358 on the 14th of April, 1899, the taking of usurious interest had never been declared a criminal offense by the General Assembly of the state of Missouri, and it is now earnestly insisted by learned counsel for petitioner that this section is unconstitutional, because it is not within the power of the legislature to make usury a crime and punish it as such.

This is a far-reaching proposition. The constitution of this state ordains that the legislative power, subject to the limitations therein contained, shall be vested ²⁶ in a Senate and House of Representatives to be styled the General Assembly of the state of Missouri: Mo. Const., art. 4. This legislative power is not defined; it is a general grant by the people to enact all laws necessary for the welfare of the people of the state. Generally speaking, the legislature of this state has the power to enact any law not prohibited by the constitution of the United States or the constitution of this state.

With much industry the learned counsel for the petitioner has collated a long line of decisions in this state to the effect that usurious contracts are not void, but voidable, and that courts will not enforce contracts which are contrary to our laws or public policy. These two propositions do not require the citation of any authorities, but they have little or no bearing upon the question raised here, to wit, that the legislature has no power to declare the taking of usurious interest a criminal offense. It may be conceded that at com-

mon law usury was not an indictable offense, yet it is a fact that various acts of the British parliament made usury a crime, and the states of Indiana, Massachusetts, New Hampshire, New York, South Dakota and Tennessee all have statutes making the taking of usurious interest a misdemeanor, and in none of these states have we been able to find that the constitutionality of such legislation has ever been denied. The state, through its legislature, may enact any law that is designed to suppress or punish a wrong, to mitigate an evil, prevent extortion or oppression. Obviously, it is no objection to a criminal statute that the crime denounced was not one indictable at common law, or that it should have been prohibited specifically by some prior statute. If such were the case, then there could be no legislation on the subject of crime, however urgent and flagrant the offense had become in the various changes of society. Dr. Wharton in his Criminal Law, tenth edition, section 14a, says: "It has been often said that at common law indictability and ²⁷ immorality are convertible terms. So far, however, from this being the case, there are indictable acts which are not immoral, and immoral acts which are indictable." At common law illegal acts are often declared misdemeanors without any precedent.

In *Kreibohm v. Yancey*, 154 Mo. 67, 55 S. W. 260, section 3710 of the Revised Statutes of 1899 was challenged on the ground that it was in conflict with the fourteenth amendment of the constitution of the United States, and sections 4 and 30 of article 2, and section 33 of article 4 of the constitution of Missouri. Responding to that contention, this court, through Brace, J., said: "The main argument in support of this contention impugns the constitutionality of usury laws generally, on the ground that such laws are in restraint of the right of contract, are not a legitimate exercise of the police power. It would serve no good purpose to review this argument at length. The power to regulate the rate of interest has been exercised by every civilized nation, ancient or modern, whose laws survive in history: *Dunham v. Gould*, 16 Johns. 267, 8 Am. Dec. 323. In Anglo-Saxon civilization, laws against usury have always been in force. By the canon law interest and usury were synonymous terms, and it was unlawful to take any money for the use of money, and this law was rigidly enforced by the temporal authorities of England until the reign of Henry VIII, when the legal right to take interest was first created by act of parliament (37 Henry VIII. cap.

9), and ever since in England and in this country, this right has existed in legal contemplation as the creature of statutory enactment. As was said by Mr. Justice Field in *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77: 'The practice of regulating by legislation the interest receivable for the use of money, when considered with reference to its origin, is only an assertion of right of the government to control the extent to which a privilege granted by it may be exercised and enjoyed.' It was in this light that the right was regarded in the 28 Colonies when the federal government was organized and the constitution adopted. And ever since the right has been so recognized and exercised by the states severally, in all of which, with perhaps one or two exceptions, statutes have been enacted and are in force regulating the rate of interest: 27 Am. & Eng. Ency. of Law, 929, note 2: Tyler on Usury, c. 3, And however much these laws may have been criticised and inveighed against by some publicists and text-writers, they have been so uniformly sustained by the courts, that now it is conceded by some of the latest of these writers that their enactment has so long been recognized as a constitutional exercise of legislative authority as to render it very unlikely that the courts will pronounce them unconstitutional; Tiedeman's Limitation of Police Power, sec. 94; Cooley's Constitutional Law, p. 235."

The taking of interest, then, beyond a legal rate is granted to no person in this state, and the act now before us simply makes the unlawful act of taking interest in excess of two per cent per month a misdemeanor. Laws against usury are founded on principles of public policy, principles that have for ages been recognized, and this act seeks only to punish that which has for many ages been considered unlawful in itself. The right to regulate interest by legislative enactment being one conceded to be within the power of the legislature, that body can regulate or prohibit it altogether. And if previous legislation on this subject punishing the infractions of usury laws by forfeitures of the interest have proved ineffectual to check the evil, it was perfectly competent for the legislature to adopt more drastic measures and make it criminal. If the legislature had the power to say what rate of interest in its own opinion transcended a fair and just remuneration for the loan of money or property, it was competent to make any excess over such rate a misdemeanor. In our opinion it would have been perfectly competent for the

²⁹ legislature to have made it a misdemeanor to exact and receive interest over and above the legal rate fixed by law, but certainly the act now under review is not open to the objection of being unreasonable, inasmuch as it only denounces the taking of interest beyond two per cent per month as criminal. Certainly it would seem that two per cent per month would gratify the greed of the most unconscionable usurer, and this act is leveled only at that class who take and receive interest beyond that amount. Responding, then, to the first contention of the petitioner, we hold that the act was not beyond the legitimate powers of the general assembly.

It would subserve no good purpose to review all the various distinctions of crime given by the various courts or text-writers from time to time. Under our system of government the people through their legislatures have the power to define or punish crimes when not restrained by the organic law of the state or the federal government. It is sometimes announced by some of the courts and some of the ablest law-writers of this country, that no act of the legislature can be declared void unless it contravenes some specific section or provision of the state or federal constitution; on the other hand, it has been held that there are limits beyond which legislation cannot rightfully go, even though the courts may not be able to point to a positive prohibition against it in the constitution, but this case does not call for any discussion of that power, holding as we do that it is within the power of the legislature to fix a maximum rate of interest for the use of money, and we have no doubt of the power of the legislature to enforce obedience to such a law, whether by forfeitures of the interest or principal, or by making it a misdemeanor punishable as a crime, and certainly there is nothing in the particular act before us which requires any vindication of the moderation of the legislature in making the receiving of interest beyond two per cent per month a misdemeanor.

³⁰ 2. It is urged, however, that the act is unconstitutional in that it violates that portion of section 1 of article 14 of the amendments to the constitution of the United States, which prohibits any state from denying "to any person within its jurisdiction the equal protection of the laws," as well also section 53, article 4, of the constitution of Missouri, which provides that the legislature shall not pass any special law granting to "any corporation, association or individual any special or exclusive right, privilege or immunity." To

sustain this latter contention it is urged that our statute relating to interest authorized the taking of certain prescribed rates, the highest being eight per cent per annum; thus money-lenders are divided into two classes, those who receive or agree to receive interest within the statutory provisions, and those who receive or agree to receive amounts in excess of the statutory limit, and it is insisted that section 2358 of the Revised Statutes of 1899 takes this latter natural class and arbitrarily divides it into two subclasses, to wit, those who receive or agree to receive interest at the rate of two per cent or less per month, and those who receive or agree to receive unauthorized interest in excess of that amount, and make criminals of the latter subclass, but not of the former, and thus the legislature has been guilty of class legislation. It is the rule of long established construction in this state "that a statute which relates to persons or things as a class in a general law, while a statute which relates to particular persons or things of a class is special": *State v. Tolle*, 71 Mo. 650. It is insisted that all usurers stand upon exactly the same footing, inasmuch as they are all doing something which the law does not authorize them to do, and that, therefore, it was not competent for the legislature to select that particular class of usurers who receive or agree to receive interest in excess of the rate of two per cent per month, and exclude those usurers who receive or agree to receive more than eight per cent per year ³¹ and not over two per cent per month. We cannot agree to this contention. In our opinion it is perfectly competent for the legislature to determine for itself what amount of usurious interest, the taking or receiving of which should constitute a criminal offense. It had already provided for the forfeiture and penalties which should attach for the taking of all usurious interest, but in denouncing for the first time as a crime a class of usurers, it had the power to select that class which takes or receives greater interest than two per cent per month. It did not attempt to affect any other class and it is a general law as far as this class is concerned. The law operates upon every person within the limits of the state who violates it. It does not lie at the mouth of one guilty of transgressing it to say to the legislature, there are other classes to which this law might apply. The same could be said of nearly any other criminal statute. Had this law exempted any person who exacted more than two per cent per month by mere arbitrary provision, there would be

force in the argument of counsel, but there is no such exemption to be found in the act. It applies to all persons who are in or who may come into like situations and circumstances and is therefore not special or class legislation within the meaning of either of the constitutional provisions above relied on.

3. But it is further insisted that the act by its very terms excludes all usurious interest except such as is taken "by means of commissions or brokerage charges," and when thus read is clearly unconstitutional, because the equal protection of the law is not granted to all persons by this act, because it attempts another arbitrary distinction, in this, that its provisions are plainly leveled only at that class of usurers who charge more than two per cent per month directly or indirectly, "by means of commissions or brokerage charges or otherwise," thus excluding all other classes who receive or agree to receive such usury directly or by any other ³² method than by means of commissions or brokerage charges. In aid of this construction the rule is invoked that in the interpretation of a statute every word and clause should, if possible, have assigned to it a meaning, leaving no useless words, and it is insisted that the clause "otherwise" under the well-established rule of statutory construction of ejusdem generis can apply only to methods similar to those enumerated and, therefore, the act applies only to those who exact interest "by way of commissions or brokerage charges," and not to the receiving of interest directly or indirectly. The canon of construction that all the words of the statute must be construed in such a way as to give them effect does not justify the confined and limited interpretation which counsel for petitioner would place upon the act, but will support a construction which prohibits all exactions of interest directly or indirectly by means of commissions or brokerage charges or otherwise at a greater rate than two per cent per month. We have no doubt whatever, when the whole act is read together, that it was the intention of the legislature that it should apply to every person who should take any interest directly or indirectly by means of commissions or brokerage charges or otherwise in excess of a rate of two per cent per month, and, after all, the purpose of all rules of construction is to arrive at the intent of the law-making power. The whole section when read together manifests an intention to cover the exaction of usurious in-

terest which is direct and also an exaction of usurious interest of more than two per cent per month by means of commissions or brokerage charges, and hence this third constitutional objection to the act based upon verbal criticism is without foundation.

It results that in our opinion the law assailed in this case is a perfectly constitutional enactment and that the petitioner was in lawful custody at the time of his application to this court for a writ of habeas corpus, and it is therefore ordered that the prisoner be and he is ³⁸³ hereby remanded to the custody of the constable, and that he pay all the costs of this application.

All concur.

The Authority of the Legislature to declare acts criminal is discussed in the monographic note to Booth v. People, 78 Am. St. Rep. 235-274. There seems to be no doubt of the competency of legislatures to regulate the rate of interest which may lawfully be exacted for the use of money: See Vermont Loan etc. Co. v. Hoffman, 5 Idaho, 186, 95 Am. St. Rep. 186. As to what transactions are usurious, see the note to Bank of Newport v. Cook, 46 Am. St. Rep. 178-202.

COBE v. LOVAN.

[193 Mo. 235, 92 S. W. 93.]

BUILDING AND LOAN ASSOCIATIONS, Transfers by, When Ultra Vires.—A transfer by a building and loan association of all its loans and securities, authorized by its board of directors, but not by its stockholders at a meeting called for that purpose, is without legal right and wholly ultra vires. (p. 489.)

BUILDING AND LOAN ASSOCIATIONS, Trustees' Sales, When not Deemed Made by Authority of.—If one solvent building and loan association assumes to transfer all its notes and securities to another, the direction of the late president of the former that a trustee sell the property described in a trust deed given to secure the payment of one of such notes, when such president is acting as agent of the latter association, cannot be considered as the act of or authorized by, the association of which he was president and to which the notes and securities had been given. Especially is this true if the statute provides that the foreclosure of stockholders' mortgages shall be under the supervision of the board of directors. (pp. 490, 491.)

PLEADING AND PRACTICE—Answer, When Sufficiently Discloses Equitable Defenses.—An answer in an action of ejectment which pleads facts showing that a trustees' deed is void is good though it does not ask to redeem or pray for equitable relief. (pp. 491, 492.)

TRUSTEES' SALE, Estoppel to Deny Title Based upon.—The holder of real property is not estopped, as against one acquiring title by a quitclaim deed under a trustees' sale for a nominal consideration, from showing that the transfer of the note to secure which the deed was given was ultra vires, and the sale thereunder consequently void. (p. 492.)

NOTICE.—A Purchaser of Real Property is Charged With Notice of the Contents of a trust deed on which his title depends and of the constitution and by-laws of the building and loan association referred to in the deed. (p. 493.)

Orr & Luster, for the appellant.

W. P. Campbell, for the respondent.

239 LAMM, J. Cast below in ejectment for block 14 in Maxey's addition to the city of Willow Springs, Cobé appeals. The petition was in conventional form, laying the ouster as of March 15, 1902.

The answer admits possession, denies all other averments, and pleads certain affirmative defenses, which may be summarized as follows: 1. Adverse possession for ten years under a claim of ownership; 2. That plaintiff and those under whom he claims have not been seised or possessed of the premises within ten years; 3. That plaintiff claims title by virtue of a foreclosure by advertisement and sale under a trust deed, executed to the Willow Springs Building and Loan Association, **240** a corporation organized under article 9, chapter 42 of the Revised Statutes of 1889—said deed of trust authorizing the sheriff of Howell county, for the time being, upon the request of said association, to make a sale on default of the payment of interest, dues and penalties as provided in the deed of trust and the constitution and by-laws of said association, for a period of six months; that such sheriff sold and conveyed the premises, but his proceedings were void for the reason that he was not requested by said association, or anyone authorized to act for the same, to advertise and sell said premises; 4. The sheriff's advertisement, sale and conveyance, as acting trustee, are alleged to be void because there was no default; and 5. Are void because they occurred several years after said association ceased to do business.

Issue having been joined, the state of the proof was such that the court ruled against respondent's defense of the statute of limitations, thus leaving as the sole issue the validity of the trustee's deed from the then sheriff of Howell county, as acting trustee under the building and loan association deed of trust.

Stated in free outline, appellant contends that the irregularities, if any, shown in the proceedings leading up to the sale are not fatal to his right to recover under the rule laid down in *Schanewerk v. Hoberecht*, 117 Mo. 22, 38 Am. St. Rep. 631, 22 S. W. 949, and later decisions following that case, and the cause should be reversed.

Stated in free outline, respondent contends that such irregularities were shown as rendered the trustee's deed void under the rule laid down in *Lovelace v. Pratt*, 163 Mo. 70, 63 S. W. 383, and, hence, his judgment, nisi, should stand.

The facts, much condensed and to some extent stated in their legal effect, are as follows: Lovan resides in Willow Springs on the locus in quo as a homestead. Cobe resides in Chicago and is vice-president of the Assets Realization Company. Lovan ²⁴¹ and Ophelia, his wife, on the twenty-fifth day of March, 1890, conveyed the premises to Wilkinson, trustee, party of the second part, for the benefit of the Willow Springs Building and Loan Association, party of the third part, to secure a note dated March 17, 1890, due in one day to said association, promising to pay three hundred dollars for value received with interest from date at the rate of ten per cent per annum, payable monthly on a given Monday—which note contains the following further promise: "And I promise to pay said association my monthly dues of four dollars each month, as stockholder in said association, with all penalties assessed on my said stock, according to the constitution and by-laws of said association." The deed of trust contained a provision that if Lovan paid the interest when due and payable, and paid said dues and penalties according to the tenor and effect of the note, and said constitution and by-laws, then the deed should be void. But otherwise, if he failed to pay said interest when due, or failed to pay his monthly dues as stockholder as they accrue; then, in either event, the deed should remain in full force. A provision was inserted for the substitution of the sheriff as trustee upon the absence of Wilkinson from Howell county, providing that, in that event, "the then acting sheriff of said county, upon the request of the party of the third part, shall sell the property herein described, or so much thereof as may be necessary to pay said note, interest and dues and penalties thereon." Provisions relating to notice, place of sale and the executing of a deed to the purchaser are not

questioned and need not be set out. The trust deed also contained the usual narration that, "Any statement of facts or recital by said trustee in relation to the nonpayment of the money herein secured to be paid, and of the amount due herein, or any default in the conditions of this trust deed, the advertisement, sale, receipt of money and execution of ²⁴² the deed to the purchaser, shall be received as prima facie evidence of such fact."

Certain by-laws of the Willow Springs Building and Loan Association were introduced in evidence. In a nutshell, they provided that there should be a president, a vice-president, a secretary and a treasurer and seven directors. That such officers and directors should constitute the board of managers of the business of the association. That every person who subscribed stock should then pay one dollar on each share and thereafter pay a like sum to the association at each stated meeting of the board of managers. That the stated monthly meetings of the board of managers should be on the first Monday after the 15th of each month for the purpose of receiving memberships, monthly dues and fines from the shareholders, interest on loans, and to loan the funds of the association, and the transaction of other business.

Lovan owned three shares. The date of his membership does not appear, and, hence, no account of payments prior to his loan can be rendered, but on giving his note for three hundred dollars and executing his deed of trust, he received one hundred and thirty-five dollars from the association. Thereafter, at the stated meetings of the board of managers in Willow Springs, he paid five dollars monthly for the months of April to November, 1890, inclusive, making his last payment on December 2, 1890. That date was also the last time the board of managers ever met to receive dues or for any other purpose. From that day to this, as gleaned from the corporate books, there was not a corporate act done or line written by the directors or the board of managers or by the corporation itself. The corporate story of what happened may be painfully spelled out in the following from its "Journal Book":

Page 35 of said Journal Book is in words and figures as follows:

“Willow Springs, Sept. 18, 1890.

“Board of managers and stockholders of Willow Springs Building and Loan Association met in called ²⁴³ meeting for the purpose of considering the question of merging or transferring the Willow Springs Association into the Phoenix of St. Joe, Mo. Mr. Robinson, agent of the Phoenix, explained the Phoenix method of doing business and submitted a proposition for merging the association into theirs. On motion of Mr. Teeter a committee consisting of W. E. Drew, E. H. Farnsworth and S. W. Wilkinson was selected to ascertain the wishes of the stockholders of this association as to merging the two association. No other business, the meeting adjourned.

“E. H. FARNSWORTH, Sec.”

Page 36 was as follows:

“Willows Springs, Mo., Oct. 28, 1890.

“Board of managers met. Quorum present. After some discussion motion to adjourn to Saturday night, November 1, 1890. Carried. Adjourned.

“E. H. FARNSWORTH,
“Per PATTERSON.”

Page 37 was as follows:

“Willow Springs, Mo., Nov. —, 1890.

“Board met, no quorum. On motion adjourned to meet on December 2, 1890.

“E. H. FARNSWORTH, Sec.”

Page 38 was as follows:

“Willow Springs, Mo., December 2nd.

“Board managers met. Quorum present. Minutes of Sept. 1st-18th and October 28th approved. Report of committee to arrange transfer to Phoenix filed and accepted. Show vote to transfer, Drew, Teeter, Wilkinson, T. Hughes, absent, Randal, Rowe, Gaylord, Withaup, ab., Thomas. Yeas 8, absent 2.

“Bills allowed: S. W. Wilkerson, \$25, services; E. H. Farnsworth, \$55, services; S. W. Wilkinson, \$5.25, record.

“Moves to prepare release by secretary. Motion to accept prop. of Phoenix carried. D.—, Teet, Wilk, G.—, Thos., Farn., six yeas.

²⁴⁴ "Motion to presdt. transfer bills rec. to Phoe. Motion carried to settle treasurer. Gorman and Layker.

"Report Treas. Allowed withdrawn.

John Kelly.....	\$14.85
Frank Sass.....	40.90
I. S. McDonald.....	18.42
Mrs. S. E. Davids.....	16.75
H. J. Rowe.....	11.25
Farnsworth	20.48
	49.68
	22.65

\$194.98."

Meditation, more or less profound, on the foregoing may result in a conclusion that there was a building and loan association in St. Joseph, Missouri, known as the Phoenix. That on September 18, 1890, one Robinson, representing the Phoenix, appeared at Willow Springs before the board of managers, in which meeting possibly some stockholders participated, and there discussed with them a pending proposition of the Willow Springs Building and Loan Association's going out of business and "merging or transferring" itself in or over to the Phoenix. That thereupon a committee was appointed to ascertain the wishes of the stockholders. That another meeting was held by the board of managers in October, at which the matter was discussed, but no action taken. That in November no quorum was present at the meeting; and that on December 2d the board of managers met, eight being present and two absent. If the narration in the record of this meeting, to wit, "Motion to accept prop. of Phoenix carried," be construed into the acceptance of a pending proposition (of unknown terms) on the part of the Phoenix Loan Association to take over the assets and assume the stock and other liabilities of the Willow Springs Building and Loan Association, it may be seen what happened. If the further narration therein, to wit, "Motion to ²⁴⁵ presdt. to transfer bills rec. to Phoe." be eyed closely and treated to a liberal gloss, it will be further seen what happened, to wit, that the president of the Willow Springs association was authorized by this cryptogram to transfer all the bills receivable belonging to the Willow Springs association to the Phoenix Loan Association of St. Joseph, Missouri. What the next

narration means, to wit, "Motion carried to settle treasurer," would depend somewhat on the local usage of the word "settle" and does not call for present adjudication. Presently, after this original and astonishing mortuary literature was spread of record, and in the same year, the Phoenix Loan Association notified Lovan that it held his deed of trust and "wanted so much money." To this demand, he stood mute. The record shows that the Phoenix association at that time held Lovan's paper with indorsements thereon, presumably transfers made pursuant to the action of the board of managers heretofore noted. Shortly thereafter there appeared in Willow Springs the president of the Phoenix association and other of its representatives, who made demands upon Lovan and wanted to know what he was going to do. To these demands, he replied that he owed nothing to the Phoenix association; that he got no money from it; that the Willow Springs association had no right to transfer his loan to the Phoenix association; and, further that he owed the Willow Springs association, but could not pay it, because it was not there to pay. Thereat, the Phoenix people demanded an out-and-out deed to the property, which Lovan refused to make. They then asked "what he would do," and he replied, "nothing," whereupon they went their ways and he saw them no more. Matters remained in statu quo until April, 1891, when there appeared an advertisement by Wilkinson, trustee, foreclosing Lovan's deed of trust. On the morning of the sale day, Lovan notified said trustee to the effect that he had no right to sell under the mortgage and had better not do it; that ²⁴⁶ there was no Willow Springs Building and Loan Association. The purport of this conversation, as we construe it, is that Lovan based his objection on the theory that he had been ready to pay the Willow Springs association in accordance with the constitution and by-laws, at the monthly meetings of its board of managers and as nominated in his bond, but had been unable to find it to do so. This notice resulted in the sale lapsing. Time ran on and finally, in 1897, one Drew, who was the president of the Willow Springs association at the time of its *felo de se*, then seven years gone, made a written request, over his title as such president, to the sheriff of Howell county to make a sale under the deed of trust on October 11, 1897. It seems Drew appeared in Willow Springs and gave an advertisement signed by such sheriff, as acting trustee.

to the printer and at that time notified him "that the association at St. Joseph had bought the stock of the Willow Springs association and that he was representing the St. Joseph association, that he was closing matters up for them." Thereafter on October 25, 1897, at a sale made, the property was struck off to the Phoenix Loan Association of St. Joseph, Missouri, at the sum of fifty dollars, and such sale was followed by a trustee's deed reciting, *inter alia*, that the powers of the trustee were executed "at the request of the legal holder of said indebtedness."

This deed was placed of record and matters again lagged along until July 15, 1899, when, upon the application of the state supervisor of building and loan associations, the Phoenix Loan Association was placed in the hands of receivers by the circuit court of Buchanan county: *State v. Phoenix Loan Assn.*, 159 Mo. 102, 60 S. W. 74. Thereafter its affairs seem to have come within the jurisdiction of the United States circuit court at St. Joseph, and, on the 23d of February, 1902, a decree of the federal chancellor was handed down confirming a sale to appellant herein of all the assets of the Phoenix Loan Association, and the ²⁴⁷ existing special master in chancery and receivers were ordered to make conveyances effectuating such confirmed sale. Thereafter, by their several quitclaim deeds, said receivers and said special master in chancery conveyed the locus in quo to appellant. Cobé, who thereupon instituted this suit, with the result first aforesaid.

Was that result right? We think so, because:

1. An incorporated building and loan association differs from an ordinary corporation. Among other ways, in the fact that in an ordinary business corporation, stock is subscribed and either paid for at the time, and thus becomes the property of the shareholder, or it is partly paid for and becomes his property, subject to future calls upon his subscription; while in a building and loan association the stock subscriber is not the out-and-out owner of his stock from the start. He pays thereon a minimum monthly payment, and when these monthly payments, with his increment of gains accrued, equal the par value of the share of stock, he is entitled to receive that amount: 4 *Am. & Eng. Ency. of Law*, 2d ed., 1004. If, in the meantime, a member has borrowed on his stock, it, by pledge or operation of the loan, remains the property or quasi property of the corporation, and the

loan is returned by the payment of interest and stock dues, penalties, etc.—the repayment of the loan culminating at the same time the stock itself matures, at which time, in theory at least, the corporation, or a given series of its stock, is liquidated, that is to say, the nonborrowing stockholders have their stock redeemed and the borrowers have their loans canceled.

The loans made to borrowers, evidenced by secured notes, together with all stock subscriptions calling for periodical dues, are assets of such corporation. It is self-evident that in a solvent corporation—a going concern—these assets must be kept together to subserve the underlying purposes of the corporation itself, and ²⁴⁸ reach the end in view. If, for instance, these assets could be separated, then the liability on the stock subscription might pass off to, and become the property by assignment of, one vendee, while the same liability in another form, to wit, a note given by a borrowing stockholder, might pass to another vendee, and thus a double liability be asserted against a stockholder. In the case at bar, there was no attempt on the part of the Willow Springs association to separate those liabilities. It parted with them, lock, stock and barrel, to the Phoenix Loan Association. That is to say, the latter undertook to become the owner of the entire stock subscriptions, as well as all bills receivable based upon loans to subscribers.

We are not dealing with the case of an insolvent building and loan association whose right to collect stock subscriptions and continue business is arrested at a given time by the hand of the law and whose assets are thereupon collected and marshaled for the purpose of winding up its affairs. There is not a hint in this record that the Willow Springs association was insolvent on December 2, 1890, at the time its board of managers assumed to part with its assets to a stranger corporation (whose power to purchase may well be doubted), and undertook to make its stockholders recognize a new and distant master residing in another corner of the state. No reason is suggested for this extraordinary performance, and we are cited to no authority giving a board of managers of a building and loan association such capricious power to end its life, to unsettle the vested rights of its members, and to make such rights depend not only on the business vicissitudes incident to the selling corporation, but

to take on a new burden of dangers in business vicissitudes arising in the life of the buying corporation.

What might have happened if a stockholders' meeting, duly called, had unanimously consented to such proceeding, and after a board of directors had, pursuant ²⁴⁹ to authority by the corporation itself, carried out such scheme, we need not consider.

Nor is it necessary for us to consider whether in a court of equity the buying corporation might have asserted and established, in a proper proceeding, equitable rights by subrogation or otherwise to the transferred assets; nor is it necessary for us to consider whether a promissory note, evidencing some incidental indebtedness to a building and loan association and not a loan to a subscriber upon stock, might, or might not be transferred by authorized indorsement. Take, for instance, the emergencies provided for by section 2811 of the Revised Statutes of 1889, where loans are allowed to be made to others, who are not shareholders, at such rate of interest as the directors may fix in case there is no stockholders' demand. If loans so made had been rediscounted for the purpose of creating a fund to subserve a stockholders' demand, springing into existence during the life of such loan, a different question might arise. Nor are we dealing here with close questions relating to the right of a building and loan association to borrow money for legitimate corporate purposes and hypothecate stockholders' papers to secure such loan. We are dealing with the right to absolutely transfer a loan made to a stockholder and secured on his home, which, under the constitution and by-laws referred to and read into the note and deed of trust, he was entitled to repay to the board of managers of the Willow Springs Building and Loan Association, at Willow Springs, monthly in small installments. And dealing with this case we are of the opinion that the attempted transfer of this mortgage loan by said board of managers to the Phoenix association was without shadow of legal right and wholly ultra vires. In our view it is contrary to the reciprocal rights and duties existing between such corporation and its members and, if the principle were once established, it would result in mischief—lift the lid of a Pandora's box of ills. This is the ²⁵⁰ general doctrine laid down in Thompson on Building Associations, second edition, section 286, and is the doctrine of this court: *Lovelace v. Pratt*, 163 Mo. 70, 63 S. W. 383. See,

also, *State v. Equitable Loan etc. Co.*, 142 Mo. 325, 41 S. W. 916.

2. Appellant insists the case at bar is not on all-fours with *Lovelace v. Pratt*, 163 Mo. 70, 63 S. W. 382, and therefore that case ought not to control this. Let us see about that. The *Lovelace* case was an ejectment suit, as is this. In that case the title of plaintiff to the locus in quo originated in the foreclosure of a building and loan mortgage, as does the title of plaintiff here. In that case, the building and loan association had transferred its mortgage security to another; so here. In that case, at the request of the transferee of such mortgage security, the trustee sold. The gist of the defense in that case was that the building and loan association had no authority to part with the security, and that a foreclosure, so procured, avoided the trustee's deed; so, too, here. And it is at this point appellant discovers what he urges is a controlling factor in the present case, and distinguishes it from the *Lovelace* case, to wit, in this case the foreclosure was directed by Drew, the one-time president of the Willow Springs Building and Loan Association. If now, it be remembered that Drew, in directing the advertisement and foreclosure, admitted he was the agent of the Phoenix association and was transacting his master's business, and if we add to that admission the further contention of appellant, to the effect that, if the title to the security did not pass by the transfer, it must have remained in the Willow Springs association and, therefore, that association had the power and duty of directing a foreclosure, we have the present question presented to us in a nutshell. In disposing of it, it must be borne in mind that the law regards substance, rather than form—the spirit and essence of a thing, rather than the mere dry letter. One may not do by indirection what he cannot do directly; or, as said by Valliant, J., in a case just handed down: ²⁵¹ “If it could not be done on a straight line, it could not be done in a circle.” To all intents and purposes the act of foreclosure in this instance was procured by the Phoenix association, and was made for its purposes. Drew was its alter ego, and may not ambush or confuse his position by a mere official designation assumed for the nonce. *Qui facit per alium, facit per se*. The transaction finds its counterpart in a very ancient one in which, by uniting a borrowed hand to a real voice, a notable property transaction was brought about. As preserved in an authen-

ticated record, it runs as follows: And Jacob went near Isaac his father; and he (that is, Isaac) felt of him, and said, the voice is Jacob's voice, but the hands are the hands of Esau. The record (of this last case) further shows that Isaac's eyes were dim and, because the hands extended to him were hairy, like Esau's, Jacob effected, in conjunction with a prior trade of birthright for a meal of bread and bean pottage, a transfer of Esau's interest, contingent and expectant, those intended for use as well as those intended for ostentation. If we may be permitted to loiter afield a moment, it may be said that Jacob by that transaction showed he was well named "The Supplanter" (sub, under; planta, sole of the foot, or heel). The record has it that in the very act of birth, he held Esau by the heel, and certainly, by afterward laying him by the heels, he justified his name. But we are not called to review this venerable transaction and adjudicate upon it. Live business presses, and sufficient unto the day is the evil thereof. Suffice it to say, that we see no difference in principle between the Lovelace case and the case at bar. And this is so, because, further, Drew received no direction from the Willow Springs association whatever. His acting in its name was a mere assumption on his part in the interest, as said, of the Phoenix association. By statute law, existing at the time Lovan made ²⁵² his mortgage, foreclosures of stockholders' mortgages were placed under the supervision of the board of directors, and not under the supervision of the president. Section 2813 of the Revised Statutes of 1889 reads as follows: "If the borrower fails totally in his payments during the space of six months, or if the balance due by such borrower has been allowed to accumulate until it equals the sum of six months' dues and interest, then the board may, in its discretion, proceed at any time to advertise for sale, under deed of trust, the property pledged to the association by such borrower."

3. *Lovelace v. Pratt*, 163 Mo. 70, 63 S. W. 383, must either be overruled, or the case before us must be controlled by it. Appellant contends that the Lovelace case is out of line with *Schanewerk v. Hoberecht*, 117 Mo. 22, 38 Am. St. Rep. 631, 22 S. W. 949, but we think not. The answer in that case was a general denial, and this is true, generally speaking, of the cases following that. The answer in this case pleads facts showing that the trustee's deed, under which appellant holds by mesne conveyance, quitclaim deeds, is void. Under

Revised Statutes of 1899, section 605, a defendant may plead his legal defenses as well as his equitable defenses to a suit at law. As a general proposition, he need not ask for affirmative equitable relief, unless the case admits of it and he chooses to. It would serve no useful purpose to review the Schanewerk case and the cases following it. That case does not decide that a defendant is cut out of an equitable defense setting forth facts which, if true, show that a certain deed, upon which plaintiff must rely, is void. That case does not decide that in order to make such equitable defense, when well pleaded, defendant must ask to redeem under every and all circumstances. From whom would defendant redeem in this case, for instance? If the Phoenix corporation got no title, because its sale was brought about in violation of law, it would follow necessarily that appellant got no title; and if he held no title, there was nobody in court from whom respondent could redeem.

253 The learned judge, who wrote the opinion in the Lovelace case, was on the bench at the time the Schanewerk case was decided and participated in the decision of the cases following that. He, with his learned associates in Division Two, could not have been unaware of the doctrine announced in the Schanewerk case, but evidently distinguished the Lovelace case, and we think rightly so.

4. But, says appellant, by letting the trust deed remain unsatisfied of record since 1890, and by letting the recorded trustee's deed go unchallenged, as an indicia of ownership, respondent is estopped to now question the validity of either as against appellant, a purchaser without notice.

To this contention respondent answers, in one form, in the pioneer figure, and warlike metaphor, following: "Lovan has done what many a good man has done under similar circumstances. He has sat quiet in his castle, blunderbus in hand, while the wolves howled and prowled through the woods. It so happened that the vice-president of the Assets Realization Company is the first to come within easy range."

The familiar elements of estoppel are wanting in appellant's case. It cannot be pretended that the indicia of ownership, allowed to remain of record in Howell county, misled appellant to his prejudice and caused a change in his position. He was a resident of Chicago. He dickered for the whole of the assets of the Phoenix association and paid therefor the sum of eighty thousand dollars. It is incon-

ceivable, in the absence of positive proof, that the fifty dollar purchase of the Phoenix association at Willow Springs had a feather's weight in that transaction. It comes well within the maxim, *de minimis*. Besides, appellant holds under quitclaim deeds, following the trustee's deed in question. He is no such innocent purchaser for value as would entitle him to avoid the effect of outstanding equities, but is charged with notice of the contents of the trust deed foreclosed, of ²⁵⁴ the constitution and by-laws of the Willow Springs Building and Loan Association referred to in that trust deed, and with all that is disclosed by his claim of title, as well as of the statutes of the state, read into the transaction.

In conclusion, in our opinion, respondent under the facts uncovered should be allowed, so far as this case in its present aspect is concerned, to sit unmolested under his own vine and fig tree—if such tree grows in Howell county (on which we express no opinion).

The judgment is, accordingly, affirmed.

All concur.

Sales by Corporations of all their assets or property are discussed in the monographic note to *Tanner v. Lindell Ry. Co.*, 103 Am. St. Rep. 548-572; and the effect of the consolidation of corporations is discussed in the monographic note to *Morrison v. American Snuff Co.*, 89 Am. St. Rep. 604-656.

Sales Under Powers in Trust Deeds and mortgages are discussed in the monographic notes to *Houston v. National etc. Loan Assn.*, 92 Am. St. Rep. 573-598; *Tyler v. Herring*, 19 Am. St. Rep. 266-297.

FRANK v. GODDIN.

[193 Mo. 390, 91 S. W. 1057.]

ACCRETIONS—Conflict of Laws.—Each state in the Union may settle for itself the title to lands formed by accretion within its boundaries. (p. 495.)

NAVIGABLE WATERS.—A Riparian Owner does not Own to the Middle or Thread of a Navigable River in Missouri, but only to low-water mark. (p. 496.)

BOUNDARIES of Navigable Streams, Changes in.—If one's land is bounded by a navigable river, it remains his boundary no matter how far it shifts, subject to be again shifted by accretion or recession. (p. 496.)

ISLANDS Formed in Place of Land Washed Away.—If the shore line is washed away and the space thus created becomes a

river bed on which new land forms, such new land does not necessarily belong to the owner whose lands were washed away. If added to his shore line by accretion or reliction, it will belong to him. If, on the other hand, a nucleolus appears in the channel off the shore, which swells to a nucleus, and thereafter, by reason of alluvium accruing thereto, reaches the dignity of an island, it does not inure to the riparian owner. (p. 496.)

ISLANDS and Their Appurtenant Alluvium Formed in Navigable Rivers belong to the respective counties within which they appear and are subject to disposition as swamp lands. (pp. 496, 497.)

ACCRETION to Lands Patented by Specified Boundaries.—A patent for swamp lands, though it describes them by specified boundaries, is subject to the chance both of avulsion and imperceptible washing away, and entitles the patentee to lands subsequently added to accretion. (p. 499.)

PUBLIC LANDS.—A Patent to Swamp Lands cannot be Colaterally Attacked by proof that the acreage included within the boundaries is much greater than that designated in the patent. (p. 500.)

Robert Walker, for the appellant.

C. E. Peers and W. S. Pope, for the respondent.

392 LAMM, J. The scene is laid near Loutre (alias, Otter) Island in the Missouri river—a historic spot in the early annals of Missouri. The dramatis personae are Frank, the owner of certain shore land on said river, i. e., the riparian owner, and Goddin, an islander. Frank bases a claim to the land involved somewhat upon the ownership of the shore, but mainly upon his purchase from Warren county on December 31, 1900, and a patent issued therefor February 8, 1901, by said county under the provisions of article 6, chapter 122, of the Revised Statutes of 1899, relating to “accreted lands.” Goddin, in possession, claims the land as an accretion to an island off said shore, locally known as Goddin island, which island he claims to own under a patent from the same county of date November 21, 1898, made under the provisions of an act of the legislature in **393** 1895 (Laws 1895, p. 207), and which act, as subsequently amended and supplemented, forms article 6, supra. As the description of the land in dispute is intricate and technical, consisting of metes, bounds, angles, degrees, and calls for distances, monuments, etc., and as such description seems not material on review, it will be omitted.

From a judgment general in form in favor of Goddin and for costs, nisi, in an action brought by Frank to determine the respective interests of Frank and Goddin in, and to quiet title to, the said real estate, based on section 650 of the

Revised Statutes of 1899, Frank appeals. Other essential record facts will appear further along.

1. A small part of section 29, township 46, range 4, in Warren county, has been preserved from the wasting wash of the river waters and is owned by appellant, who purchased through probate proceedings from a Stuart estate. When originally surveyed by the government, section 29 consisted of a fractional northeast quarter, one hundred and fifty-eight and nine-tenths acres, a full northwest quarter, one hundred and sixty acres, and a fractional south half, thirty-nine and eighteen one-hundredths acres—the river bounding it on the south. The erosion of the current ate away the larger part of this land, some of it during Frank's ownership. A few years ago there appeared in the river, partly south of Frank's shore line, a sand bar, or, in the language of rivermen, "a towhead," which grew by recession and accretion until a certain portion of the bar projected over the aforesaid survey, leaving the channel of the river split in twain, part being north of the sand bar and between that and the shore line, and part south of said bar. The bar continued to grow, not in a saltatory way, but by accretion of alluvium insensibly formed and deposited, willows finally took root, overflows came leaving deposits until some portions at highest elevations were above flood tide; at which time respondent procured his patent, entered into possession, and, struggling with recurring ³⁹⁴ floods, gained a precarious foothold, and has opened a small plantation, including therein the land in controversy.

We do not understand the learned counsel for appellant to contend that, because some of Frank's shore land was disintegrated, held in solution by the water and carried off, pushing the north bank of the river farther north, he would be entitled to new land re-formed on the situs of the old, unless such new land was formed by accretion to the north shore or by recession there. His contention, as we interpret it, is rather that this condition of things created equities springing from the natural justice of the thing, which should have some determinative force on other controverted questions in the case presently to be considered. Is this contention sound? We think not, because:

In the first place, whatever be the common law or the civil law, each state of this Union may settle for itself the title to lands formed by accretions within its boundaries:

Barney v. Keokuk, 94 U. S. 324, 24 L. ed. 224; St. Louis v. Rutz, 138 U. S. 226, 11 Sup. Ct. Rep. 337, 34 L. ed. 941.

In the second place, in Missouri, the riparian owner does not own to the middle of the thread of a navigable river, *ad filum medium aquae* (Benson v. Morrow, 61 Mo. 345), but only owns to low-water mark: Cooley v. Golden, 117 Mo. 33, 23 S. W. 100, 21 L. R. A. 300; State v. Longfellow, 169 Mo. 109, 69 S. W. 374. And this court in Naylor v. Cox, 114 Mo. 232, adopted the reasoning and rule announced in Welles v. Bailey, 55 Conn. 317, 3 Am. St. Rep. 48, 10 Atl. 565, thus: "All original lines submerged by the river have ceased to exist; the river is itself a natural boundary, and every changing condition of the river in relation to adjoining lands is treated as a natural relation and is not affected in any manner by the relations of the river and the land at any former period." It results from the foregoing that where the water line is the boundary, as it was of Frank's land north of the river, that boundary, no matter how far ³⁹⁵ it shifted north, remained his south boundary subject to be again shifted south by accretion or rescission.

In the third place, the conclusion follows, using the foregoing legal propositions as postulates, that where shore land has been washed away and the void space thus created becomes the river bed and thereafter new land re-forms in the river within the original survey, such new land does not necessarily belong to the owner of the survey—the riparian owner. If it be formed to the shore land by accretion or reliction it will belong to the riparian owner. If, on the other hand, a sand nucleolus appears in the channel off the shore, which swells, peradventure, to a nucleus and thereafter, by reason of alluvion accreting thereto, eventually reaches the geographical dignity of an island, such island with the alluvion thereto accreted does not inure to the riparian owner: Chinn v. Naylor, 182 Mo. 583, 81 N. W. 1109; DeLassus v. Faherty, 164 Mo. 361, 64 S. W. 183, 58 L. R. A. 193; Naylor v. Cox, 114 Mo. 232; Cooley v. Golden, 117 Mo. 33, 23 S. W. 100, 21 L. R. A. 300; Cox v. Arnold, 129 Mo. 337, 50 Am. St. Rep. 450, 31 S. W. 592; McBaine v. Johnson, 155 Mo. 191, 55 S. W. 1031; Moore v. Farmer, 156 Mo. 33, 79 Am. St. Rep. 504, 56 S. W. 493; Widdecombe v. Chiles, 173 Mo. 195, 96 Am. St. Rep. 507, 73 S. W. 444, 61 L. R. A. 309. But, under the statutes heretofore referred to (Rev. Stats. 1899, art. 6, c. 122), all such islands and their appurtenant alluvium, the fan-

tastic progeny of the mysterious and muddy river, alternately spewed out of and then, perchance, swallowed into the maw of its waters, belong to the respective counties within which they appear, and are subject to disposition as swamp lands for the benefit of the public schools—they being part of the public domain: *State v. Longfellow*, 169 Mo. 109, 69 S. W. 374.

2. The chief contention of Frank is that the county's grant to Goddin was by a fixed boundary, was confined and fixed by arbitrary and immutable lines and, hence, the right to accretion, reliction or recession could not apply to his grant.

To deal with this contention intelligently reference must be had to the record before us. It seems the ³⁹⁶ Warren county court conveyed to Frank by fixed boundaries, calls and distances, a certain part of new-made land which substantially appeared above the surface of the waters after its patent to Goddin and which formed adjacent to the connection with Goddin's land. It seems, furthermore, that Goddin petitioned for a grant of an island of exceedingly irregular form and loosely estimated by him to contain three hundred acres. It seems, also, said county court ordered a survey made under the provisions of the act then existing (*Laws 1895, supra*), and by the survey a unique, irregular and quasi-geometrical figure was platted and a diagram thereof presented to the county court. The survey estimated the tract at about one hundred acres. Thereupon Goddin paid into the county treasury one hundred and twenty-five dollars, being the least price at which one hundred acres of land could be sold, and the county court by its patent set forth and conveyed to him as follows:

"Whereas, it having been shown to the satisfaction of the county court of Warren county, Missouri, at its August term, 1898, that a tract of land has, within the past five years, formed in the old bed of the Missouri river in or opposite to sections 28 and 29, township 46, range 4, west, in Warren county, Missouri, by the recession or abandonment of the waters of said stream.

"The said tract of land was thereupon ordered by this court to be surveyed, according to law, by the county surveyor of the county aforesaid, and that he report his proceedings under said order at the next term of this court thereafter, to wit, the November term, 1898, of the county court of Warren county, aforesaid; and whereas, as appears by the report

of said surveyor filed at the November term of this court, 1898, he did make survey of said island which, according to his said report, contains about one hundred acres of somewhat elevated land higher than the sand bars then surrounding same, which said land, according to the laws now in ³⁹⁷ force in this state, becomes a part of the school lands of Warren county, Missouri, and subject to sale by order of the county court of the county aforesaid, at public or private sale, and whereas, B. H. Goddin has offered and deposited with the clerk of this court the sum of one hundred and twenty-five dollars for said land, being at the rate of one dollar and twenty-five cents per acre therefor.

"It is considered by the court that it is the best interest of said county that said offer be and the same is hereby accepted, and it is therefore ordered, adjudged and decreed by the court that all the right, title and interest that said county of Warren acquired for school purposes by reason of the premises and by virtue of the laws of the state of Missouri, be and the same is hereby vested in and sold and conveyed to said B. H. Goddin, and unto his heirs and assigns forever.

"In testimony whereof, we have hereunto set our hands," etc.

It may be conceded to appellant that a grantor might convey his upland by such boundaries, calls and immutable lines and description as would result in a reservation to the grantor of appurtenant flat lands and their present or subsequently accreted alluvion. Such was the case in *Dunlap v. Stetson*, 4 Mason, 349, Fed. Cas. No. 1164, and such substantially was the case of *Cook v. McClure*, 58 N. Y. 437, 17 Am. Rep. 270—both relied upon by appellant. The same principle was in effect applied by this court in controversies relating to urban lots conveyed with reference to and bounded by streets, one of which fronted on a navigable river bank: *Smith v. City of St. Louis*, 21 Mo. 36; *Smith v. St. Louis Public Schools*, 30 Mo. 290; *Ellinger v. Missouri Pac. R. R.*, 112 Mo. 525, 20 S. W. 800; *Sweringen v. City of St. Louis*, 151 Mo. 348, 52 S. W. 346. As said by Napton, J., in *Smith v. St. Louis Public Schools*, 30 Mo. 290, referring to the general rule regulating accretion: "This rule, however, did not apply to fields which the Romans termed limited, or *agri limitati*. 'In agris limitatis jus alluvionis ³⁹⁸ locum non habere constat.'" We conceive that appellant's learned counsel has fallen into the error of assuming that Goddin's

land is *ager limitatus*. To our mind, the grant was not that of a field limited by fixed and arbitrary boundaries. To the contrary, his petition, survey and patent, read together and fairly construed, referred and related to an island, as such, with the river for a boundary. It is true that in the diagram of the surveyor the survey is surrounded by earmarks indicating sandbars. But the oral evidence of the surveyor shows that the survey was intended to be made and was made substantially to the water's edge and that the river was the boundary. In this condition of things new land thereafter formed to said island on either side by recession or accretion, under settled rules of law as applied in the cases heretofore cited, inured to the benefit of the island owner, and we accordingly so hold.

Goddin took the chances of both avulsion and imperceptible wasting away. On the other hand, he purchased the chance of accretion, recession or reliction. There is nothing in the case to fairly indicate that he intended to buy, or did buy, a limited tract, leaving the title to alluvion, afterward accreted, in the county to be disposed of and thus hedge him in and away from water ingress and egress by such disposition.

It was not necessary for his patent in terms to convey thereafter accreted land. Such accretion inured to him by operation of law: *Jefferies v. East Omaha Land Co.*, 134 U. S. 178, 10 Sup. Ct. Rep. 518, 33 L. ed. 872; *St. Louis v. Rutz*, 138 U. S. 226, 11 Sup. Ct. Rep. 337, 34 L. ed. 941.

In dismissing the matter now in hand, it may be said that the evidence satisfactorily establishes the fact that the land covered by Frank's patent makes a part of Goddin Island, and that Goddin Island sloped from the center elevation down to the river.

3. Appellant presents the further insistence, somewhat borne out by the evidence, that the surveyor ³⁹⁹ surveying the land previous to respondent's patent miscalculated the superficial area of the irregular geometrical diagram presented to the county court and that it contained one hundred and twenty-seven acres. Relying on this evidence, and relying further upon the statute which requires a purchaser to pay at least one dollar and twenty-five cents per acre for this character of land, it is contended that respondent's patent is void, and, therefore, appellant's grant is left operative. But such infirmity, if infirmity it be, does not appear on the face of respondent's patent and the proceedings leading up to the

same. It arises for the first time at the trial from an exceedingly complicated and somewhat uncertain mathematical calculation of two civil engineers introduced as witnesses by appellant. Can such collateral assault on this patent be allowed? We think not. It must be remembered that the genuineness of the patent is not assailed. If, therefore, the irregularity appeared in the very proceedings or in the patent itself, the rule might be different and the patent held void when offered in evidence: *Morgan v. Stoddard*, 187 Mo. 323, 86 S. W. 133. But the better doctrine in cases where the irregularity is made to appear by matter in pais, dehors the court record, is that the patent should be avoided by a direct proceeding, and that, while it remains operative and free from direct assault, it may not be overthrown by indirection in a collateral proceeding such as this: *Simpson v. Stoddard County*, 173 Mo. 421, 73 S. W. 700.

In our opinion the judgment should be affirmed, and it is so ordered.

All concur.

Features of the Law of Accretions applicable to islands are discussed in the note to *Bellefontaine Imp. Co. v. Niedringhaus*, 72 Am. St. Rep. 280-286. According to *Holman v. Hodges*, 112 Iowa, 714, 84 Am. St. Rep. 367, an island which springs up in a navigable stream does not belong to the owners of the contiguous lands; and if by accretion it finally joins the main land, the title to the whole of the soil so formed belongs to the state. See, too, *Moore v. Farmer*, 156 Mo. 33, 79 Am. St. Rep. 504.

LIPSCOMB v. ADAMS.

[193 Mo. 530, 91 S. W. 1046.]

CONTRACT for the Recovery of Land, When Includes an Unoccupied Portion.—If a contract between a claimant of land and a firm of attorneys describes the land subject thereto, and adds that certain persons are in possession of some or all of such land, and that it is the desire and intention of such claimant to recover possession, and that the attorneys are to prosecute all necessary suits to recover the land, and are to receive for their compensation one-half of the land recovered, a small tract included in the description, but not actually occupied by anyone at the time the contract is made, must be deemed embraced within its provisions, if there is an adverse claim of title thereto. (p. 505.)

ATTORNEYS, Contract of for Contingent Fees, When Will not be Denied Enforcement in Equity as Against Conscience.—A

contract between a claimant of land and a firm of attorneys to the effect that the latter will prosecute all necessary suits to recover the land specified therein, and, if unsuccessful, shall be entitled to no compensation, and if successful, to one-half of the land recovered, it being of the value of three or four thousand dollars, will not be denied enforcement in a court of equity on the ground that it is against conscience. (p. 506.)

ATTORNEYS, Contract With Including an Agreement not to Compromise—Public Policy.—A contract between a claimant of land and a firm of attorneys that the latter will prosecute all necessary suits for the recovery of such land, and that the attorneys are to have one-half of the lands recovered as compensation for their services, and that the claimant will not compromise any such suit without the approval of the attorneys, is not against public policy. (p. 508.)

CONTRACT, Construction of is Against Attorney Who Wrote It.—A contract between a land owner and a firm of attorneys, drawn by the latter, when there is reasonable doubt respecting its meaning, should be construed against them. (p. 509.)

SPECIFIC PERFORMANCE, Denial of for Want of Mutuality.—A contract providing that one of the parties thereto may purchase of the other specified lands at a price designated will not be specifically enforced where, by its terms, it does not obligate anyone to make the purchase. (p. 509.)

LACHES.—A Suit in Equity to Recover Land is Barred by Laches when the defendant has not suffered because of the delay in bringing the suit, and the improvements placed by him on the land are of trifling character, and the taxes paid by him have been repaid by what he has gotten out of the land. (p. 511.)

C. O. Tichenor and Frank F. Brumback, for the appellant.

Joseph S. Rust, for respondents.

• 536 **VALLIANT, J.** In the first count in the petition plaintiffs seek to have their equitable title to thirteen acres of land in Jackson county adjudged and decreed to them, and in the second count they seek to recover possession of the same—the first count being a suit in equity, the second an action at law.

The main facts in the case are undisputed. In 1872 James Bridger, who was the owner of two hundred and eighty-seven acres of land in Jackson county, executed a deed of general warranty conveying the land to his daughter, Virginia K. Wachsman, for the consideration of love and affection. The thirteen acres in suit were a part of those two hundred and eighty-seven acres. Seven years afterward, in 1879, Bridger executed two other deeds, by one of which he conveyed (or essayed to convey) sixty-six acres of the same two hundred and eighty-seven acres to his son William, and by the other sixty-six other acres of the same to his other daughter, Mary

E. Carroll. The sixty-six acres covered by the deed to Mrs. Carroll included the thirteen acres, the subject of this suit. Those deeds were all duly recorded.

February 23, 1886, Mrs. Carroll and her husband executed a warranty deed conveying the thirteen acres in question to Ruben Smith for \$350.

June 1, 1886, Mrs. Wachsman, then a widow, without other means than this land, came to the plaintiffs, who were attorneys at law practicing in Kansas City, and proposed to employ them to recover for her the one hundred and thirty-three acres of land covered by the two deeds last above mentioned executed by her father in 1879. Thereupon a contract in writing was made in which, after reciting that Mrs. Wachsman was the owner of the one hundred and thirty-three acres above mentioned and therein particularly described, that some or all of the land was in the possession of divers persons and that she was desirous of recovering it, it was agreed that the plaintiffs Lipscomb and Rust were to prosecute all necessary suits and render whatever other professional services were necessary ⁵³⁷ to recover the land, and for their compensation they were to have one-half of the land recovered, for which she was to make them a deed, and if a compromise was made they were to have one-half of whatever was received, whether money or property, and all contracts in regard to the litigation were to be approved by them. The contract was executed and acknowledged as required by law concerning contracts affecting the title to real estate and was duly recorded June 3, 1886. Soon after the execution of this contract, to wit, September 6, 1886, the plaintiffs brought two suits for their client, Mrs. Wachsman, one against her brother, William Bridger, for the sixty-six acres of land claimed by him under the deed from his father, and the other against Mrs. Carroll and her husband for the land covered by the deed from her father to her, except the thirteen acres in controversy in this suit. The reason the suit against Mrs. Carroll and her husband did not include these thirteen acres was that they had previously, to wit, February 23, 1886, conveyed the thirteen acres by warranty deed to Ruben Smith.

On November 18, 1886, plaintiffs entered into another contract in writing with Mrs. Wachsman, whereby it was agreed that no compromise of the litigation was to be made except with the consent of Lipscomb and Rust, and that should it be agreed to buy from the antagonists their interest or claim in

the lands Lipscomb and Rust before taking their half the land were to pay one-half the compromise price. "It is further agreed that if said Mrs. Wachsman shall recover said land, inasmuch as said Lipscomb and Rust will be entitled to one-half of the same under said contract of June 1, 1886, and are desirous of owning the whole of said land, said Wachsman, for and in consideration of \$2,500 to be paid in cash, will convey to said Lipscomb and Rust by good and sufficient deed said land free and clear of any encumbrance or claim of any and all persons whomsoever." ⁵³⁸ That instrument was also duly acknowledged and recorded November 18, 1886.

After the execution of that document, and while the two suits were pending, Mrs. Wachsman compromised the matter and dismissed the suits without the knowledge or consent of Lipscomb and Rust; she executed to her brother and sister each a quitclaim deed for \$600 for the land claimed by them respectively, including in the deed to Mrs. Carroll the thirteen acres now in controversy. Those quitclaim deeds were dated November 26, 1886, and were duly recorded.

Plaintiffs then brought a suit in equity against William Bridger and Mrs. Carroll to recover the half of the land claimed by them under the contract of June 1, 1886, which resulted in a compromise by which these plaintiffs paid William Bridger \$1,050, for a quitclaim to the land claimed by him, and gave Mrs. Carroll twenty acres of the land she claimed, she relinquishing to them the balance. The thirteen acres now in suit were not included in that compromise. Lipscomb testified that the reason the compromise did not include the thirteen acres was that it was vacant and that Mrs. Carroll had already conveyed her title to Smith.

Defendant Adams claims title to the thirteen acres under warranty deeds as follows: Mary Carroll and her husband to Ruben Smith, February 23, 1886, consideration \$350; Ruben Smith and wife to W. H. Adams, June 1, 1886, consideration \$500; Adams and wife to Taylor S. Smith, March 4, 1897, consideration \$650; Taylor S. Smith and wife, quitclaim back to W. H. Adams, January 4, 1898.

The original suit was against Taylor S. Smith, the quitclaim deed last mentioned was made by him to Adams after this suit was begun and Adams was substituted for Smith as defendant. Adams during all the time covered by this record except a short period was and is a resident of Kansas. Taylor S. Smith was and is a resident of Missouri.

539 Plaintiffs' testimony tended to show that the land in suit had never been inclosed except temporarily until Taylor S. Smith bought from Adams in 1897, when he inclosed it and thereupon plaintiffs brought this suit.

Defendant's testimony tended to show that Adams had from time to time made use of the land during the ten years following his deed from Ruben Smith and that he had during all those years paid the taxes on it.

There was a good deal of testimony pro and con bearing on the question of adverse possession, but it was not sufficient to sustain the defendant's plea of the statute of limitations.

There was a decree for the plaintiffs on the first count of the petition, giving them title to an undivided half of the land by virtue of their contract of June 1, 1886, and giving them title also to the other undivided half on payment by them to defendant, by a day named, of the sum of \$250 estimated by the court as the proportion applicable to the thirteen acres of the \$2,500 they were to pay Mrs. Wachsman for her half of the whole one hundred and thirty-three acres. And on the second count there was a judgment for possession, \$30 damages and monthly rents assessed at forty-two and one-half cents; execution, however, was stayed until the \$250 should be paid. From that judgment defendant appeals.

1. Appellant presents the point that the plaintiffs acquired no interest in the thirteen-acre tract in suit, for the reason that it was vacant on the date of their contract and was not "recovered" through any litigation conducted by them.

The evidence does show that these thirteen acres were vacant at the date of the contract and it does not show that it was included in any suit in court. But the contract expressly describes the one hundred and thirty-three acres covered by the two deeds of 1879, and in that description these thirteen acres are included. It starts out with the recital that Mrs. Wachsman is the owner of the land and that "divers persons are in possession of some or all of said land, **540** and whereas it is the desire and intention of said Wachsman to recover the possession of said land," etc. The contract is not by its express terms limited in its operation to only so much of the land as might then be in the actual, adverse possession of some one. Mrs. Wachsman is presumed to have known that the thirteen acres were then not in the actual possession of an adversary, and if she did not intend to engage the services of the plaintiffs to do whatever was necessary to clear her title

to the same, there was no necessity for her to have included it as she did in the description of the land in the contract. If there was any title acquired by Mrs. Carroll to any of the sixty-six acres covered by the deed from her father to her in 1879, it applied as well to these thirteen acres as to any of the rest. What defense William Bridger and Mrs. Carroll, or those claiming under either of them, could have made under the deeds of 1879, we do not know; it is intimated in the briefs for appellant that there was a good defense, and that suggestion carries the idea that before Mrs. Wachsman could get rid of the effect of those two deeds she would have to go through a legal battle. Whatever there was in the way of defense of those deeds of 1879 applied as well to the thirteen acres as to any of the rest of the land. True, Mrs. Wachsman might have gone on this thirteen-acre piece and built a fence around it, but that would only have changed her position from plaintiff to defendant, leaving her liable, for ten years at least, to be called into court to defend her title. Suppose she had taken that course and had been sued by this defendant for the possession, would she not, under this contract, have been entitled to the professional service of these plaintiffs?

Plaintiffs promptly brought suits in ejectment against the only persons within reach of process; they did not include in either of those ejectment suits these thirteen acres because there was no one in possession. They might have brought suit in equity to clear the title and ⁵⁴¹ have obtained service by publication on the defendant Adams, who was a nonresident, but before a reasonable time had elapsed in which to enable them to determine what course to take Mrs. Wachsman prevented them taking any further action in her name by compromising with her brother and sister and conveying to the latter these thirteen acres within a very short while after the two ejectment suits had been instituted. We hold that the contract covered these thirteen acres as well as the rest of the one hundred and thirty-three acres.

2. It is argued that the services actually rendered were so little in proportion to the compensation claimed that a court of equity should not enforce it. The contract was for one-half the land to be recovered. Taking the value of the land at that time as estimated by the witnesses the fee of plaintiffs would have amounted in value to from \$1,500 to \$2,000, for which the plaintiffs undertook to conduct this litigation, and

if they were unsuccessful they were to have nothing. What there was before them in the way of professional labor they could not know. Mrs. Wachsmann had no means to compensate them otherwise than as provided in the contract. The defendant in his answer in the case at bar says that he holds title through regular conveyance through persons who owned the same adversely to Mrs. Wachsmann. That averment indicates that at the time Mrs. Wachsmann made this contract of June 1, 1886, she had a contest before her. It is true the work actually performed was not great, because soon after the suits were instituted Mrs. Wachsmann compromised them, and the price she received shows either that she did not consider that she had a certain victory in sight or else that the land was not then of such value as to render the contingent fee she had agreed to give unreasonable, or else it demonstrates the wisdom for her own protection of that clause in the contract which forbade her to compromise without the approval of her attorneys. There is nothing in the contract ⁵⁴² on this point that would cause a court of equity to refuse to enforce it on the ground that it was against conscience.

3. The point on which appellant most earnestly insists is that the clause in the contract of November 18, 1886, by which Mrs. Wachsmann agrees not to compromise without the consent of her attorneys, is contrary to public policy and therefore void.

An agreement of this kind may or may not be condemned as against public policy, according to the circumstances of the case; each case must be judged in the light of its own facts. In 23 American and English Encyclopedia of Law, second edition, 456, it is said: "Public policy is in its nature so uncertain and fluctuating, varying with the habits and fashions of the day, with the growth of commerce, and the usages of trade, that it is difficult to determine its limits with any degree of exactness." In a note to the text is a reference to a California case quoting the definition of public policy from Story on Contracts, section 546: "It has never been defined by the courts, but has been left loose and free of definition, in the same manner as fraud. This rule may, however, be safely laid down that whenever any contract conflicts with the morals of the time and contravenes any established interest of society, it is void as being against public policy."

To limit the term "public policy" within the bounds of a fixed definition would be to render evasion of the law in that

respect a matter of easy invention. The law on the subject of contracts for attorney's fees has undergone changes in modern times. Once it was thought that to contract for a contingent fee was unlawful, but upon whatsoever theory that idea existed in past ages there is now no good reason for it and we have long since discarded it. Such contracts are as much for the benefit of the client as for the attorney, because if the client has a meritorious cause of action, but no means otherwise with which to pay for legal services, ⁵⁴³ unless he can, with the sanction of law, make a contract for a contingent fee to be paid out of the proceeds of the litigation, he cannot obtain the services of a law-abiding attorney, and if perchance he should find one who would secretly make with him a contract in violation of the law, he might put himself in unsafe hands.

We do not lay it down as a general rule that a contract by which a client agrees not to compromise a suit without the consent of his attorney is not contrary to public policy, for circumstances may well be supposed in which such a contract would be held to be illegal for that reason, but what we now say on the subject of public policy affecting the validity of a contract is said with reference only to the contract now before us.

If the plaintiffs had a right to make this contract, why did they not have the right to take security for its fulfillment? Does it conflict with the morals of the times or contravene any established interest of society, to insert into an otherwise lawful contract a clause designed to prevent the perpetration of the very fraud that was attempted to be perpetrated on these attorneys? What more palpable fraud could have been perpetrated than this woman attempted to perpetrate on her attorneys, whose services had already brought her adversaries to terms? The defendant in this case thinks it is immoral and subversive of society to allow the plaintiffs the benefit of that clause in their contract, yet he sees nothing wrong in attempting to withhold from them their half of the land under a deed made by their client in fraud of their rights.

Besides, the agreement restricting the right to compromise is often a protection of a client who, like Mrs. Wachsman for example, in needy circumstances and ignorant, is liable to be imposed upon by a crafty adversary. By the compromise now in question, Mrs. Wachsman for a total consideration of \$1,200 essayed ⁵⁴⁴ to convey one hundred and thirty-three acres of

land to which, as it turned out, she had a perfect title, and which, taking the lowest figure given by any witness, was worth at that time at least \$3,000, and as counsel for appellant in their briefs insist was at that time worth a great deal more. Even if she had been under no agreement with her attorneys not to compromise without their knowledge, what can we say of the moral conduct of the party who would deal with this poor old ignorant woman in the absence of her attorneys of record, and with what grace can a party who claims under such a transaction talk about contracts that contravene good morals and violate public policy? There is no more honorable class of men than attorneys at law, and as a rule they deal with their clients for their clients' best interest.

The case is discussed in the briefs as if it was the second contract only, to wit, the one dated November 18, 1886, that forbade the compromise without the consent of the plaintiffs. but a clause to that effect is also contained in the contract of June 1st.

In the last clause of the contract of June 1, 1886, in which settlement and compromise are mentioned, the conclusion of the sentence is, "All contracts in regard to said litigation shall be approved by said Lipscomb and Rust."

We hold that this contract was not contrary to public policy, and that under it the plaintiffs are entitled to an undivided one-half of the land in suit as compensation for their services rendered and agreed to be rendered.

4. The plaintiffs' claim to the other undivided half of the land rests on an entirely different basis; it rests on that part of the contract of November 18, 1886, which provides that Lipscomb and Rust may become the purchasers of Mrs. Wachsman's half on paying to her \$2,500. So that as to that half they are seeking a specific performance of a contract to purchase.

545 The difficulty with that part of the plaintiffs' case is that there is no consideration to support the promise of Mrs. Wachsman to sell her half. The contract is not mutual; Mrs. Wachsman agrees to sell, but Lipscomb and Rust do not obligate themselves to buy. The language is: "It is further agreed that if the said Mrs. Wachsman shall recover said land, inasmuch as said Lipscomb and Rust will be entitled to one-half the same under said contract of June 1, 1886, and are desirous of owning the whole of said land, said Wachsman for and in consideration of \$2,500 to be paid in cash will convey

to said Lipscomb and Rust by good and sufficient deed said land free and clear," etc.

Reduced to its substance that means it was agreed by the parties that when Mrs. Wachsman recovered the land she would convey her half to Lipscomb and Rust for \$2,500 cash. But suppose that when that time came Lipscomb and Rust did not care to buy, what could Mrs. Wachsman do about it?

If that clause had been inserted in the first contract, June 1st, the agreement to sell might have been construed as a part of the consideration for the services to be rendered, that is, that in compensation for their services the attorneys were to have one-half the land recovered and the right to buy the other half for \$2,500. But this clause was not in that contract, the attorneys by the contract of June 1st had already obligated themselves to render those services for one-half the land to be recovered, Mrs. Wachsman was entitled to that without further burden; therefore, when she took upon herself an additional obligation a new consideration was required to support it.

The meaning of the language employed in that clause is not entirely beyond doubt, and it may be that viewing it from one standpoint it would be susceptible of a construction that would, from the express agreement ⁵⁴⁶ to sell, imply an agreement to buy; that is to say, if at the end of the then contemplated litigation Mrs. Wachsman had been in a condition to sell and had tendered a deed and demanded the price, and been refused, she might have had an action for a breach of the implied contract. But if under that state of the case the contract would be held to be susceptible of that construction, it could be so on the ground that it ought to be construed most strongly in favor of the client. Because when this second contract was made the relation of attorney and client already existed. But when the attorney sues to enforce specific performance of a contract which he made with his client, and which he himself wrote, if there is a reasonable doubt about the meaning of the language in which his obligation is expressed, it should be construed, as to him, *contra proferentem*.

We hold that the agreement of Mrs. Wachsman to sell her half of this land for \$2,500 was not supported by any consideration and the plaintiffs are not entitled to a specific performance: *Davis v. Petty*, 147 Mo. 382, 48 S. W. 944.

5. The point is made by the appellant that the plaintiffs have waited too long and their cause is stale.

There is no such adverse possession of the land as to bar the plaintiffs' right to sue for their one-half, and defendant has not suffered by the delay. The improvements, if they deserved to be so called, made by defendant before the institution of this suit were of a trifling character. He himself testified that he got as much off the land as he paid out for taxes. There is nothing in that point.

The only error in the record is in that part of the decree which awards the plaintiffs a specific performance of their alleged contract to purchase Mrs. Wachsman's half of the land.

The judgment is reversed and the cause remanded to the circuit court, with directions to enter a decree on ⁵⁴⁷ the first count vesting the title to an undivided half of the thirteen acres of land in controversy in the plaintiffs, and judgment on the second count for possession of that undivided half, with \$15 damages and rents at the rate of twenty-one and one-fourth cents per month from May 16, 1903, until paid, and as to the other undivided half the decree and judgment be entered for defendant, plaintiffs having leave to withdraw the \$250 paid into court by them.

All concur.

Contracts with Attorneys for a contingent fee are now pretty generally recognized as valid: See the monographic note to *Shirk v. Neible*, 83 Am. St. Rep. 175. Compare *Gargano v. Pope*, 184 Mass. 575, 100 Am. St. Rep. 575. Perhaps the attorney, however, has the burden to prove that the agreement is a fair one for his client: *Lynde v. Lynde*, 64 N. J. Eq. 736, 97 Am. St. Rep. 692.

A Client is Generally Accorded the Right to compromise an action without the consent of his attorney, and an agreement abridging that right is usually regarded as against public policy: See the monographic note to *Cameron v. Boeger*, 93 Am. St. Rep. 172-175.

STATE v. FEELEY.

[194 Mo. 300, 92 S. W. 663.]

HOMICIDE—General Threats Having No Reference to the Deceased.—Language amounting to general threats having no reference to a homicide which occurred several hours afterward are not admissible as parts of the *res gestae*, but may be admitted to show general malice and a disposition on the part of the defendant to do a criminal act, though the person afterward, on the same day, killed by him was not known to him at the time of making the threats. (p. 520.)

APPEAL AND ERROR.—Matters of Exception Occurring in the Presence of the Court cannot be shown by affidavit, unless the court refuses to sign a bill of exceptions when presented to him, on the ground that the matters stated in some of them are not true. (p. 520.)

APPEAL AND ERROR.—If the Cross-examination in a Criminal Case is not Prejudicial, it will not entitle the defendant to a new trial, though it embraces subjects not proper for such examination, as where the defendant is asked whether certain persons were present at the time and place designated by him, he not having testified respecting such persons on his direct examination and no evidence being subsequently submitted tending to show that his answers were not true. (pp. 520, 521.)

HOMICIDE—Reputation of Deceased When Drinking, Rebuttal of by Proof of General Reputation.—If the defendant in a prosecution for murder introduces evidence to show that the deceased was quarrelsome and dangerous when drinking, the prosecution is entitled to introduce in rebuttal evidence to prove the general reputation of the deceased in the neighborhood where he lived for peace, quiet and good citizenship. (pp. 522, 523.)

HOMICIDE—Evidence of the Dangerous Character of the Deceased, Though not Known to the Accused.—Where there is doubt whether a homicide was committed maliciously or from a well-founded apprehension of danger, the defendant is entitled to show that deceased was a violent and desperate man, though this fact was not known to the defendant before the homicide. (p. 524.)

HOMICIDE, Motives, Instructions on Question of, When not Necessary.—It is not error to fail to instruct a jury in a homicide case on the question of motive, if the defendant has testified that he shot the deceased because afraid that deceased was going to kill him, and in the instruction on the right to self-defense he was given the full benefit of such motive. (pp. 524, 525.)

HOMICIDE—Self-defense.—When one enters upon a difficulty for some unlawful purpose, such as gratifying malice, there can be no self-defense. (p. 526.)

WITNESS, Instruction Respecting Impeached.—If evidence has been offered and received tending to impeach a witness, the court may instruct the jury that if any witness has been impeached, they are not bound to disregard his testimony, but are at liberty to disregard the whole or any part thereof or to believe or disbelieve him, as they believe he has testified truly or falsely in the cases. (pp. 526, 527.)

HOMICIDE—Right of the State to Elect to Prosecute for Murder in the Second Degree.—Under an indictment for murder in

the first degree, the state, with the permission of the court, may elect to prosecute defendant for murder in the second degree. (p. 527.)

HOMICIDE.—An Instruction Eliminating the Question of Murder in the Second Degree may be refused if there is evidence sufficient to authorize an instruction on both degrees of murder. (p. 527.)

APPEAL AND ERROR.—Amendment of the Record.—No record lodged with the clerk of the appellate court can be changed without the permission of that court duly entered of record at the time. (p. 528.)

Scott & Bowker, Francisco & Clark and W. W. Graves, for the appellant.

Herbert S. Hadley, attorney general, and N. T. Gentry, assistant attorney general, for the state.

³⁰⁵ **BURGESS, P. J.** At the October term, 1903, of the circuit court of Bates county the grand jury of said county preferred an indictment against the defendant, Robert Feeley, charging him with murder in the first degree, in having, on the eighth day of September, 1903, at said county, shot and killed, with a pistol, one Martin Hoots. There were two mistrials. Thereafter, at the May term, 1905, of said court the defendant was again put upon trial on the charge of murder in the second degree, convicted and his punishment assessed at ten years' imprisonment in the penitentiary. He filed motions for new trial and in arrest of judgment, which ³⁰⁶ being overruled, he saved his exceptions, and appeals to this court.

The evidence tends to show that the defendant was born and raised in Bates county, near a small town called Burdette. The defendant, some twelve years before the trial of this cause, moved to Nevada, in this state, where he has resided ever since. On the eighth day of September, 1903, defendant left his home in Nevada for the purpose of visiting his father at his home near Burdette. He went by train to a little place called Archie, where he hired one Frank Calhoun to take him in a buggy to Burdette. While on the road to said town the defendant pulled a pistol out of his pocket and remarked to Calhoun that he was a straight shot and a game man, and that he, Calhoun, would find it out before he got back. When Burdette was reached they saw Martin Hoots, the deceased, with a gun on his shoulder, walking along in front of a store owned by a man named Buel Mudd. There was evidence tending to show that de-

fendant said, "There goes a dirty coward," and that deceased, who appeared to have heard the remark, replied, "If he calls me a dirty coward I will take it up." Deceased went into the store to buy some shotgun shells, but was told that there was none in stock. Deceased then set his gun down in the store, and a friend picked it up and carried it away to the residence of Dr. Cash. David Roach was sitting on the porch of the store when defendant got out of his buggy. As deceased came out of the store and was passing by Mr. Roach, he greeted the latter with, "Hello, Dave." Defendant, who was near by said, "Who in the hell are you?" Deceased replied, "I don't know as it's any of your business." Defendant then said, "You are not so game but what I am just as game as you are"; to which deceased replied, "If you are looking for trouble you are up against it." Then defendant said, "You run on home," and deceased rejoined, "You had better make me run on home." Mr. Roach then walked away with deceased ³⁰⁷ about a distance of sixty feet and deceased asked who that was, at the same time saying he thought it was Bob Feeley, and that he loved every man named Feeley. He also told Mr. Roach that he had had some trouble with Jim Fenton, and had shot at the latter to scare him, but that the next time he shot he would shoot to kill Fenton. Professor Maxey, who was near by, saw defendant on the porch of Roach's store take a pistol out of his pocket, wave it around his head, and then walk off the porch. Defendant followed after deceased, but Mr. Roach took hold of him and led him back to the store, when defendant said, "Who is that son-of-a-bitch?" Being told deceased's name, defendant said, "He is looking for trouble; I will fix him if he bothers me." Defendant then took his pistol out of his pocket and exhibited it to Roach and others. He appeared to be intoxicated, and he and deceased, who was drinking, had several disputes during the afternoon.

Deceased and one Jim Fenton, who lived near the edge of the town, had had some trouble in the forenoon of the day of the homicide, and deceased had been up to Fenton's a time or two to see him. After he returned from Fenton's house, the last time he was there, and about half an hour before the shooting, one Wilkerson introduced deceased to the defendant. The two men shook hands, the deceased remarking, "Give me your hand, Bob; I understand you are

a brother of Crit and Frank Feeley." Both men appeared to be friendly, and a short time afterward they were seen by several persons standing near the hitch rack, drinking whisky. Calhoun, seeing the defendant's condition, tried to get him away, and did succeed in getting him into the buggy. Just then the deceased passed by, on his way to the store, and said to the men standing there, "The coward would not come out." About this time some man came out of the blacksmith-shop and told defendant that deceased was talking about him, and defendant at once got out of the buggy and told Calhoun to go on home. ³⁰⁸ Cothrien, a witness, told the defendant to get back in the buggy, and assured him that deceased was talking about Jim Fenton, with whom he had had trouble. Defendant then said he was going to see Fenton, and started toward Fenton's residence, and while on the way he met Mrs. Fenton and had a talk with her, after which he was seen at the back of said blacksmith-shop, where he again met deceased. A witness saw deceased take a drink out of defendant's bottle and then throw the bottle down. The two men stood talking for a few minutes, when defendant fired a shot, and deceased fell. Defendant then fired four more shots in rapid succession, which took effect upon deceased, and he also struck deceased on the back of the head with his pistol. He then threw his pistol and hat on the ground and walked toward an iron bridge, a short distance off. While on the bridge defendant waved his hands over his head several times, and then returned to where the dead body lay. In the meantime several persons appeared on the scene and saw that Hoots was dead, and that defendant's hat, a whisky bottle and a 38-caliber pistol were lying on the ground near by. One of the shots entered deceased's body about one and a half inches to the left of the median line and came out at about the same distance to the right of said line. Another bullet entered just under the left eye and came out above the right ear, passing through the brain. Three bullets entered in the back. Defendant asked the people who had gathered near the body who the deceased was, and when some one remarked that the man was dead, defendant said, "He is not dead to me." About this time a rainstorm was brewing, and the persons present moved the dead body to the store, and gathered up some rocks and marked therewith the place

where the body lay. There was evidence to show that there were no rocks nearer than twenty feet to the body at the time, but upon this question the evidence was conflicting. The deceased had no weapons on his person at the time of the shooting. ³⁰⁹ That night defendant was heard say, "I am the worst son-of-a-bitch in town; he has been running over me all day, and now I have shot it into the back of his neck; shot it in right." He used similar expressions in the hearing of others.

The evidence upon the part of the defendant tended to show that there were rocks at the place where the deceased fell when shot. Defendant also showed by a number of witnesses that his reputation for peace and good order at Nevada, where he lived was good. He also testified in his own behalf substantially as follows:

"Q. You may state your name to the jury. A. Robert Feeley.

"Q. You are the defendant in this case, are you, Mr. Feeley? A. Yes, sir.

"Q. How old are you, Mr. Feeley? A. Forty years old.

"Q. Are you a married man. A. Yes, sir.

"Q. Son of Uncle Norris Feeley of this county? A. Yes, sir.

"Q. Where were you born? A. Out west of Burdette.

"Q. West of Burdette. Mr. Feeley when did you leave Bates county and Cass county and go south? A. About eighteen years ago.

"Q. How much of that time, where did you live? A. Nevada.

"Q. How much of that time have you lived in Nevada? A. About twelve years.

"Q. What is your business? A. Barber.

"Q. On the eighth day of September, 1903, where did you start? A. Started to my father's.

"Q. Your father's. State to the jury, Mr. Feeley, what time you got to Burdette about? A. Why, I guess about 4 or 5 o'clock about.

"Q. 4 or 5 o'clock? A. Yes, sir.

"Q. Well, just state to the jury when you got to Burdette and what you did? A. I got out of the buggy ³¹⁰ and stepped upon the porch and met Mr. Roach. Met Mr. Roach there and was talking to him.

"Q. Where was it you got out? A. Mr. Mudd's store.

"Q. Mr. Buel Mudd's store?

"Q. Mr. Feeley, when and where was the first time you saw the deceased, Martin Hoots? A. I was standing on the store porch and he came up.

"Q. Had you ever met or heard of Martin Hoots prior to that time? A. No, sir.

"Q. What was he doing when you first saw him? A. He was going south.

"Q. State to the jury what, if anything, he had. A. He had a shotgun.

"Q. State to the jury what conversation, if any, you had with the deceased, or in his presence. A. Well, he came up and I asked Mr. Roach who he was. He says, 'He is Martin Hoots,' and he said, 'It's none of your business.'

"Q. Who said that? A. Mr. Hoots did.

"Q. Mr. Hoots said, 'It's none of your business'?

"Q. Mr. Feeley, what further conversation, if any, did you have there with Mr. Hoots? A. Why, Mr. Roach says, 'That is Uncle Norris Feeley's son,' and he said he had an order on Crit, my brother, for some money and I told him I guess Crit would pay it and he talked a few minutes and he walked on away.

"Q. When he left you where did he go? A. He went south.

"Q. Which way? A. Toward the old blacksmith-shop.

"Q. Where did you go when the deceased started toward the old blacksmith-shop, where did you go? A. I went out south of the store to get in and go home.

"Q. Who did you see, if anyone, while you were at the buggy? A. Uncle Dan Cothrien.

"Q. When did you next see the deceased, Martin Hoots, Mr. Feeley? A. He came up to the buggy.

311 "Q. Coming which way? A. From the west.

"Q. What did he have with him, if anything? A. He had a shotgun.

"Q. State to the jury what, if anything, Martin Hoots said when he addressed you. A. Well, he said, 'The God damned son-of-a-bitch was a coward; he wouldn't come out.'

"Q. What did you do then? A. I stepped out of the buggy.

"Q. Was anything further said there at that time between you and Mr. Hoots? A. No, sir.

“Q. What became of Hoots? A. He went on north toward the store.

“Q. Where did you go? A. I went over behind the store to the old schoolhouse.

“Q. Back of the old schoolhouse? A. Yes, sir.

“Q. How did you happen to go over there? A. Well, Mrs. Fenton was over there and she called me to come over.

“Q. Did you have any conversation with Mrs. Fenton? A. Yes, sir.

“Q. What was it? A. Back of the schoolhouse.

“Q. Was it, or was it in the schoolhouse yard? A. It was in the schoolhouse yard.

“Q. State what conversation, if any, you had with Mrs. Fenton, in regard to the deceased, Martin Hoots. A. Well, I was talking with her and going to go up home with her and she said for me not to go with her, that her son Jim had been having trouble with Hoots and for me not to go, that he was a dangerous man to go about and I didn't go.

“Q. Where did you next see the deceased, Martin Hoots? A. In behind the blacksmith-shop.

“Q. What, if anything, was said by you, or Hoots? A. Why, he called for me to come over where he was.

“Q. Where were you when he called you? A. I was in the schoolhouse yard.

312 “Q. Where was Hoots? A. He was back of the blacksmith-shop.

“Q. Did you go to the back end of the blacksmith-shop where Hoots was? A. Yes, sir.

“Q. What was said by you or Hoots when you got over there, if anything? A. Well, he wanted to know what God damned old woman that was I was talking to. I told him it was old Grandma Fenton. He says, ‘God damn it. I have been up to Fenton’s two or three times after Jim,’ and he says, ‘The coward won’t come out.’ He says, ‘I have had trouble with him.’ He says, ‘I made him and sheriff Mudd leave town,’ and this town belonged to him. And he asked me if I had any whisky and I told him yes, and he wanted a drink and I pulled out my bottle and handed it to him and he says, ‘No, you take a drink.’ I took a drink and then he drank and threw it down. He says, ‘This whisky is no account; bad stuff,’ and he says, ‘Just like you.’ He says, ‘I am going to make you go home.’ I told him if he would wait a few minutes I would go home without making. He says, ‘No, you ain’t, I am going to make you go now.’ He

stepped toward me and I stepped back and pulled my gun and told him to stand back, I didn't want any trouble. He reached back to pick up a rock and then I commenced shooting.

"Q. Now, Mr. Feeley, just stand up here and show the jury the position Hoots was in when you commenced firing the pistol. Just come down here, I guess you had better. Which way, first, was Mr. Hoots standing from you when you had this conversation with him? A. He was standing about like that (indicating).

"Q. Where was he with reference to where I would be? Say I am Hoots; which way was he—what direction? A. I was west of Hoots about where you are standing.

"Q. Now just show the jury what position Hoots was in when you fired the first shot. A. Something like this (stooping down).

313 "Q. Where were you standing if you were Hoots? A. About where I was.

"Q. Now, Mr. Feeley, how many shots did you fire, do you know? A. No, I emptied my gun.

"Q. Mr. Feeley, what was the position of Hoots when you fired the last shot? A. Well, it was about straight.

"Q. You may state to the jury why you shot Martin Hoots? A. Well, sir, I did because I—

"Mr. Jackson (Interrupting): 'I object to that.'

"Court: 'Overruled.'

"A. I done it because I was afraid he was going to kill me.

"Q. Was going to kill you? A. Yes, sir."

Over the objection and exception of defendant, the court gave fourteen instructions covering murder in the second degree, self-defense and reasonable doubt, only two of which, the eleventh and fourteenth instructions, are criticised. The grounds of objection and criticism will be reviewed later in this opinion.

It is contended by defendant that the court committed error in admitting in evidence, over the objection of defendant, the testimony of witness Calhoun, which was to the effect that while on the way from Archie to Burdette, defendant said to him, "He was a straight shot and he was a game man, and I would find it out before I got back." The contention is that, while admitted as a threat, it is too vague and indefinite to be called such, and that even if it could be so called, it

was inadmissible. That defendant did not know the deceased at the time is clearly shown by the evidence, and the threat could not, therefore, have been made against him in particular. In *State v. Crabtree*, 111 Mo. 136, 20 S. W. 7, it was held that general threats made by the defendant before the homicide, and having no reference to the deceased, were not admissible in evidence against him. But in that case the evidence showed that the threats applied to the members of defendant's own ³¹⁴ family, if to any in particular, and had no reference whatever to the deceased. In *Godwin v. State*, 38 Tex. Cr. Rep. 466, 43 S. W. 336, that case was cited with approval. In the last case cited, which was a prosecution for murder, it was held that testimony of threats made by the defendant on the day preceding the homicide to kill somebody, but not directed in any way toward the deceased, was inadmissible. Practically the same rule is announced in the case of *Strange v. State*, 38 Tex. Cr. Rep. 280, 42 S. W. 251. Council for defendant also cite *Whitaker v. Commonwealth (Ky.)*, 17 S. W. 358, as sustaining the contention of the defendant, but it does not do so. On the contrary, it was ruled that general threats, while not competent as part of the *res gestae*, part of the bloody transaction, were competent as showing general malice, and a purpose to injure or kill some one, and the deceased became the victim.

In the recent case of *State v. Brown*, 188 Mo. 451, 87 S. W. 519, Fox, J., in speaking for the court, held such threats to be admissible in evidence, "as indicating the existence of a frame of mind or disposition from which criminal actions proceed, and the action of the court in overruling the objections of defendant to the introduction of those statements is fully supported by the rule as announced upon this subject in *State v. Grant*, 79 Mo. 113, 49 Am. Rep. 218; *State v. Guy*, 69 Mo. 430; *State v. Hamilton*, 170 Mo. 377," 70 S. W. 876.

In *Hopkins v. Commonwealth*, 50 Pa. St. 9, 88 Am. Dec. 518, the rule is stated in the following language: "Nor was it necessary that the premeditated malice should have selected its victim. If the jury believe that the defendant had formed the deliberate design to kill somebody, and in pursuance of that purpose, within an hour after declaring it, did kill McMarity, the commonwealth has a right to insist upon his conviction of murder in the first degree, and that they might thus insist, they had a right to prove his declaration an hour before the deed."

In *Brooks v. Commonwealth*, 100 Ky. 194, 37 S. W. 1043, it is held that general ³¹⁵ threats by the accused to kill someone, made shortly before the homicide, were admissible to show malice, without proving that such threats were directed toward any particular individual. The court said: "According to the weight of authority, the testimony of the other witnesses of general threats made by the accused or of his purpose to do an act which would be criminal, the like of which followed, was admissible in order to establish 'general malice and purpose to injure or kill some one,' of which the deceased became a victim."

We do not think the threat proven in the case at bar was admissible in evidence as part of the *res gestae*, because it had no immediate connection with the homicide, which occurred several hours afterward, but we do think, according to the weight of authority and the rule announced in our own decisions, it was admissible to show general malice and a disposition on the part of the defendant to do an act which was criminal, such threat to be given such weight by the jury as they, under all the circumstances, thought it entitled to.

The point is made by defendant that the court erred in permitting W. O. Jackson, counsel for the state, in course of his argument to take a pistol, and have Mr. Ludwick, the prosecuting attorney, assume different attitudes in front of the pistol in order to demonstrate what could or could not have been the range of the shots. But no such occurrence is shown by the bill of exceptions, and cannot, therefore, be considered by this court. Matters of exception which occur in the presence of the court cannot be shown by affidavits, unless the court refuses to sign the bill when presented to him upon the ground that the matters therein stated, or some of them, are not true: *State v. McAfee*, 148 Mo. 370, 50 S. W. 82; *State v. Grant*, 144 Mo. 56, 42 S. W. 827; *State v. Lamb*, 141 Mo. 298; *State v. Reed*, 154 Mo. 122, 55 S. W. 278.

Defendant testified in his direct examination to going to the schoolhouse yard and talking to Mrs. Fenton, and to returning to a point behind the blacksmith shop, ³¹⁶ and there seeing and talking with deceased; and, over the objection of defendant, the prosecuting attorney, in the cross-examination of defendant, was permitted to ask him about the presence of Rich Haley, Toney Rhodes, Willie Nelson and Sol Wilkerson there at the same place and time, although he

had not testified to the presence of either of them in his examination in chief. Defendant contends that this was error. Section 2637 of the Revised Statutes of 1899, by implication, prohibits the cross-examination of a defendant in a criminal case, who testifies in his own behalf, touching matters not testified to by him in his examination in chief, if timely objection be interposed to such cross-examination; and it has been held that the defendant can only be cross-examined as to matters referred to by him in his examination in chief: *State v. Chamberlain*, 89 Mo. 129, 1 S. W. 145; *State v. Patterson*, 88 Mo. 88, 57 Am. Rep. 374, and authorities cited. But we do not think that such a cross-examination, regardless of the fact that it may not be prejudicial to the defendant or work him any harm, should, ipso facto, be ground for the reversal of a judgment of conviction; otherwise the most immaterial matter elicited from a defendant on cross-examination and not testified to in chief would authorize the reversal of a judgment of conviction. We cannot believe that such was the intention of the legislature in passing the law. Whether the persons named, or either of them, were present at the time and place indicated was entirely immaterial for the purpose of this inquiry, and we are unable to see in what way the mere fact that defendant was improperly cross-examined as to their presence could prejudice his case. Moreover, none of these persons was introduced as a witness by the state for the purpose of contradicting the defendant with regard to the fact of his or their presence at the time and place indicated. In an exhaustive review of the authorities upon this question, at the present term of the court, in the case of *State v. Barrington*, not yet reported, Fox, J., in speaking ³¹⁷ for the court, held that the cross-examination of a defendant upon immaterial matters not testified to by him upon his examination in chief will not, when no evidence is offered by the state to contradict him, justify a reversal of a judgment of conviction.

It is said for defendant that the court erred in permitting the state to show the general reputation of deceased when not drinking, when the defendant had only introduced evidence tending to show that deceased was a quarrelsome and dangerous man when drinking. The argument is that such evidence upon the part of the state was improper, not rebuttal, and brought forward an issue not raised by the defendant.

The record shows that, in rebuttal to testimony offered by defendant tending to show that deceased was a quarrelsome and dangerous man when drinking, the state introduced evidence tending to prove that the general reputation of deceased in the neighborhood in which he lived for peace and quiet and good citizenship was good.

In support of the contention of defendant, *Keener v. State*, 18 Ga. 194, 63 Am. Dec. 269, is chiefly relied upon. In that case the deceased, who was a railroad conductor, was killed by Keener in a brothel. Upon his trial for murder the defendant proposed to prove the general character of deceased for violence in the particular place where the difficulty occurred, to which the state objected and the evidence was excluded. The case went to the supreme court of that state, and the judgment of conviction was reversed upon the ground of the exclusion of said evidence, the court expressly repudiating the general doctrine that a person can have but one general reputation, and that in the neighborhood only in which he lives, and holding that "a man may have different general characters, adapted to different circumstances and localities; that is, a character for rail-cars and a character for the brothel; a character for the church and one for the street; a character when drunk and a character when sober." Wigmore on Evidence, volume 2, section 1616, is another ³¹⁸ authority relied upon by defendant as sustaining his contention. The doctrine announced in the Keener case forms the basis of the text in that work upon this subject. These authorities, with perhaps one exception, namely, *Atlantic etc. R. R. v. Reynolds*, 117 Ga. 47, 43 S. E. 456, are the only ones to which our attention has been directed, or that we have been able to find after diligent search, which announce this doctrine. But even these do not sustain defendant's contention, because it is not pretended in this case that deceased had acquired any kind of reputation at any place other than in the neighborhood in which he resided, while the question decided in Keener's case, upon which the other authority cited by defendant is based, was that a man may acquire and have, at the same time, different general reputations in different places or localities. While it would have been proper for the defendant to show by testimony the general reputation of deceased in the neighborhood in which he lived for violence and quarrelsomeness when drunk, yet, under the circumstances hereinafter to be noted, that was only one trait

or quality of his disposition which went to make up his general reputation, and not separable from it, and the state should not, therefore, be deprived of the right to show, in rebuttal, his general reputation for peace, quiet and good citizenship in the neighborhood in which he resided.

In the case of *Hussey v. State*, 87 Ala. 121, 6 South. 420, it was said: "There was no error in allowing the state to prove the good character of the deceased for peace and quiet. The ground of objection to this evidence seems to be that the general reputation of the deceased had not been put in issue, but only the particular traits of his character as a quick-tempered, violent man, easily provoked, and likely to provoke a difficulty. If these traits of disposition are provable at all—which we do not decide—they are not separable from the question of character. It is plain that the state could rebut this evidence by proof of defendant's [sic] reputation for ³¹⁹ peace and quiet, the whole question of character often going to the intent with which an alleged crime was committed, 'the prevailing character of the party's mind, as evinced by the previous habits of his life, being a material element in discovering that intent in the instance in question': 1 Greenleaf on Evidence, sec. 54, note 3."

Whether or not, in a trial for murder, where it is doubtful whether the homicide was committed with malice or from a well-grounded apprehension of danger, the defendant has the right to show the quarrelsome and dangerous reputation of the deceased, as tending to show that the killing was not in malice, regardless of the fact that he may not know it at the time of the killing, as well also as to whether the defendant has the right to show such reputation under any circumstances, the authorities are much in conflict. In *State v. Hicks*, 27 Mo. 588, the rule that defendant must at the time of the killing have knowledge of the reputation of deceased for being a quarrelsome and dangerous man was expressly recognized by an instruction asked by defendant himself, which was refused by the trial court, and which this court ruled should have been given. While that case was followed in some respects in *State v. Keene*, 50 Mo. 357, the rule was not followed respecting the necessity of knowledge on the part of defendant of the general reputation of the deceased in order to entitle him to introduce evidence tending to show that deceased's general reputation was that of a quarrelsome and dangerous man. The court said: "When the homicide

is committed under such circumstances that it is doubtful whether the act was committed maliciously, or from a well-founded apprehension of danger, it is very proper that the jury should consider the fact that the deceased was turbulent, violent and desperate, in determining whether the accused had reasonable cause to apprehend great personal injury to himself." The same rule is announced in *State v. Bryant*, 55 Mo. 75. The same question was before this court again in *State v. 320 Downs*, 91 Mo. 19, 3 S. W. 219, in which it is said: "When the killing has been done under such circumstances that there is doubt as to whether the act was done from malice or from a sense of real danger, testimony of the turbulent character of the deceased may be received, and should be admitted, as tending to show and explain the motive that prompted the act"; citing *State v. Hicks*, 27 Mo. 588; *State v. Elkins*, 63 Mo. 159; *State v. Keene*, 50 Mo. 357; *State v. Bryant*, 55 Mo. 75. In the more recent case, however, of *State v. Kennade*, 121 Mo. 405, 26 S. W. 347, it was held that evidence as to the reputation of deceased for quarrelsomeness was properly rejected, it not having been shown that defendant knew it. The court said: "Even if deceased had a reputation for being quarrelsome and dangerous, evidence of it could not have been received unless it had been previously shown that defendant knew it, and therefore might more reasonably apprehend danger in certain circumstances than if that reputation had been different. As this knowledge of defendant of the reputation of deceased is affirmatively shown by his testimony not to have existed, an answer to the question asked the officers was correctly denied," citing *State v. Hicks*, 27 Mo. 590. That case is clearly in conflict on this point with the previous decisions of this court which we have cited, and should not longer be followed.

In the case at bar, defendant testified that he shot deceased because he was afraid deceased was going to kill him, and under such circumstances evidence of the character of the deceased for being quarrelsome and dangerous when drinking was properly admitted.

A point is made upon the failure of the court to instruct the jury upon the question of motive when requested by defendant to instruct upon all the law of the case. No instruction upon this particular feature of the case was necessary, for, according to the defendant's own testimony, he shot de-

ceased because he was afraid he was going to kill him. In other words, his motive in ³²¹ shooting deceased, if his testimony be true, was to defend himself against the apprehended assault which was then about to be made upon him by deceased; and in the instruction on the right of self-defense given in the case defendant was given the full benefit of such motive. Moreover, there was no error for failure to instruct upon motive, "because a man is not to be acquitted of crime simply because his motive for perpetrating it cannot be discovered": State v. Brown, 168 Mo. 449, 68 S. W. 568; State v. David, 131 Mo. 380, 33 S. W. 28.

Instruction No. 11 is claimed to be erroneous upon the ground of absence of evidence tending to show that defendant voluntarily entered into the difficulty. This contention is groundless. The evidence tended strongly to show that defendant was rather anxious to get into a difficulty with some one, particularly the deceased; certainly he did not try to avoid it. His frequent aggravating remarks in the presence of, and directed toward, the deceased for the evident purpose of provoking him into a difficulty, his shooting him while unarmed and even after he was down, and all the circumstances connected with the killing, show that defendant not only voluntarily entered into the difficulty for the purpose of wreaking his malice upon the deceased, but that he sought and provoked it for such purpose. But, says defendant, even if there was evidence authorizing the instruction, the form and wording in which it is couched is erroneous. In support of this position defendant relies upon State v. Rapp, 142 Mo. 443, 44 S. W. 270. Instructions Nos. 1 and 2, commented on in that case, deprived the defendants therein of the right of self-defense if they voluntarily entered into the difficulty, whatever their motive, even though it might have been for the sole and only purpose of defending themselves against the assault of their adversary, while under the law it is only where the difficulty is entered into for some unlawful purpose, such as taking the life of the ³²² adversary or to do him some great bodily harm, as provided in the instructions in this case, that the defendant is deprived of the right of self-defense. "Self-defense is an affirmative, positive intentional act," and it logically follows that such act is voluntary: State v. Gilmore, 95 Mo. 554, 8 S. W. 359, 912. In speaking for the court in the case of State v. Gordon, 191 Mo. 114, 109 Am. St. Rep. 790, 89 S. W. 1025.

Gantt, J., said: "It has been ruled in various cases by this court that self-defense is an affirmative, intentional act, and in that sense is voluntary, and while, perhaps, it was too strongly put in *State v. Rapp*, 142 Mo. 443, 44 S. W. 270, to say that 'voluntarily entering into a difficulty is not an ingredient of any homicidal crime,' as was said in that case, still we think that it is clear that when one is assaulted by another and he neither brought on or voluntarily entered into such a difficulty with a view to take advantage of a quarrel begun between him and his opponent, he does not forfeit his right of self-defense by voluntarily resisting the assault made upon him, and if the circumstances are such that when thus assaulted he has reasonable cause to believe, and does believe, that his opponent then and there entertains a design to kill him or do him some great bodily harm, and there is imminent danger of the accomplishment of such design, then he may resist the accomplishment of such a purpose by killing his adversary to prevent the accomplishment of such a purpose." But, as we have said, when the difficulty is entered into for some unlawful purpose, such as wreaking or gratifying malice, then there can be no self-defense in the case. The position taken by the defendant with reference to this instruction is, we think, clearly untenable.

In the brief of counsel for defendant it is insisted that instruction No. 14 is erroneous, in that it is a direct comment upon the evidence of W. T. Simpson, who was a witness for the state. The position is that no other witness was impeached in the way indicated by the instruction, and that the effect of it was to bolster ³²³ up his testimony. The case of *State v. Rutherford*, 152 Mo. 124, 53 S. W. 417, is relied on by defendant to sustain his contention; but the reason the instruction in that case was condemned was because it singled out certain evidence which was before the jury and gave it marked prominence, when the weight of all the evidence was for the consideration of the jury. The instruction in this case in no way intimated to the jury the weight to be given to the testimony of any particular witness, but told them, as it should, that if any witness had been impeached, they were not for that reason bound to disregard his testimony, but were at liberty to disregard the whole or any part of the testimony of such witness, or believe or disbelieve him, as they might believe that he had testified truthfully or falsely in the case. That the instruction may not have applied to

any other witness than Simpson makes it no more objectionable than an instruction which tells the jury that if they believe that any witness has willfully sworn falsely to any material fact, they might disregard all or any part of the testimony of such witness as might seem to them proper, which has so often been approved by this court that it seems unnecessary to cite the decisions upon the subject.

A further contention is that the court should have instructed the jury to acquit the defendant of murder in the second degree. The argument is that the evidence of Simpson, a witness for the state, and the only person who saw the killing, makes it murder in the first degree, and that defendant was not tried for that crime; that all the evidence showed it to be murder in the first degree or nothing. When a person is indicted for murder in the first degree, as in this case, the state, with the permission of the court, may elect to prosecute him for murder in the second degree, and the defendant will have no right to complain of the course of the state in electing to prosecute him for a less than the highest grade of homicide: Rev. Stats. 1899, sec. 2369; *State v. Talmage*, ³²⁴ 107 Mo. 543, 17 S. W. 990; *State v. Lowe*, 93 Mo. 547, 5 S. W. 889; *State v. Keeland*, 90 Mo. 337, 2 S. W. 442; *State v. Nelson*, 88 Mo. 126; *State v. Wagner*, 78 Mo. 644, 47 Am. Rep. 131; *State v. Burk*, 89 Mo. 635, 2 S. W. 10; *State v. Moxley*, 115 Mo. 644, 22 S. W. 575. While the case of *State v. Talmage*, 107 Mo. 543, 17 S. W. 990, has been expressly overruled as to what it takes to constitute manslaughter in the third degree (*State v. Pettit*, 119 Mo. 410, 24 S. W. 1014; *State v. Barutio*, 148 Mo. 249, 49 S. W. 1004), its correctness in all other respects has never been questioned by this court. In a homicidal case, it is only when there is no evidence to authorize an instruction upon the particular grade of the offense upon which an instruction has been given that it will be held to be erroneous. Here there was sufficient evidence to authorize instructions upon both degrees of murder; hence, there was no error in instructing upon the lower grade of the offense, or in refusing to instruct the jury to acquit defendant of that offense. As was said by Gantt, P. J., in speaking for the court, in *State v. Silk*, 145 Mo. 240, 44 S. W. 764, 46 S. W. 959: "It is urged that the offense was murder in the first degree or nothing; that the court ought not to have instructed for murder in the second degree. We think the evidence shows

an intentional killing with a deadly weapon, which alone raises the presumption of murder in the second degree."

The issues in this case were submitted to the jury upon instructions which covered every feature of the case and which were very fair to the defendant. They were fully justified by the facts disclosed by the record. According to the testimony of defendant himself, and all the facts connected with the homicide adduced in evidence, defendant was guilty of murder in the first or second degree, or else the killing was in self-defense. The jury found him guilty of the offense for which he was put upon trial, and we think the verdict was fully warranted by the evidence. The judgment should be affirmed. It is so ordered.

All concur.

325 ON MOTION FOR REHEARING.

BURGESS, P. J. An opinion was delivered in this case on the thirty-first day of January last, affirming the judgment of the trial court, in which we declined to pass upon instructions Nos. 11 and 14, for the reason that neither the record filed in this court nor the original bill of exceptions filed with the clerk of the circuit court showed that any complaint was made of the action of the court in giving said instructions. In motion for a rehearing, however, filed February 6th inst., our attention is called to the fact that by stipulation between counsel for the defendant and the state, filed with the clerk of this court on January 3, 1906, the motion for new trial is correctly set out in appellant's brief at pages 5 to 8, inclusive, which shows that the point upon the action of the court in giving all instructions in behalf of the state was duly raised by the motion. On January 4, 1906, another stipulation entered into by the same counsel, correcting the record in other respects, was also filed with the clerk of this court. The records of this court fail to show the filing of either of these stipulations, and when we came to the investigation of the case we found but one, that being the stipulation filed January 4, 1906, which referred in no way to the instructions, and it being so unusual for two different stipulations to be filed for the correction of the record in the same case, and especially without asking or obtaining the permission of the court, we overlooked the stipulation filed January 3d. It may not be out of place to say here that no record, after being

lodged with the clerk of this court, can be changed without the permission of the court, duly entered of record at the time. But, owing to the importance of this case, we have duly considered the questions raised by counsel for defendant upon the instructions, and have modified the opinion in this respect. The motion for rehearing is overruled.

All concur.

The Admissibility of Threats in Evidence in prosecutions for homicide is discussed in the monographic notes to *State v. Nelson*, 89 Am. St. Rep. 691-710; *Campbell v. People*, 61 Am. Dec. 53-58.

The Admissibility of Evidence of Good Character in criminal prosecutions is discussed in *People v. Bonier*, 103 Am. St. Rep. 888-909.

The Law of Self-defense is discussed in the monographic notes to *State v. Sumner*, 74 Am. St. Rep. 717-740; *State v. Gordon*, 109 Am. St. Rep. 804-826.

STATE v. STEWART.

[194 Mo. 345, 92 S. W. 878.]

CONSTITUTIONAL LAW—Power to Punish Bigamous Cohabitation Founded on a Marriage in Another State.—The legislature has power to make criminal and provide for the punishment of cohabitation in the state founded on a bigamous marriage contracted beyond the state. (p. 532.)

CRIMINAL LAW—What Acts Shall Constitute a Crime is a Matter Left to the Legislative Branch of the government, subject to the limitations imposed by the state and national constitutions. (p. 534.)

CONSTITUTIONAL LAW—Power to Designate as Bigamy Acts Which Were not Bigamous at Common Law or Under Previous Statutes.—The legislature may designate as bigamy and provide for the punishment of a cohabitation in this state founded on a bigamous marriage contracted elsewhere. (p. 540.)

INDICTMENT for Cohabitation Within the State Founded on a Bigamous Marriage Elsewhere.—An indictment charging that defendant, at a time specified and within a designated county in the state of Illinois, unlawfully and feloniously married and took to wife one W. J., he, the defendant, then and there having a lawful wife living, to wit, L. W. S., and that the defendant afterward, on a date mentioned, within the state of Missouri, and from that date until another date specified, unlawfully and feloniously did abide and cohabit with said W. J., and her have to wife, the said former and lawful wife, the said L. W. S., being then and there still alive, sub-

stantially complies with the statute of Missouri making criminal a cohabitation in that state founded on a bigamous marriage contracted elsewhere. There is no merit in the claim that the indictment charges adultery only. (p. 541.)

Herbert S. Hadley, attorney general, N. T. Gentry, assistant attorney general, and Grant Gillespie, for the state.

James M. Rollins, for the respondent.

348 GANTT, J. At the June term, 1905, the grand jury of the city of St. Louis returned an indictment against the defendant, charging him with the violation of section 2169 of the Revised Statutes of 1899. On July 20, 1905, the day prior to the one on which the case was set for trial, defendant filed a motion to quash the indictment, alleging, among other things, that said section of the statute, upon which the indictment was based, was unconstitutional. The motion to quash was sustained by the trial court, and the state tendered a bill of exceptions which was signed and filed and an appeal taken by the state.

The indictment is in the following words:

“State of Missouri,
“City of St. Louis, } ss.

“Circuit Court, City of St. Louis, June Term, 1905.

“The grand jurors of the State of Missouri, within and for the body of the city of St. Louis, now here in court, duly impaneled, sworn and charged, upon their oath present, that James W. Stuart, alias George W. Stewart, on the fifteenth day of December, one thousand nine hundred and three, in the county of Alexander, in the State of Illinois, unlawfully and feloniously did marry and take to wife one Wilmer Jones, and to her, the said Wilmer Jones, then and there married, without the State of Missouri, he, the said James W. Stuart, alias George W. Stewart, then and there still having a lawful wife living, to wit, Loney Wells Stuart; and that the said James W. Stuart, alias George W. Stewart, afterwards, to wit, on the sixteenth day of December, one thousand nine hundred and three, within the State of Missouri, to wit, in the city of St. Louis aforesaid, and from that day until the eighteenth day of May, one thousand nine hundred and five, unlawfully and feloniously did abide and cohabit with the said Wilmer ³⁴⁹ Jones and her, the said Wilmer Jones have to wife, the said former and lawful wife, the said Loney

Wells Stuart, being then and there still alive; against the peace and dignity of the State.

“RICH. M. JOHNSON,
“Assistant Circuit Attorney.

“A true Bill

“F. P. Crunden, Foreman.”

The motion to quash, omitting caption, was as follows:

“Now, on this day comes the defendant, by his attorney, and moves the court to quash the indictment herein for the reasons following:

“1. Because the indictment charges no offense under the laws of the state of Missouri.

“2. Because, on the face of the indictment this court nor any other court in the state of Missouri has jurisdiction to inquire into nor try this defendant; it being apparent and charged in the indictment that the alleged bigamous marriage took place in another county and state.

“3. Because the charge contained in the said indictment is indefinite, uncertain and vague, and does not fully apprise defendant of the offense wherewith he is charged.

“4. Because of the other reasons and matters apparent upon the face of the record.”

1. Section 2169 of the Revised Statutes of 1899 is in these words: “Cohabiting in this state bigamy, when: Every person, having a husband or wife living, who shall marry another person, without this state, in any case where such marriage would be punishable if contracted or solemnized within this state, and shall afterward cohabit with such person within this state, shall be adjudged guilty of bigamy, and punished in the same manner ³⁵⁰ as if such marriage had taken place within this state.”

By reference to the foregoing statement it will be noted that the indictment in this case is predicated on a violation of said section, and was quashed on motion by the circuit court of the city of St. Louis. We are not advised upon what ground the indictment was set aside, but the argument in this court on both sides was directed principally to the constitutionality of the section, and to that question we will first address ourselves.

With the right of a sovereign state in the protection of the morals of its own citizenship to make crimes committed elsewhere punishable in her own courts, if the guilty offender shall come within her jurisdiction, we are not concerned in

this case. This statute is leveled at an offense against public immorality committed in this state, to wit, the continued cohabitation in this state under a bigamous and criminal marriage contracted without the state, which would be punishable in this state criminally if contracted or solemnized within this state.

By common law it was not punishable to marry a second time during the life of the first consort or to cohabit under such second marriage, though it was a canonical offense, but as early as 1604 it was made a felony by an act of parliament in England and Wales.

The prototype of our statutes on the subject of bigamy and bigamous cohabitation is found in the statute 9 George IV, chapter 31, section 22, which provides that "if any person, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or elsewhere, every such offender, and every person counseling, aiding or abetting such offender, shall be guilty of felony," etc. This statute is to all intents substantially reaffirmed in 24 & 25 Victoria, chapter 100, section 57. Many of our sister states have followed the statute of 9 George IV, conforming it to our American ³⁵¹ conditions. That the General Assembly of Missouri has the power, for the protection of good morals and to punish indecency, to make the cohabitation of a man and woman begun under a bigamous marriage in another state, a felony in this state, there can be no sort of question, and it is practically conceded by the learned counsel for the defendant in this case that if the General Assembly had denominated the offense which it denounced in section 2169 of the Revised Statutes of 1899, a felony only and not bigamy, there could be no constitutional objection to it. Indeed, a similar statute is found in many of our sister states. Thus it is provided by section 4933 of the Iowa code that, "If any person who has a former husband or wife living marry another person or continue to cohabit with such second husband or wife he or she, except in the cases mentioned in the following section, is guilty of bigamy," etc.

In *State v. Steupper*, 117 Iowa, 591, 91 N. W. 912, the supreme court of Iowa sustained an indictment which charged the defendant with feloniously cohabiting with a woman in Iowa in 1901, after he had feloniously married her in Nebraska, the said defendant at the time of said marriage and

cohabitation having a lawful wife living. The court said: "It is not the continuation of cohabitation within this state which is important, but it is the fact that in this state cohabitation continues, which was commenced in another state under the bigamous marriage."

It will be observed that the Iowa statute defines as bigamy the same acts which our state denounces as such.

By section 4185 of the Code of 1876 of the state of Alabama it is provided: "If any person having a former wife or husband living marries another, or continues to cohabit with such second husband or wife in this state, he or she must, on conviction, be imprisoned in the penitentiary, or sentenced to hard labor for the county for not less than two nor more than five years." ³⁵² In *Brewer v. State*, 59 Ala. 101, the supreme court of that state, speaking of this section, said: "But section 4185 of the Code declares two offenses of very different constituent elements, although of the same general character, and punishable in the same manner. One of the offenses can be prosecuted and punished only in the county in which the unlawful marriage is solemnized; in the other, no matter where the marriage takes place, if bigamous, the offense is complete if the parties thus unlawfully married 'continue to cohabit' in the county in which the indictment is found."

By section 2, chapter 130, of the Revised Statutes of Massachusetts of 1836, under the title of "Polygamy," it is provided: "If any person, who has a former husband or wife living, shall marry another person, or shall continue to cohabit with such second husband or wife, in the state, he or she shall, except in the cases mentioned in the following section, be deemed guilty of the crime of polygamy, and shall be punished," etc.; and in *Commonwealth v. Bradley*, 56 Mass. 553, an indictment charging that the defendant was married in New Hampshire in 1836, and afterward, in 1846, while that marriage was still subsisting, was married in Connecticut to another woman, and afterward did cohabit and continue to cohabit with said second wife in Massachusetts, the said former wife still living, was held good and the conviction sustained. Many other similar statutes might be cited to show that in various states of our Union cohabitation under a bigamous marriage contracted without the state, has been denominated and defined as bigamy. At common law the entering into the second marriage while a former one re-

mained undissolved was designated polygamy, but the terms "bigamy" and "polygamy" are used to denote the same offense by most modern law-writers, and treated under the same head. The proposition urged by the learned counsel for the defendant is that it was unconstitutional for the General Assembly to define continued cohabitation under a ³⁵³ bigamous marriage as bigamy.

Conceding that the offense denounced in section 2169 of the Revised Statutes would not have constituted bigamy as that term was and is used to designate the offense defined in section 2167 of the Revised Statutes of 1899, and in various statutes in other states, and as stated by authors on criminal law generally, why was it not competent for the General Assembly, in the exercise of its plenary power, to legislate to make that bigamy which before the enactment of section 2169 was no offense at all in this state? The contention of learned counsel, if followed to its logical conclusion, would lead to the nullification of many other statutes in this state. For instance, burglary, at common law, according to the accurate Mr. Chitty, was the breaking and entering the dwelling-house of another in the night-time with intent to commit a felony, whether the felony be actually committed or not, and if a statute merely punished one who should commit burglary, doubtless the common-law essentials of the crime would be held necessary, but there is probably not a state in the Union which has not by its own legislation extended the offense so as to include breaking and entering in the daytime, and so as to include breaking and entering shops, warehouses, railroad cars, booths, boats and other premises. So that at this day many acts constitute burglary which at common law or a few years ago were a different offense or no offense at all. In this state eleven different sections of our Criminal Code (sections 1880 to 1890) are devoted to defining what acts shall constitute burglary, the larger portion of which did not amount to burglary at common law. The same may be said of numerous well-defined crimes at common law, and it has been, and is now, the accepted doctrine of the courts that what acts shall constitute a crime is a matter left entirely to the legislative branch of the government, subject, of course, to the limitations of the federal and state constitutions: ³⁵⁴ *People v. Barry*, 94 Cal. 481, 29 Pac. 1026.

Learned counsel for the defendant relies upon *State v. Hartley*, 185 Mo. 669, 105 Am. St. Rep. 608, 84 S. W. 910,

in which section 1825 of the Laws of 1901, page 128, which provides that, "Every person who shall administer to any pregnant woman any medicine, drug or substance whatever, or shall use or employ any instrument or other means with intent thereby to destroy the foetus or child of such pregnant woman, unless the same shall be necessary to preserve the life of such woman, shall be guilty of manslaughter, in the second degree," was held inoperative by this court because the statute undertook to establish a degree of homicide where there was in fact no killing or homicide either of the mother or child, and the same view was taken of an almost exactly similar statute by the supreme court of Kansas in *State v. Young*, 55 Kan. 349, 40 Pac. 659. We still adhere to the *Hartley* case (185 Mo. 669, 105 Am. St. Rep. 608, 84 S. W. 910), but are of opinion that it does not support defendant's contention in this case or the judgment of the circuit court. As said by Mr. Bishop: "Language is the offspring of the past, but its life is in and for the ever-opening and progressive future. Its principal mission is to convey from one mind to another the new thoughts as they arise; for the old is continually dying, while the new is being born. If each word had a single fixed and unchanging meaning and if there were simply certain established collocations of words, each with its one signification, the powers of language would be very limited, and it could never express a new idea." There is no such confusion of ideas or incongruity in the acts which our legislature has declared in section 2169 shall constitute bigamy and be punished as such as there was and is in the law which we held inoperative in *State v. Hartley*, 185 Mo. 669, 105 Am. St. Rep. 608, 84 S. W. 910.

The argument of counsel is that the unconstitutionality of section 2169 lies in the fact that it seeks to make cohabitation bigamy, and that it is beyond the power of the legislature to name the acts denounced by the ³⁵⁵ statute bigamy. Counsel assumes that because the bigamous marriage is first contracted in a foreign state, the crime is complete, and cannot be again committed in this state. We think counsel has misconceived the purpose of our statute.

It does not purport or attempt to punish the void form of marriage, the prostitution of a solemn ceremony which the law permits only when a legitimate union is formed, which of course is punishable in the state where it occurs, but it does what the greater number of the states of the Union have

done: it makes the continuation of a cohabitation, begun and commenced under the void and illegal ceremony in another state, in this state, a felony, and names it bigamy, and, of course, punishable under our constitution in the county in which the offense is committed in this state.

Under the act of 9 George IV, and under all the statutes of the several states of the United States making bigamy a felony or crime, the second marriage itself, however formal the ceremony, is void. Although the statutes provide that if any person being married shall marry another, it is obvious, as was said by Lord Chief Justice Cockburn, in *Regina v. Allen*, L. R. 1 C. C. R. 367, 12 Cox C. C. 193: "When it is said, in construing the statute in question, the same effect must be given to the term 'marry' in both parts of the sentence, and that, consequently, as the first marriage must necessarily be a perfect and binding one, the second must be of equal efficacy, in order to constitute bigamy, it is at once self-evident that the proposition, as thus stated, cannot possibly hold good; for if the first marriage be good, the second, entered into while the first is subsisting, must of necessity be bad. It becomes necessary, therefore, to engraft a qualification on the proposition just stated, and to read the words 'shall marry' in the latter part of the sentence as meaning shall marry under such circumstances as that the second marriage would be good but for the existence of the first. But ³⁵⁶ it is plain that those who so read the statute are introducing into it words which are not to be found in it, and are obviously departing from the sense in which the term 'being married' must be construed in the earlier part of the sentence. But when it once becomes necessary to seek the meaning of a term concurring in a statute, the true rule of construction appears to us to be not to limit the latitude of departure so as to adhere to the nearest possible approximation of the ordinary meaning of the term, or to the sense in which it may have been used before, but to look to the purpose of the enactment, the mischief to be prevented, and the remedy which the legislature intended to apply. . . . Polygamy, in the sense of having two wives or two husbands at one and the same time for the purpose of cohabitation, is a thing altogether foreign to our ideas, and which may be said to be practically unknown; while bigamy, in the modern acceptation of the term, namely, that of a second marriage consequent on an abandonment of the first while the latter still subsists, is

unfortunately of too frequent occurrence. It takes place, as we all know, more frequently where one of the married parties has deserted the other; sometimes where both have voluntarily separated. It is always resorted to by one of the parties in fraud of the law, sometimes by both, in order to give the color and pretense of marriage where the reality does not exist. Too often it is resorted to for the purpose of villainous fraud. The ground on which such a marriage is very properly made penal is, that it involves an outrage on public decency and morals, and creates a public scandal by the prostitution of a solemn ceremony, which the law only allows to be applied to a legitimate union, to a marriage at best but colorable and fictitious, and which may be made, and too often is made, the means of the most cruel and wicked deception. . . . Now, the words 'shall marry another person,' may well be taken to mean shall 'go through the form and ceremony of marriage with another ³⁵⁷ person.' . . . We think we are warranted in inferring that the words were used in the sense we have referred to, and that we shall best give effect to the legislative intention by holding such a case as the present to be within their meaning."

When it is considered that in both cases the relation of the party who has a living husband or wife, and then goes through the form and ceremony of marriage with another person, and afterward continues cohabitation with such party, is practically the same, and an outrage on public decency and morals is perpetrated and a public scandal ensues, it is obvious, we think, that the two offenses are so nearly akin and partake of the same general character, that it was perfectly competent for the law-making power to describe both of them as bigamous, and that in so doing the legislature has done no more than it has done in extending the law of burglary to acts which at common law did not constitute burglary, and there is no such repugnancy in the nature of things as would justify this court in holding a statute which has been on our statute books since the Revised Statutes of 1855, and which has never before been questioned as inoperative and void. If the simple word "marry" in the act of parliament and in all of the statutes in the several states on the subject of bigamy is susceptible of such diverse meanings in the same section, with what reason can it be said that the statute of this state and of Iowa and other states which designate the felonious continued cohabitation in pursuance of

a bigamous second marriage as bigamy, and the statute of Massachusetts which defines it as polygamy, are inoperative merely because the word "bigamy" is used to define acts which theretofore had been used only to define the act of going through the form and ceremony of marriage with another person, when in law such marriage was illegal, criminal and void? We are not willing to strike down so salutary a statute on such a flimsy ground.

358 In support of this contention the learned counsel has cited us to various decisions of this court which we will now consider.

In *State v. Smiley*, 98 Mo. 605, 12 S. W. 247, the defendant was indicted in Madison county. The indictment charged that the defendant, on August 24, 1884, at the county of Johnson, in this state, married Ruth Grant, he then having a wife living, and that afterward and prior to the finding of this indictment he was lawfully apprehended and in custody in Madison county for the felony aforesaid. The indictment was drawn under sections 1533 and 1536 of the Revised Statutes of 1879. Section 1533 of the revision of 1879 was identical with section 2167 of the Revised Statutes of 1899, but section 1536 provided that an "indictment for bigamy as defined in the preceding sections might be found and proceedings, trial, conviction, judgment and execution thereon had in the county in which such second or subsequent marriage or the cohabitation shall have taken place, or in the county in which the offender may be apprehended."

Black, J., after reciting sections 1533, 1535 and 1536, said: "The first marriage is alleged to have been contracted in this state, so that section 1535 (now section 2169 of the Revised Statutes of 1899) has no application whatever to the present case. Indeed, it is not alleged that defendant cohabited at any time or place with Ruth Grant. The indictment is based on section 1533, and cohabitation is not made an element of the offense therein described. The offense was completed in Johnson county when the second marriage was solemnized: *State v. Fitzgerald*, 75 Mo. 571. The indictment should have been preferred by the grand jury of Johnson county, unless it can be upheld by force of the last clause of section 1536, namely, 'or in the county in which the offender may be apprehended.' There can be no doubt but the allegations of the indictment are sufficient to bring the case within this clause. This clause has nothing to do with

the elements ³⁵⁹ of the offense, and relates alone to the place where the indictment may be found. Now, under the constitution of 1875, the indictment for a felony must be found by a grand jury of the county where the offense was committed: *Ex parte Slater*, 72 Mo. 102; *State v. McGraw*, 87 Mo. 161; *State v. Briscoe*, 80 Mo. 643. It follows that the clause of section 1536 just quoted is void, because in conflict with the constitution of 1875 and it matters not that it might have been upheld under the constitution of 1865."

This case, therefore, is authority only for the proposition that where an indictment for bigamy is based solely upon section 1533 of the Revised Statutes of 1879, now section 2167 of the Revised Statutes of 1899, it must be found in the county where the second or bigamous marriage is solemnized, and that so much of section 1536 of the Revised Statutes of 1879 as authorized an indictment and prosecution "in the county in which the offender may be apprehended" was void. This court expressly excepted section 2169 of the Revised Statutes of 1899 from the scope of its opinion. Of the soundness of that opinion no doubt whatever can be entertained under our constitution of 1875. To the same effect is *State v. McGraw*, 87 Mo. 161, which simply decides that an indictment for burglary can only be found in the county where the burglary was committed. The other cases cited, to wit, *State v. Cooper*, 103 Mo. 266, 15 S. W. 327, *State v. Hansbrough*, 181 Mo. 348, 80 S. W. 900, *State v. Fitzgerald*, 75 Mo. 571, *State v. St. John*, 94 Mo. App. 229, 68 S. W. 374, *Adair v. Mette*, 156 Mo. 496, 57 S. W. 551, have no bearing on the question now under consideration. They relate solely to the quantum and character of proof necessary to establish a valid first marriage in the prosecution of the crime of bigamy. *State v. Hatch*, 91 Mo. 568, 4 S. W. 502, merely holds that the crime of embezzlement can only be prosecuted in the county in which the embezzlement occurs.

The statute (section 2169 of the Revised Statutes of 1899) already quoted provides that "every person, having a husband or wife living, who shall marry another person, without this ³⁶⁰ state, in any case where such marriage would be punishable if contracted or solemnized within this state, and shall afterward cohabit with such person within this state, shall be adjudged guilty of bigamy and punished," etc. It is at once obvious that this section is leveled at an offense committed in this state, but it makes no attempt to make any

provision for the indictment or prosecution of such offender in a county other than that in which the bigamous cohabitation occurs in this state, and the indictment in this case charges the bigamous cohabitation to have taken place in the city of St. Louis within this state, and the indictment is preferred by the grand jury of said city, so that it clearly appears that the indictment was found and prosecuted in the county in which the offense was committed, and therefore the doctrine of *Ex parte Slater*, 72 Mo. 102, and *State v. Smiley*, 98 Mo. 605, 12 S. W. 247, and similar cases have no application unless we accept the contention that it is without the power of the state of Missouri to punish the cohabitation in this state of parties under a bigamous and felonious marriage solemnized in another state. To do this would be to announce that the state was impotent to punish an act, flagrantly immoral and indecent, committed within its own boundaries. In the language of Mr. Justice Baldwin in *Holmes v. Jennison*, 14 Pet. 614, 10 L. ed. 618: "It would be but a poor and meager remnant of the once sovereign power of the states, a miserable shred and patch of independence, which the federal constitution has not taken from them, if, in the regulation of its internal police, state sovereignty has become so shorn of authority as to be competent only to exclude paupers, who may be a burden on the pockets of its citizens; unsound, infectious articles, or diseases, which may affect their bodily health; and utterly powerless to punish those moral ulcers on the body political, which corrupt its vitals, and demoralize its members."

We hold that it is too clear for doubt that it is and ³⁶¹ was entirely competent for the state to enact and enforce a law, such as is found in section 2169 of the Revised Statutes of 1899, to punish a man or woman who has contracted a bigamous marriage in another state, a marriage which would be punishable under the laws of this state if contracted here, and then cohabit within this state with the consort of such bigamous and criminal marriage. A statute like this obtains in many of the states of our Union, and the power of such states to make and enforce it has been uniformly upheld. It is the offense against the state in which the bigamous cohabitation is committed that is punished, and not the mere solemnization of a bigamous marriage in another state. The doctrine of relation has nothing to do with the question: *State v. Steupper*, 117 Iowa, 591, 91 N. W. 912; *Brewer v. State*,

59 Ala. 101; Bishop on Statutory Crimes, sec. 588; Finney v. State, 3 Head, 544; Commonwealth v. Bradley, 56 Mass. 553. While a state cannot punish as crimes acts committed beyond the state boundary, "if the consequences of an unlawful act committed outside the state have reached their ultimate and injurious result within it, the perpetrator may be punished as an offender against such state": Cooley's Constitutional Limitations, 177, and cases cited in note 3; Beggs v. State, 55 Ala. 108. We hold, then, that section 2169 of the Revised Statutes of 1899 is a valid, constitutional statute, and the objection that the indictment is bad because bottomed on an unconstitutional law is not tenable.

2. As to the other grounds of the motion to quash, we think they are not well taken. The indictment alleges that at the time of the second marriage in Illinois the defendant had a lawful wife, to wit, Loney Wells Stuart, living; it avers the unlawful second marriage in Illinois and then, as already observed, charges that the defendant did afterward, to wit, on the 16th of December, 1903, and from that day until the eighteenth day of May, 1905, unlawfully and feloniously in the city of St. Louis, within this state, did abide and cohabit with ³⁶² said Wilmer Jones, the said second wife. This was a substantial compliance with the statute, and there is no merit in the claim that it only charges adultery. It individuates every fact necessary to bring the case within the provisions of section 2169 of the Revised Statutes of 1899.

The circuit court erred in quashing the indictment, and the judgment is reversed and the cause remanded for further proceedings.

Burgess, P. J., and Fox, J., concur.

If a Second Marriage Charged as Bigamous was celebrated in another state, the party cannot be punished for it here; but continuing to cohabit with such second husband or wife while the first is living, by the party marrying again, with knowledge that the first husband or wife is living, is polygamy by the law of this state, and on no ground of comity or policy is a state bound to sanction polygamous marriages, though valid in another state where they were entered into: State v. Johnson, 12 Minn. 476, 93 Am. Dec. 241.

O'DAY v. MEADOWS.

[194 Mo. 588, 92 S. W. 637.]

HUSBAND AND WIFE, Competency of to Contract With Each Other.—Under the statutes of Missouri a husband and wife may contract with each other as if unmarried, and her contracts with him are to be enforced just as if she had contracted with a third person. (p. 544.)

DEEDS, When not Testamentary in Character.—A conveyance to take effect upon the grantor's death is not testamentary in character and does not operate as a will merely. (p. 550.)

CONVEYANCES.—An Estate in Futuro which is a contingent estate for the life of another may be created by a conveyance under the statute of Missouri without at the same time creating a particular estate to support it. (p. 554.)

DEED OF SETTLEMENT in Favor of Wife When not Rescinded or Avoided by Her Maintaining a Suit for Divorce and Alimony.—A deed of settlement between a husband and wife in which he conveys to her or for her use certain property and makes provision for her support, and which she by its terms accepts in full satisfaction of her claims of every kind, whether for dower, alimony, or maintenance, is not rescinded nor made void by her bringing a subsequent action against him for divorce and alimony and procuring a decree awarding her both. He might have pleaded such deed in the divorce suit in bar of the claim of alimony, but his failure to do so and the resulting decree made without considering the deed do not annul it. (p. 557.)

Action of ejectment brought by Mrs. Clymena Alice O'Day against B. F. Meadows, a tenant in possession of the property sued for. Mrs. Sue I. B. O'Day, widow of John O'Day, deceased, was made party defendant on her own motion. She pleaded in her answer that on the 5th of March, 1900, John O'Day was the owner of the property sued for, and that he and the plaintiff were then husband and wife, and that they entered into an agreement in writing for the purpose, as expressed therein, of adjusting and settling all questions as to rights of property between them, in which he agreed to assign and deliver to her a large amount of property amounting in value to two hundred thousand dollars and to convey, or cause to be conveyed, to her certain parcels of property, and to erect a homestead of designated value, and she stipulated to accept the property in full satisfaction of all claims of every kind, whether for dower, alimony, or maintenance, and to waive all claim to any share or interest in other property; that in execution of this agreement John O'Day assigned to plaintiff the property stipulated for therein, and also that

he and she made a conveyance to A. C. O'Day purporting to grant, bargain, sell and convey to him an estate in certain real property, including that described in the plaintiff's complaint "commencing upon the death of said John O'Day and continuing as long as the said Clymena Alice O'Day shall live"; and that in further execution of said written agreement the said A. C. O'Day executed and delivered to plaintiff a deed purporting to grant, bargain, sell and convey to her an estate in the same property commencing upon the death of said John O'Day and continuing as long as the said Clymena Alice O'Day should live; that the plaintiff on the 31st of August, 1900, repudiated her said agreement and the said instrument made in execution thereof by filing a bill for divorce against said John O'Day and claiming alimony; and that on the trial of the cause judgment was rendered for plaintiff, and other and different property from that described in said article of settlement and said conveyance, and by different limitations was assigned, transferred and conveyed to the plaintiff, but the property described in her complaint herein was not, and it was ordered and decreed that alimony be paid to plaintiff in the sum of twenty-four thousand dollars, and certain property be delivered and conveyed to her, and that said decree and the orders therein were fully complied with by said John O'Day; the he afterward, in 1901, died equitably and legally seised in fee of the land sued for, and by his last will and testament, which had been duly admitted to probate, devised the land described in the plaintiff's complaint to his widow, the defendant Sue I. B. O'Day.

At the trial the various instruments pleaded by the defendant, including the decree of divorce, were offered and received in evidence. The trial court found in accordance with the pleadings and the evidence, and concluded that by bringing the suit for divorce and procuring the judgment therein, the plaintiff had repudiated and rescinded the agreement and conveyance, and that she was, therefore, not entitled to recover any part of the property sued for, and that judgment should be entered for the defendant for her costs of suit. The plaintiff appealed.

T. A. Sherwood and Henry C. Young, for the appellant.

Delaney & Delaney, for the respondents.

613 FOX, J. The record before us fully discloses the proposition upon which it is sought to maintain the judgment and decree rendered in this cause by the trial court.

1. It is insisted by respondent that the agreement between John O'Day and his wife, the plaintiff in this cause, was invalid and not binding on the wife according to the rules of the common law, and in fact that it was not a contract at all, as it lacked mutuality. It is also insisted that this contract was voidable at the election of the plaintiff, Clymena Alice O'Day, and some act on her part or acquiescence on her part after she became discoverd was necessary before the agreement could be dignified as a contract.

2. It is insisted by respondents that the conveyance from John O'Day and wife to A. C. O'Day (being the deed upon which this plaintiff must base her right to recover) does not pass a legal title sufficient to maintain ejectment: 1. Because the paper is testamentary in its nature. 2. It attempts by deed to create a freehold estate in futuro—that is, a contingent estate per autre vie without creating at the same time and by the same deed or instrument a particular estate to support it.

3. It is earnestly contended that the action of plaintiff for divorce in which she made claim to alimony was a direct repudiation of the agreement between John O'Day and the plaintiff and of the deeds made pursuant thereto, and that such conduct on her part operated as a rescission and cancellation of the deeds conveying the property in dispute to plaintiff.

We will treat the proposition in the order as above designated.

614 1. Upon the first proposition, as to the validity of the contract between John O'Day and this plaintiff during coverture, it is sufficient to say that in view of the conclusion reached in the recent case of Rice, Stix & Co. v. Sally, 176 Mo. 107, 75 S. W. 388, that is no longer an open question in this state. That case was decided by court in bank, and the conclusions reached upon the question involved in the first proposition were fully concurred in by the entire court. The question as to the validity of contracts between husband and wife is fully covered in that case. All of the authorities in this state, as well as those treating of the subject in other jurisdictions, were discussed and fully reviewed, and the conclusion of the court upon the subject in hand was thus an-

nounced: "After a careful consideration we are of the opinion that the intention of our legislature was to remove the disabilities under which a married woman labored at common law so as to permit her to contract and be contracted with, sue or be sued, and that the language used, being entirely without exception, is broad enough to permit her to contract with her husband, and that her contracts with him will be enforced at law, just as if she had contracted with third persons, and this, we think, is the weight of judicial opinion in other states where statutes no broader than ours have been construed": *Farmers' Exch. Bank v. Hageluken*, 165 Mo. 443, 88 Am. St. Rep. 434, 65 S. W. 728.

Following the doctrine as announced in that case it must be held that John O'Day and the plaintiff in this case, during coverture as husband and wife, had the full power and authority under the statute, as to their property rights, to contract with each other, and such contract will be enforced at law just as if she had contracted with third persons.

2. This brings us to the consideration of the second proposition, which, in our opinion, is the most serious question involved in this record. Upon this proposition it is urged by counsel for respondent that the ⁶¹⁵ deed from John O'Day and wife to A. C. O'Day (upon which plaintiff's right of recovery must be predicated) is testamentary in its nature and therefore insufficient to pass the legal title to the premises therein conveyed. The terms of the deed to which this challenge of sufficiency to pass the title is directed are as follows: "And said John O'Day and Clymena Alice O'Day, his wife, in consideration of the sum of one dollar in hand paid by said A. C. O'Day, hereby remise, sell and quitclaim to said A. C. O'Day an estate in all the north half of said body of land hereinbefore described (except the twenty acres thereof on the south end hereinbefore conveyed), and also in that certain tract or parcel of land acquired by said John O'Day from M. C. Vinton by deed dated February 7, 1898, and which deed is recorded in book 165 at page 434 in the office of the recorder of deeds, Springfield, Greene county, Missouri, commencing upon the death of the said John O'Day and continuing as long as the said Clymena Alice O'Day shall live. To have and to hold said last created estate to the said A. C. O'Day and to his assigns, heirs, executors and administrators during said period hereinbefore fixed. In witness whereof the said John O'Day and Clymena

Alice O'Day have hereunto set their hands and seals this sixth day of March, 1900."

The record discloses that this deed was executed by John O'Day and this plaintiff, who was at that time his wife, duly acknowledged and delivered to the grantee in that deed, A. C. O'Day, who caused the same to be placed on record, and that subsequently A. C. O'Day, in substantially the same terms conveyed the property in dispute to this plaintiff, which deed was duly and properly acknowledged before a notary public and duly recorded in the recorder's office of Greene county, Missouri.

It is apparent from the terms of this deed that John O'Day intended and undertook to carve out of the land embraced in that deed a life estate—that is, an estate ⁶¹⁶to continue so long as his wife, this plaintiff, should live, which, in our opinion, under the laws of this state he had the right to do.

It is ably argued by counsel for respondents that this instrument was simply testamentary in its nature and was not in fact a deed, and that no rights vested in plaintiff until after the death of John O'Day; hence the instrument amounted to nothing more than a will and was sufficient to pass such legal title as would maintain ejectment.

The grantor and grantee in this deed was capable of contracting, and the terms used were those usually employed in a quitclaim deed, stating that "in consideration . . . we hereby remise, sell and quitclaim to said A. C. O'Day an estate" in the land in controversy, coupled with the designation of the time when the possession and enjoyment of such estate should commence, which was "upon the death of the said John O'Day and continuing so long as the said Clymena Alice O'Day shall live." Then follows the concluding clause of that instrument, which fully recognizes that the deed was operative and effective upon its execution and delivery, then and there fixing the rights of the grantee in respect to such property, and that an estate had been created by the terms of the instrument, which says: "To have and to hold said last created estate to the said A. C. O'Day and to his assigns, heirs, executors and administrators during said period hereinbefore fixed." The insistence of counsel for respondents that this deed was testamentary in its nature leads us to the inquiry as to what are the essential characteristics of such instruments. The marks of an instrument testamentary in

its character are nowhere more clearly stated than in *Nichols v. Emery*, 109 Cal. 323, 50 Am. St. Rep. 43, 41 Pac. 1089, where it was said: "The essential characteristic of an instrument testamentary in its nature is, that it operates only upon and by reason of the death of the maker. Up to that time it is ambulatory. By its execution the maker ⁶¹⁷ has parted with no rights and divested himself of no modicum of his estate, and per contra no rights have accrued to and no estate has vested in any other person. The death of the maker establishes for the first time the character of the instrument. It at once ceases to be ambulatory; it acquires a fixed status and operates as a conveyance of title. Its admission to probate is merely a judicial declaration of that status." In that same case it was expressly pointed out that it was important to note the distinction between the interest transferred and the enjoyment of that interest. As in the case at bar, the distinction must be kept in mind between the creation and conveyance of the estate and the commencement of the possession and enjoyment of that estate. Another mark of distinction between wills and instruments testamentary in their character and deeds formally executed is, that in the former the grantor may at any time revoke the provisions of his will or an instrument conveying property which is testamentary in its character. In the latter, where the deed is formally executed and delivered by parties capable of contracting, and a present fixed right of future enjoyment is created, there is no power in the grantor prior to his death to revoke such deed. Take the deeds in this case from John O'Day and wife to A. C. O'Day and A. C. O'Day to the plaintiff; it certainly will not be seriously contended that after the execution and delivery of those deeds John O'Day had the power, prior to his death, to revoke or in any way lessen the force, vitality, intent and purpose of the provisions of such deeds. They became effective upon their execution and delivery, and the rights of the grantees in such deeds were fixed at that time. The tendency of modern decisions is to uphold conveyances when not clearly repugnant to some well-defined rules of law: 2 Devlin on Deeds, sec. 855. These deeds now in judgment before us vested an estate in the grantees at the time of their execution and ⁶¹⁸ delivery; and, as was said in *Tindall v. Tindall*, 167 Mo. 218, 66 S. W. 292, "the law favors vested estates, and the rule is that estates shall be held to vest at the earliest possible period unless a contrary intention

is clearly manifested in the grant: *Doe v. Considine*, 6 Wall. 458, 18 L. ed. 889; *Amos v. Amos*, 117 Ind. 19," 19 N. E. 539.

The law is nowhere more clearly stated as to when an estate is vested than, by Chancellor Kent: 4 Kent's Commentaries, 14th ed., p. 202. It is thus announced: "An estate is vested when there is an immediate right of present enjoyment, or a present fixed right of future enjoyment."

It is clear by the execution and delivery of the deeds now in hand in which it is recited by the grantors that "we hereby remise, sell and quitclaim an estate" in the premises described, a life estate was created and the possession and enjoyment of that estate, by the other terms in the deeds, were simply postponed until the death of John O'Day. A present fixed right of future enjoyment of that estate was beyond dispute created by the terms of the deed in controversy.

In *Abbott v. Holway*, 72 Me. 298, it was contended that the instrument in judgment in that case was not a conveyance because it was contrary to public policy and an attempt to evade the statute regulating the making and execution of wills. Barrows, J., responding to that contention, said: "But the instrument was duly executed by the defendant's testator, a man capable of contracting, and having an absolute power of disposition over his homestead farm, subject only to the rights of his existing creditors. It was duly recorded so that all the world might know what disposition he had made of a certain interest in it, and what was left in himself. If operative at all, it operated differently from a will. A will is ambulatory, revocable. Whatever passed to the wife by this instrument became irrevocably hers."

The mere fact that provisions in a deed may postpone ⁶¹⁹ the enjoyment of the estate created should not be made the basis of a rule of construction that such instruments are testamentary in their character. Upon this subject the remarks of Chief Justice Stone, in *Sharp v. Hall*, 86 Ala. 110, 11 Am. St. Rep. 28, 5 South. 497, are very appropriate. He said: "There are few, if any, questions less clearly defined in the law-books than an intelligible, uniform test by which to determine when a given paper is a deed and when it is a will. Deeds, once executed, are irrevocable, unless such power is reserved in the instrument. Wills are always revocable so long as the testator lives and retains testamentary capacity.

Deeds take effect by delivery, and are operative and binding during the life of the grantor. Wills are ambulatory during the life of the testator and have no effect until his death. Out of this has grown one of the tests of testamentary purpose, namely, that its operation shall be posthumous. If this distinction were carried into uniform, complete effect, and if it were invariably ruled that instruments which confer no actual use, possession, enjoyment, or usufruct on the donee or grantee, during the life of the maker, are always wills and never deeds, this would seem to be a simple rule, and easy of application. The corollary would also appear to result naturally and necessarily, that if the instrument, during the lifetime of the maker, secured to the grantee any actual use, possession, enjoyment or usufruct of the property, this would stamp it irrefutably as a deed. The authorities, however, will not permit us to declare such inflexible rule."

The distinction between wills and instruments testamentary in their character and deeds is very clearly drawn in *McDaniel v. Johns*, 45 Miss. 632. It was there said that "a will is an instrument by which a person makes a disposition of his property to take effect after his decease, and which is, in its own nature, ambulatory and revocable during his life. It is this ambulatory quality which forms the characteristic of 620 wills; for though a disposition by deed may postpone the possession or enjoyment, or even the vesting, until the death of the disposing party, yet the postponement is in such case produced by the express terms, and does not result from the nature of the instrument."

We have critically analyzed the provisions of the deeds involved in this controversy, and we are unable to discover any design or purpose on the part of the grantors to make them testamentary in their character, but on the other hand, the terms employed in those deeds evince, in the clearest and most explicit manner known to the forms of conveyancing, an intention to convey and not to devise. As was said by Broom in his *Maxims* eighth edition, star page 540, in translating a fundamental maxim of the law, "a liberal construction should be placed upon written instruments, so as to uphold them, if possible, and carry into effect the intention of the parties."

The terms of the deeds relied upon by plaintiff to support her title in this proceeding are very unlike the instrument under consideration in *Murphy v. Gabbert*, 166 Mo. 601, to

which our attention has been specially directed. It is manifest from the terms of that instrument that it was testamentary in its character and was properly so held. It was expressly provided by that instrument that, "the intention of this instrument of writing is such that Mrs. Ann Ellison relinquishes her entire right at her death, then this deed is to immediately come into effect, but not until then." It is clear that the instrument involved in that case, by its own terms, was not to take effect or become operative until the death of the grantor. Unlike the deeds involved in this controversy, which clearly, by the terms employed in them, fixed the rights of the grantees in respect to the property conveyed, upon the execution and delivery of them.

Upon this proposition it must be held that these deeds were not instruments testamentary in their character,⁶²¹ but were operative and effective in conveying an interest in real estate.

The second subdivision of respondents' contention upon this proposition is that it attempts by deed to create a freehold estate in futuro that is, a contingent estate per auter vie without creating at the same time and by the same deed or instrument a particular estate to support it. Upon this proposition we confess that if the rules of law which were applicable to ancient feudal tenures, and all the restrictive effects of such laws upon alienations of real property, were in force and applicable to the conveyancing of real estate under the statutes of this state, the contention of respondents could well be maintained. This insistence on the part of the respondents involves for the first time a construction of the last subdivision or sentence of section 4596 of the Revised Statutes of 1899. This section provides: "When an estate hath been, or shall be, by any conveyance limited in remainder to the son or daughter, or to the use of the son or daughter of any person to be begotten, such son or daughter born after the decease of his or her father shall take the estate in the same manner as if he or she had been born in the lifetime of the father, although no estate shall have been conveyed to support the contingent remainder after his death. And hereafter an estate of freehold or of inheritance may be made to commence in future by deed in like manner as by will." While the last subdivision or sentence of that section, "and hereafter an estate of freehold or of inheritance may be made to commence in future by deed in like manner as by

will," is in the same section making provisions in respect to posthumous children, yet it is apparent that it has no application to the first subdivision of the section which treats and fully disposes of the subject of posthumous children. The last sentence of that section of the statute is useless and meaningless unless it be construed as changing the rules applicable to conveyances at common ⁶²² law, and, in our opinion, the intention of the legislature, by the insertion of that independent provision providing that "an estate of freehold or of inheritance may be made to commence in future by deed in like manner as by will" was for the specific purpose, as had been done in other states, notably Virginia and Indiana, to change the common-law rules applicable to conveyances. Dr. Minor in his *Institutes*, volume 2, page 370, in treating of this subject, said: "At common law a freehold estate in lands to commence in futuro cannot be created, because, as we have seen, it cannot arise without livery of seisin, which must in its nature take effect immediately or not at all; and if it should take effect so far as to pass the freehold of the grantor, the same would be vested in nobody, but would be in abeyance, contrary to the established policy of the law (3 Th. Co. Lit. 192, n [G]; 2 Blackstone's Commentaries, 165, 166); but in conveyances operating under the statutes above named (*supra* i. e.), which pass the freehold without livery of seisin, this reason does not apply. The freehold remains in the grantor or in the devisor's heirs, until the time appointed for it to take effect, and then passes to the grantee or devisee, by the force and effect of the several statutes. The future limitation may be either appointed to arise upon a contingency (e. g., a devise to the heirs of A, who is yet living, or to the unborn son of A), or at a period certain (e. g., a grant to A for life, or in fee, to commence five years from the date); but in either case, in order to constitute an executory limitation, there must be no preceding particular estate to give it effect as a remainder, for the rule admits of no exception, being indeed, as we have seen, of the essence of the definition, that no estate can be construed to be an executory limitation which is capable of taking effect as a remainder: *Fearne's Remainders*, 382, note [a], 394 et seq., 395 et seq., note (d); 1 Th. Co. Lit. 646, note [C]. In Virginia it is further provided by statute that any estate may be made to commence in futuro ⁶²³ by deed, in like manner as by will, which either is without meaning

or applies to conveyances at common law, as feoffment and the like; and in the latter aspect makes very radical innovations upon the common-law doctrine of conveyances: V. C. 1873, c. 112, sec. 5. In devises such limitations are not otherwise known than as executory devises, but when they occur in conveyances operating under the statute of uses, they are called springing uses. No name has yet been bestowed on them under the statute of grants (8 & 9 Vict.), but they might very well be denominated springing grants, and such limitations in general might be called springing limitations."

Section 900 of the Revised Statutes of 1899, upon the subject of conveyances, provides that "conveyances of lands, or of any estate or interest therein, may be made by deed executed by any person having authority to convey the same, or by his agent or attorney, and acknowledged and recorded as herein directed, without any other act or ceremony whatever."

Under a similar statute in respect to conveying real estates the supreme court of Maine, in *Abbott v. Holway*, 72 Me. 298, held that, even in the absence of a statute with provisions similar to section 4596, a conveyance purporting to convey a freehold estate to commence at a future date should be upheld. The decision in that case is such a practical and common sense application of the rule which should govern the conveying of real estate under our system of government and method of conveyancing, that we will be pardoned for reproducing the full discussion applicable to the subject. In treating of the question involved in that case, which is similar to the one in the case at bar, Barrows, J., speaking for that court, thus discussed the question and announced the conclusions of that court: "Our statutes (Rev. Stats., c. 73, sec. 1) provide that 'a person owning real estate and having a right of entry into it, whether seised of it or not, may convey it, or all ⁶²⁴ of his interest in it, by a deed to be acknowledged and recorded as hereinafter provided.' Detailed regulations as to the mode of execution and as to the force and effect of conveyances thus made and recorded, follow this general provision in some thirty sections, more or less. Can it be doubted that under such statutes the owner of real estate can convey in the manner prescribed such part or portion of his estate as he and his grantee may agree, subject only to those restrictions which the law imposes as required by public policy, but relieved from

the technical doctrine which arose out of ancient feudal tenures, and all the restrictive effect which they had upon alienations? Why prevent the owner in fee simple from agreeing with his grantee (and setting forth that agreement in his conveyances) as to the time when, and the conditions upon which, the instrument shall be operative to transfer the estate from one to the other?

"In substance our law now says to a party having such an interest in real estate as is mentioned in Revised Statutes, chapter 73, you may convey that interest or any part thereof in the manner herein prescribed with such limitations as you see fit, provided you violate no rule of public policy, and place what you do on record so that you may see how the ownership stands.

"In the discussion of the effect of the statute of uses and of our own statutes regulating conveyances of real estate in *Wyman v. Brown*, 50 Me. 139 (a leading case upon the validity of conveyances under which the grantee's right of possession was to accrue not upon delivery of the deed but at some future day), Walton, J., remarks: 'We are also of the opinion that effect may be given to such deeds by force of our own statutes, independently of the statute of uses. Our deeds are not framed to convey a use merely, relying upon the statute to annex the legal title to the use. They purport to convey the land itself, and being duly acknowledged and recorded, as our statutes require, operate ⁶²⁵ more like feoffments than like conveyances under the statute of uses.' In this connection he quotes Oliver's Conveyancing, touching the operation and properties of our common warranty deed to the effect that in the transfer authorized by the statute in this mode 'the land itself is conveyed as in a feoffment, except that livery of seisin is dispensed with upon complying with the requisitions of the statute, acknowledging and recording substituted instead of it.'

"And he concludes that deeds executed in accordance with the provisions of our statutes and deriving their validity therefrom may be upheld thereby, as well as under the statute of uses, notwithstanding they purport to convey freeholds to commence at a future day.

"In other words, the mere technicalities of ancient law are dispensed with upon compliance with statute requirements. The acknowledgment and recording are accepted in place of livery of seisin, and it is competent to fix such time in the

future as the parties may agree upon as the time when the estate of the grantee shall commence. No more necessity for limiting one estate upon another, or for having an estate (of some sort) pass immediately to the grantee in opposition to the expressed intention of the parties.

“The feoffment is to be regarded as taking place, and the livery of seisin as occurring at the time fixed in the instrument, and the acknowledgment and recording are to be considered, as giving the necessary publicity which was sought in the ancient ceremony.”

Upon the provisions of section 900 of the Revised Statutes of 1899, in respect to conveyancing of real estate, supplemented by the provisions of section 4596, *supra*, we are of the opinion that the deeds involved in this controversy conveying the property in dispute were valid and conveyed a sufficient legal title upon which to predicate an action in ejectment.

626 3. This leads us to the final contention of respondents—that is, that the bringing of the action for divorce, claiming alimony therein and obtaining a judgment for such alimony, was a direct repudiation of the original agreement between John O'Day and this plaintiff, and operated as a rescission and cancellation of the deed by John O'Day and wife to A. C. O'Day and by A. C. O'Day to this plaintiff, made in pursuance of such original agreement. To this insistence of respondents we are unable to give our assent. The deeds which resulted in the conveyance of a life estate to this plaintiff at the time of the institution of the divorce suit were fully executed, acknowledged and delivered, and the original agreement between John O'Day and the plaintiff, who was then his wife, did not by the terms of said agreement make the force and validity of such conveyances dependent upon her subsequent action in bringing a suit for divorce and claiming alimony. It may be conceded for the purposes of this case that, having accepted the conveyances made in pursuance of the original agreement in lieu of dower, alimony, etc., the claim for alimony in her divorce suit and the obtaining of judgment therefor was a wrongful act, yet we are unable to conceive upon what principle of law the mere commission of that wrongful act is to operate as a rescission or cancellation of solemn conveyances fully executed and delivered. To illustrate: if A should execute and deliver a deed to B in which certain land was conveyed, and an independent

agreement should have been previously made, the terms of which would recite that this conveyance was made in lieu of ten head of horses, which were to be delivered by A to B, and subsequent to the execution and delivery of the deed B should bring suit against A to recover the horses, would it be seriously contended that the bringing of that suit and even the recovery of the horses would operate as a rescission or cancellation of the deed executed to B? Certainly not; for A in that instance had his day in ⁶²⁷ court in the suit to recover the horses where he could make his defense that there was no right of recovery, for the reason that this deed which had been executed and delivered under a solemn agreement was, in lieu of those horses, and therefore there could be no right of recovery. If he should fail to make that defense, the loss is his and the responsibility for such loss must be attributable to his failure to make his defense at the proper time. So it is in the case at bar. Mr. O'Day fully executed and delivered the deed to A. C. O'Day, and concede for the purposes of this case that it was made in pursuance of an original agreement between him and his wife and in lieu of alimony, yet when plaintiff in this case brought suit for divorce, claiming alimony, Mr. O'Day was served with a copy of the petition; he knew what her claim was; he had his day in court, and if he had previous to that time satisfied her by conveyances, then beyond any sort of question it was his plain duty to make it known to the court in that proceeding, and thereby prevent a recovery of judgment for such alimony.

The record discloses that to the action for divorce he made no defense whatever to her claim for alimony; he simply filed a general denial (except as to the marriage), and that general denial of course went only to the causes alleged in the petition as ground for divorce and the amount of property of which it was alleged he was seised. He made no objections to the decree of divorce or to the judgment for alimony, allowing it to stand unappealed from. Even in the action for divorce the defense that the mere bringing of an action claiming alimony was in violation of an original agreement could not have been made the basis of a cancellation or rescission of a fully executed contract. While the court having jurisdiction of the parties could have proceeded to have adjusted their property rights, yet it by no means would have undertaken to have settled by a decree that a fully executed conveyance ⁶²⁸ should be canceled or rescinded upon the

basis that the plaintiff had wrongfully claimed alimony; however, it is unnecessary to pursue this subject further. He made no such defense after being fully notified as to the nature of the cause of action. He was fully cognizant of the original agreement; must have known he was the grantor in a deed of conveyance that had been fully executed and delivered, and if there were to be any steps taken in the direction of rescinding or canceling his conveyances, that was a matter to which he should have called the attention of the court by an appropriate pleading, and having had his day in court and failing to do so, it is now too late for those succeeding to his rights to ask the court to rescind or cancel such conveyances.

A great deal is said in the briefs of both counsel for appellant and respondents upon the subject of *res adjudicata*. We are of the opinion that the doctrine of *res adjudicata* has very little to do with this case. It is contended by respondents that plaintiff in her reply failed to properly plead *res adjudicata*. Under the pleadings in this case there was no necessity for any such pleading. The answer of Sue I. B. O'Day simply charged that the institution of the action for divorce and the recovery of judgment for alimony was a repudiation of the original agreement, and operated as a rescission or cancellation of the deeds of conveyances. The reply of plaintiff denied this allegation and that denial put in issue the allegations of the answer. As to whether or not the institution of the divorce suit was a repudiation of the original contract and a rescission or cancellation of the deeds of conveyance were not, as a matter of fact, adjudicated in the divorce proceeding; however, it is clear that was the place for the settlement of that question, and the failure of the defendant John O'Day in that proceeding to avail himself of all defenses that he was called upon by the nature of the proceeding to make must be treated under the law as ⁶²⁹ equally effective in settling that question adversely to him as though the same result had been reached after making a complete defense and a thorough adjudication of the subject.

The answer of the defendant Sue I. B. O'Day in this cause does not proceed upon the theory that these conveyances vesting this life estate should be rescinded or canceled by reason of any fraud or mistake, or that they had been rescinded or canceled by any affirmative action of any court of competent jurisdiction, and it nowhere appears that the par-

ties to these conveyances were consenting to any cancellation or rescission of such instruments. If there is any presumption to be indulged from the divorce proceeding and the judgment rendered therein, and the conduct and action of all parties surrounding that transaction, it is that the validity of the conveyances assailed in this proceeding were fully recognized in the divorce proceeding. But there was not an utterance by either of the parties, nor an allegation in either the petition of the plaintiff or the answer of the defendant in that proceeding, in any way indicating that there was a contest as to the validity of the deeds which had been fully executed and delivered by the grantors prior to the action for divorce; but, on the contrary, as before stated, the validity of such instruments was fully recognized.

The deeds offered in evidence by plaintiff conveyed to her a life estate and were sufficient to authorize a recovery of such estate in an action of ejectment. She was entitled to the possession of the land in controversy upon the death of John O'Day.

We have thus indicated our views upon the propositions involved in the record before us, and nothing remains to be done except to announce our conclusion, which is that the decree and judgment as rendered in this cause by the trial court was erroneous. There should have been a judgment for the plaintiff. It is, therefore, ordered that the judgment in this cause be ⁶³⁰ reversed and the cause remanded, with directions to the trial court to ascertain the amount of damages sustained by plaintiff by reason of the withholding of the premises and monthly value of the rents and profits, and render judgment for the plaintiff for the recovery of the possession of the premises, as well as the damage, rents and profits ascertained.

All concur.

The Distinction Between a Will and a Deed is discussed in the monographic note to *Ferris v. Neville*, 89 Am. St. Rep. 486-500.

Conveyances to Take Effect after the death of the grantor are discussed in the monographic note to *Wilson v. Carrico*, 49 Am. St. Rep. 219-222.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

O'DONNELL v. CITY OF SYRACUSE.

[184 N. Y. 1, 76 N. E. 738.]

MUNICIPAL CORPORATIONS, Liability of.—Before a municipal corporation can be held liable for causing an injury, it must appear that some duty incumbent on it to perform had been neglected or improperly discharged. The act, the commission or omission of which is charged as the cause of the injury, must have been within the scope of its powers, as provided by its charter or by some positive enactment of law. (p. 562.)

A MUNICIPAL CORPORATION Acts in a Governmental Capacity to the Extent that it exercises its powers in matters of public concern, and it acts in a private capacity in so far as it exercises its powers under its by-laws for private advantage in matters pertaining to the municipality as proprietor of various works and properties. (p. 562.)

A MUNICIPAL CORPORATION is not Answerable for the Nonexercise, or for the Manner of Its Exercise, of Those Discretionary Powers which are of a public or legislative character. (p. 562.)

A MUNICIPAL CORPORATION is Liable for the Nonperformance, or the Manner of Its Performance, of Its Corporate Duties having relation to its special interests, and which duties are absolute and perfect and not discretionary, and in the performance of which the plaintiff has an interest. (p. 562.)

MUNICIPAL CORPORATIONS, Liability of for Streams Which Have Been Declared Public Highways.—A declaration in a statute that a creek flowing within the limits of a city is a public highway does not impose any peculiar duty on the municipality which will make it answerable for injuries due to its failure to control such creek or keep it in a safe condition or free from obstructions not caused by the municipality. (p. 563.)

MUNICIPAL CORPORATIONS, Liability of for Bridges Across Streams Within Their Limits.—Where a municipal corporation is authorized, and it is its duty, to construct bridges across a stream flowing through the city limits, it is not answerable for any consequential damages occasioned by a bridge impeding the flow of the stream. (p. 564.)

MUNICIPAL CORPORATION, Liability of for Damages Due to the Overflow of a Stream Connected with Its Sewer System.—The duty of a city in respect to a watercourse flowing through its limits and which it uses as an outlet to its sewer system to make provisions obviating the danger of overflow is governmental and discretionary in its character. Hence, it is not answerable to a citizen whose property is injured by the overflow of such stream, though the overflow was made greater and the injury inflicted thereby more serious by the fact that such watercourse was used as an outlet of the sewer system, and its waters were polluted and caused to inflict additional damage thereby. (pp. 567, 568.)

Action to recover for damages resulting to the plaintiff's property from an overflow of Onondaga creek, she alleging that such overflow and damages were chargeable to the neglect of the defendant to perform its duties with respect to the proper care and maintenance of the channel of the stream. The action was tried before a referee, who found that on the 15th of December, 1901, the water of the creek rose to an unusual height, overflowed its banks, reached the lot of the plaintiff, filled the cellar of her house, and flooded the lot to the depth of two feet; that this water was mixed with sewage coming from sewers constructed by the defendant and emptying into the creek; that in consequence of the flood, a portion of plaintiff's lot was washed away, her fruit trees, vines, and bushes and certain articles of personal property were destroyed, sewage deposit left, and the grouting in the cellar loosened; that the creek rises in the highlands in the southern part of the county of Onondaga and passes in a northerly direction through the central portion of the city of Syracuse, and empties into Onondaga lake; that the creek was not shown to have been used for the purposes of navigation, except to some extent for logs prior to 1850; that twenty-three sewers, all of which had been constructed by the defendant, emptied into the creek; they operated to produce a larger and quicker flow of the creek, and, to some extent, contributed to the overflow in question; that the defendant was incorporated in 1847, and the legislature, in 1854, conferred upon the municipal council power to make ordinances to clear out and deepen the channel of the creek and for the removal of obstructions, and the revised charter of 1885 gave power directly to the common council to regulate and to clear out, deepen, and improve the channel, and require obstructions to be removed therefrom; that for many years prior to December, 1901, the channel of the creek had been considerably and materially obstructed by ashes, cinders, dirt, and other rubbish thrown

into it from the bank and flowing down stream and by refuse from the sewers, and these obstructions, by impeding the flow, contributed to the overflow of the water in question, and the flow of water was also impeded by several bridges constructed by defendant; that the flood of December, 1901, was extraordinary, but there had been a flood in 1865 equaling it; that the liability of the watershed of the creek to rapid accumulation and overflow in case of heavy rain or melting snow had rather increased since 1865; that in 1897, the attention of the defendant's common council was called to this subject by one of its committees; that the flood in question was such as might reasonably have been expected to occur; that the right of the defendant to use the creek as an outlet of the sewers was recognized by the legislature as early as 1872; that by reason of the extensive use of the creek for that purpose it had become a part of the sewer system, and its use was necessary to the efficiency of such system, and the city had care and charge thereof; that it was the duty of the city to keep the channel of the creek in a reasonably safe condition for the discharge of the sewage and water; that its failure to perform this duty contributed to the overflow in question and was one of the efficient causes thereof. A judgment entered in favor of the plaintiff was affirmed by the appellate division of the fourth department, and the defendant appealed.

Walter W. Magee, corporation counsel, and Benjamin J. Shove, for the appellant.

Theodore E. Hancock and John N. Mosher, for the respondent.

7 GRAY, J. The theory of the defendant's responsibility, maintained by the learned referee in an opinion, was that, by practically taking possession of Onondaga creek for its municipal purpose it had "converted a natural watercourse into a public sewer," and its duty was "the same as if the sewer was originally artificial." Hence, it was "bound to maintain it in a reasonably safe and efficient condition," and having failed to perform this duty, the failure was an efficient cause of the injury to the plaintiff's property. At the appellate division, this theory of liability was concurred in. It was thought that, from the use made of the creek, "the city was called upon to exercise, affirmatively, its govern-

mental functions to reduce to a minimum the damages likely⁸ to result from the use," and that "the affirmative obligation, inseparably linked with this user, throws upon it the burden of paying whatever damages resulted from the overflowage, although the unusual flood was the inducing cause and responsible for the greater proportion of the damages." I am unable to agree with the courts below in this view of the city's responsibility toward its inhabitants. I might suggest that, as it was found that the city's acts but contributed "to some extent" to the overflow of the creek, it was error to hold it liable for a damage to the plaintiff, to which the acts of others, not acting in concert with it, had contributed. The channel of the creek had been obstructed by the throwing in of ashes, cinders, dirt and rubbish from its banks and by the formation of bars of sand and gravel; so that others than the city were measurably responsible for interfering with the channel of the stream. The municipality was chargeable only with that much of the damage which was caused by its wrongful acts, and if the damage was incapable of separation and the proportions of liability could not be established, that fact affords no reason for holding the city responsible for the tortious acts of others. The rule is discussed in *Chipman v. Palmer*, 77 N. Y. 51, 33 Am. Rep. 566, in the light of both the American and the English cases, and is summarized in the statement that "where different parties are engaged in polluting or obstructing a stream at different times and different places, the whole damages occasioned by such wrongful acts cannot be collected of one of the parties": See, also, *Sammons v. City of Gloversville*, 175 N. Y. 346, 67 N. E. 622. I think the rule is applicable to this case; but I prefer to place its decision upon a broader ground, and to hold that no responsibility whatever lay upon the city for what damage the plaintiff or others similarly situated may have sustained by reason of the extraordinary rise and overflow of the creek.

It will not, I assume, be disputed that a municipality would not be liable for the consequences of a mere overflow of the stream or river, upon whose banks the settlement had been made and had grown into the proportions of a city, in⁹ the absence, of course, of any conditions enjoining some duty with respect thereto, through the neglect of which injury had been occasioned. Indeed, it was conceded below that no duty, ordinarily, would be cast upon a municipality to

restrain the waters between the banks, and hence none to indemnify its citizens against the consequences of freshets or floods. But the argument is that the city, by its user of Onondaga creek, under its charter and ordinances, and under certain statutes, came under a responsibility for its safe condition; that is to say, that it had assumed a dominion over the stream by converting it to its use for sewer purposes, and was, therefore, under an "affirmative obligation, inseparably linked with the user," of paying the damages resulting from an overflow. This is a broad proposition, and, as I think, an unwarrantable extension of the rule of municipal liability. In order that a municipality shall be made liable for causing an injury, it must appear that some duty incumbent upon it to perform had been neglected, or had been improperly discharged. The act, the omission or commission of which is charged as the cause of the injury, must have been within the scope of the corporate powers, as provided by the charter, or by some positive enactment of law. A municipal corporation is the delegate of sovereign power to legislate as to the public needs of the locality. It may be said, in a sense, to possess a dual character. It acts in a governmental capacity to the extent that it exercises its powers in matters of public concern, and it acts in a private capacity in so far as it exercises its powers, under its by-laws, for private advantage, in matters pertaining to the municipality, as the proprietor of the various works and properties: *Lloyd v. Mayor etc. of New York*, 5 N. Y. 369, 55 Am. Dec. 347. It exercises the governmental powers delegated by the state over the particular political subdivision thereof, and it cannot be held liable for the nonexercise of, or for the manner in which it exercises, those discretionary powers which are classed as of a public or legislative character. But where the duty is a corporate one, having relation to its special interests, and it is absolute and perfect, and not discretionary ¹⁰ in its nature, in the performance of which the plaintiff has an interest, his action will lie against the municipality for the damages occasioned by a failure to perform. In other words, if the duty be judicial in its nature, as calling for the exercise of judgment, no liability rests upon the municipality for nonperformance; whereas, if it be of a ministerial nature, neglect to perform it will render the municipality responsible to one injured thereby: See *Dillon on Municipal Corporations*, secs. 753, 778; *Griffin v. Mayor*

etc. of New York, 9 N. Y. 456, 61 Am. Dec. 700; Lloyd v. Mayor etc. of New York, 5 N. Y. 369, 55 Am. Dec. 347. It is a principle of municipal responsibility, early accepted from the common law, in this state, that in the acceptance of a charter sufficient consideration is found in the grant of powers and franchises to support an implied undertaking to perform what duties are imposed, which will inure to the benefit of every individual interested in their performance: Weet v. Trustees of Village of Brockport, 16 N. Y. 161, note; Cain v. City of Syracuse, 95 N. Y. 83. But in the application of the principle, the distinction is to be borne constantly in mind that a corporate duty is not always absolute. For instance, if it relate to legislation in the public interest, or to the undertaking of some work of a public nature which it has not been commanded to do by the state, however comprehensive of the matter the powers conferred by charter or by positive legislative enactments may be, the duty is necessarily discretionary, because within the exercise of a deliberate judgment. Nor does it follow that, although there may be an admitted corporate control of the subject, an absolute and imperative duty arises: Cain v. City of Syracuse, 95 N. Y. 83.

I think we may at once dismiss from our minds any consideration of the argument that, because Onondaga creek had been declared a public highway by statute, a peculiar duty had devolved upon the city in consequence pertinent to this case. The ordinary rule of municipal obligation with respect to the care and maintenance of highways, under the statute, does not apply, and no duty ordinarily rests upon the municipality ¹¹ through whose boundaries a river or stream passes, in whole or in part, to keep it in a safe condition or free from obstructions not of its own causing: Seaman v. Mayor etc. of New York, 80 N. Y. 239, 86 Am. Rep. 612; Coonley v. City of Albany, 132 N. Y. 145.

In the discussion of this case, I accept its facts as they are established by the findings of the trial court, and I find the theory of the plaintiff's recovery to be contained substantially in this proposition, that a peculiar responsibility rested upon the city of Syracuse, by reason of an assumption of corporate dominion over the creek, in using it as a part of its sewerage system, under provisions of its charter and of special legislative enactments, and that the neglect to exercise, or the imperfect exercise of, the power effectively to protect the inhab-

itants against an overflow of the stream made the city liable in damages to anyone injured thereby. The liability of the city was predicated upon the notion of its negligence in the performance of municipal duties incumbent upon it, with respect to the maintenance of the channel of the creek. No negligence is found nor appears, so far as mere construction of sewers or of bridges is concerned. It was the effect of the former, as increasing the flow of the stream, that is made to support the charge of negligence in not providing for the adequate carriage of the waters from freshets and floods. As to the bridges, their construction was authorized, and it was an unquestionable duty of the municipality whose territory the stream separated to construct them as connections and portions of the streets or highways. No liability was thereby cast upon the city for any consequential damages which may be claimed to have been occasioned through their having impeded the flow of the stream: *Radeliff's Exrs. v. Mayor etc. of Brooklyn*, 4 N. Y. 195, 53 Am. Dec. 357; *Atwater v. Trustees of Village of Canandaigua*, 124 N. Y. 602, 27 N. E. 385.

I consider that we must find support for this judgment solely in some duty cast by the statute upon the municipality and negligently performed or omitted. I find no evidence of a corporate dominion or control assumed other than in ¹² the use made of the creek, as an outlet for its system of sewers, and it is necessary briefly to notice, in the light of the legal principles to which I have above called attention, the powers conferred upon the corporate authorities in the charter legislation, or in the special acts, to which our attention has been directed. The city of Syracuse was incorporated in 1847. Onondaga creek, rising in the highlands to the south of the city, flows through it to the north, draining the extensive watershed of the country beyond the city and furnishing a natural drainage for municipal needs. The original charter provisions gave authority to the common council to make highways, bridges, sewers, etc., and imposed duties with respect to their proper maintenance and repair. In 1854 (chapter 28 of the laws), the legislature, revising the charter, gave power to the common council to pass ordinances and to make regulations, providing, among other things, for the construction and the repair of sewers; for the regulation, straightening and improvement of the channel of Onondaga creek and for the draining of the lands adjacent thereto; for the prevention of encroachments upon the channel and for

the deepening of the same. In subsequent charters, as amended, revised, or affected by legislation, ample powers were conferred upon the municipal government with respect to the making, maintenance or improvement of sewers and to the regulating, deepening and improving of Onondaga creek. In 1854 and 1855 (chapters 86 and 508 of the laws), special commissions were appointed by the legislature for the purpose of straightening the creek and of making a new and artificial channel, and to some extent, this work was done. By subsequent acts commissions were appointed and powers were conferred upon the municipal authorities to establish a system of sewerage. In 1898 (section 151 of chapter 595 of the laws), the legislature provided that "all sewers . . . shall conform in all things to the system of sewerage set forth in the report and shown by the maps made by Samuel M. Gray," etc., with power to "the common council in their discretion to make any necessary change in said system," etc. ¹³ It also appears that the attention of the common council had been called by one of their committees to the necessity of some action to avert danger from the recurrence of possible floods by improving the channel.

We may assume, therefore, that there were lacking neither authority nor power in the municipal government to take any measures relating to the improvement of Onondaga creek, nor advisory statements as to the necessity for such measures. But, clearly, all such measures were discretionary with, and lay in the judicial action of, the authorities. As to the sewers the situation was different. Their construction, so far as it had been assumed, devolved a duty upon the municipality for their maintenance, in a proper manner and free from obstructions, which was of a purely ministerial nature; for it was a corporate obligation having relation to its special interests: *Rochester W. L. Co. v. City of Rochester*, 3 N. Y. 463, 53 Am. Dec. 316. The Gray system, provided for by the act of 1898, intended an operation of the sewers which would prevent pollution of the waters of the creek, and it made no provision for floods; however it may be argued that the effect would probably have been to protect against them. No absolute duty appears to have been enjoined by statute upon the municipality with respect to the creek; nor was any created by an assumption of the undertaking to control and to restrain, under all circumstances, its waters. The creek had been from early times the natural drainage outlet for the ter-

ritory, and it became such for the city upon its banks. The right of the city to make use of it for that purpose is beyond question, whether from long use by the community or from legislative recognition. The situation and instances in its history sufficiently advised the inhabitants of the menace from an overflow of the stream, through the inability to carry off in its channel any extraordinary quantity of waters precipitated by melting snows or excessive rains. But aside from the plainly discretionary nature of the powers vested in the municipal government, with respect to the subject, the exercise of those powers was fraught with many obvious difficulties. It ¹⁴ was confronted with a serious problem in a situation, not created by its own acts, but by nature. If the difficulty could be met and danger could be averted, the duty of corporate action was one calling for the exercise of deliberate judgment and discretion.

The question of municipal responsibility for insufficient or for defective sewerage has been, not infrequently, the subject of discussion in the decisions of this court, and the reasoning in some of the cases is not without its pertinence. In *Mills v. City of Brooklyn*, 32 N. Y. 489, the complaint was for the insufficiency of the sewer to carry off the water from the streets, in consequence of which the plaintiffs' premises were flooded and their building was injured. In deciding adversely to the claim of the plaintiffs for damages, it was held that "the duty of draining the streets and avenues of a city or village is one requiring the exercise of deliberation, judgment and discretion. It cannot, in the nature of things, be so executed that in every single moment every square foot of the surface shall be perfectly protected against the consequences of water falling from the clouds upon it. The duty is . . . of a judicial nature, for it requires the qualities of deliberation and judgment. It admits of a choice of means and of the determination of the order of time in which improvements shall be made." Again, it was said: "It may, therefore, be laid down as a very clear proposition that if no sewer had been constructed at the locality referred to, an action would not lie against the corporation, though the jury should find that one was necessary." In *Seifert v. City of Brooklyn*, 101 N. Y. 136, 54 Am. Rep. 664, 4 N. E. 321, the plaintiff recovered the damages which had been occasioned by inundations of the district of his residence, through a defective construction of the sewers. In the opinion the cases

were reviewed and the principle of the immunity of municipal corporations from liability for damages occasioned, either by an insufficiency of the plan of an improvement or by the neglect to exercise the power to make desired improvements was asserted. In that case the liability of the defendant was upheld upon the ground ¹⁵ that its acts had resulted in the creation of a nuisance. It was observed that "while the corporation was under no original obligation to the plaintiff or other citizens to build a sewer at the time and in the manner it did, yet, having exercised the power to do so and thereby created a nuisance on his premises, it incurred a duty, having created the necessity of its exercise and having the power to perform it, of adopting and executing such measures as should abate the nuisance and obviate the damage." In *Byrnes v. City of Cohoes*, 67 N. Y. 204, the plaintiff's property had been damaged by a flood of water collected from the streets, which, but for the curbing and guttering, would have passed away in a natural watercourse. It was held that "the cases . . . to the effect that a municipal corporation is not liable for an omission to supply drainage or sewerage do not apply to a case where the necessity for the drainage or outlet is caused by the act of the corporation itself."

It seems to me to be very clear, therefore, that the omission of the municipal authorities of the city of Syracuse to make provision for obviating the danger of an overflow of the creek was not the neglect of an absolute duty, which made the corporation liable for the damages of which the plaintiff complains. Assuming that there was a duty which could have been effectively performed, and assuming that the municipality had the control, neither reason nor authority supports the contention that the failure to exercise the governmental power of acting upon a matter not relating to some special interest, nor to some undertaking assumed nor commanded by any legislative enactment, imposed a responsibility upon the corporation for what might happen injuriously to the citizens through the occurrence of an extraordinary flood. In *Cain v. Syracuse*, 95 N. Y. 83, it was said that with respect to the failure of the common council to exercise the power to direct the tearing down of a wall which had been made dangerous by a fire and from the fall of which the plaintiff's intestate had been killed, that, assuming the power existed, "did a duty result so absolute, certain and imperative as to found a ¹⁶ right of action upon the omission? We must consider

the nature and scope of the duty, and in so doing must not be misled by the test which makes permissive words absolute and a command. That test . . . will not serve to make a duty, which is inevitably and inherently discretionary, nevertheless ministerial, because the public have an interest in its exercise, or the rights of individuals may be affected by it." In this case the power may be conceded to have existed in the common council to have ordered works or to have put into execution plans for averting the possible recurrence of freshets and floods; but it did not act, whether from inability to devise any satisfactory plan or for any other reason is immaterial, and its nonaction, like that of the state legislative body, could create no cause of action. The plaintiff and the other citizens affected by the flood were no worse off than they would have been if the creek had not been used at all for sewerage purposes, except for the incidental deposit of sewage matter. The drainage of sewers into the channel, however, did not cause the flood, although naturally contributing to the volume of the stream. The flood was an extraordinary and an unusual one, resulting from the natural causes of the action of the elements and of the lay of the land.

I have given my reasons at some length in view of the importance of the case, not only in its possible bearing upon other damage cases, but in the application of the principle of municipal liability in such cases, and I advise that the judgment appealed from should be reversed and that a new trial should be ordered, the costs to abide the event.

Cullen, C. J., O'Brien, Haight and Vann, JJ., concur.

Edward T. Bartlett and Werner, JJ., dissent.

Judgment reversed, etc.

The Liability of a Municipal Corporation for damages due to the overflow of a stream running through it, especially in case it discharges its sewage in the stream, is discussed in the recent case of A. L. Lakey Co. v. Kalamazoo, 138 Mich. 644, 110 Am. St. Rep. 338.

COLLINS v. RUSSELL.

[184 N. Y. 74, 76 N. E. 731.]

HUSBAND AND WIFE.—Curtesy is a Common-law Right Recognized by the Laws of New York, and it gives to a husband a life estate in the lands of which his wife dies seised. (p. 569.)

HUSBAND AND WIFE.—A Husband cannot be a Tenant by the Curtesy of an Estate Which His Wife Holds in Remainder and to the possession of which she never becomes entitled because there is a precedent life estate the tenant of which survives her. (pp. 569, 570.)

HUSBAND AND WIFE.—Tenancy by the Curtesy Does not Exist in Favor of a Husband as to lands in which his wife had an estate in remainder acquired by deed, where she never had any seisin of the lands during coverture, there being a preceding life estate which had not terminated at her death. (p. 570.)

T. W. McArthur and F. M. Starbuck, for the appellant.

A. H. Jones and J. S. Russell, for the respondents.

76 O'BRIEN, J. This action is brought by a husband to recover possession of certain premises, which he claims as tenant by the curtesy. The defense is that the wife was not actually seised of the premises during her lifetime, and that therefore the estate in curtesy did not attach.

By the deed which conveyed the property to the wife there was conveyed to another party a life estate therein. It does not appear that the wife was ever in actual possession of the property, since the life tenant survived her, and it is assumed, as I understand the case, that the wife was never in actual possession of the property. The wife died before the termination of the life estate, and hence the only interest that she ever had in the land was an estate in remainder.

Curtesy is a common-law estate and recognized by the laws of this state. It gives to the husband a life estate in the lands of which his wife died seised. In Washburn on Real Property (sixth edition, sections 328, 335), it is said that "the husband's curtesy is in many respects but a continuation of the estate of the wife," and "if the estate of the wife be one in reversion or remainder, subject to a prior freehold estate in another, her constructive seisin of such reversion will not entitle her husband to curtesy, unless the prior freehold determine during coverture." In this case the life estate referred to continued until long after the death of the plaintiff's wife, and the latter was never in possession. The other

conditions upon which the estate in curtesy depends existed—that is, the marriage, the birth of a child and the death of the wife.

The plaintiff's complaint was dismissed at the trial and the judgment has been affirmed at the appellate division. We think that the appeal cannot be sustained, since actual seisin in the wife is necessary in order to vest the husband with the estate in curtesy.

In *Ferguson v. Tweedy*, 43 N. Y. 543, it was held that, as a general rule, actual seisin of the wife during coverture is necessary to a tenancy by the curtesy; that where there is an outstanding estate for life the husband cannot be tenant by the curtesy of the wife's estate in reversion or remainder⁷⁷ unless the particular intervening estate terminate during coverture. This rule has been relaxed somewhat in respect to wild and unclosed lands, but in a case like the present it seems to remain as above stated.

In *Carr v. Anderson*, 6 App. Div. 6, 39 N. Y. Supp. 746, it was held that the essential element of a tenancy by the curtesy exists in the fact that the wife had actual seisin of the lands during coverture based upon an actual entry upon the same—one which requires or gives an occupation as a demonstrative thing, and if the wife never made an entry upon the lands, the husband had no tenancy by the curtesy. It is claimed by the appellant that a distinction exists where the wife's estate is by deed instead of by inheritance, and in *Adair v. Loit*, 3 Hill, 182, it was held that the rule did not apply where the wife took by deed. No such distinction is to be found in the later decisions in this state, and an examination of the *Adair* case discloses that the court determined that there was actual as well as legal seisin in the wife. The question is fully discussed in the learned opinion below and in the two cases that we have cited, and further discussion would seem to be unnecessary.

The judgment should be affirmed, with costs.

Cullen, C. J., Haight, Vann, Werner, Willard Bartlett and Hiscock, JJ., concur.

Judgment affirmed.

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I. Nature and Origin of the Estate of Tenancy by the Curtesy.

a. Tenancy by the Curtesy Defined.—The books say that when a man takes a wife seised during coverture of an estate of inheritance, legal or equitable, such as that the issue of the marriage may by possibility inherit it as heir to the wife, has issue by her born alive, and the wife dies, the husband surviving has an estate in the lands for his life which is called an estate by the curtesy: *Snyder v. Jones*, 99 Md. 693, 59 Atl. 118; *Day v. Cochran*, 24 Miss. 261; *Redus v. Hayden*, 43 Miss. 614; *Forbes v. Sweesy*, 8 Neb. 520, 1 N. W. 571; *McMasters v. Negley*, 152 Pa. St. 303, 25 Atl. 641; *Breeding v. Davis*, 77 Va. 639, 46 Am. Rep. 740; *Winkler v. Winkler's Exr.*, 18 W. Va. 455. Hence it will be seen that four things are requisite to an estate of tenancy by the curtesy, namely: marriage, seisin of the wife, birth of issue alive capable of inheriting and the death of the wife: *Hunter v. Whitworth*, 9 Ala. 965; *Carlington v. Richardson*, 79 Ala. 101; *McDaniel v. Grace*, 15 Ark. 465; *Monroe v. Van Meter*, 100 Ill. 347; *McNeer v. McNeer*, 142 Ill. 388, 32 N. E. 681, 19 L. R. A. 256; *Jackson v. Jackson*, 144 Ill. 274, 36 Am. St. Rep. 427, 33 N. E. 51; *Snyder v. Jones*, 99 Md. 693, 59 Atl. 118; *Hathon v. Lyon*, 2 Mich. 93; *Day v. Cochran*, 24 Miss. 261; *Stewart v. Ross*, 50 Miss. 776; *Ferguson v. Tweedy*, 56 Barb. 168; *Billings v. Baker*, 15 How. Pr. 525; *Jackson v. Johnson*, 5 Cow. 74, 15 Am. Dec. 433; *Kirk v. Richardson*, 32 Hun, 434; *Valentine v. Hutchinson*, 43 Misc. Rep. 314, 88 N. Y. Supp. 862; *Forbes v. Sweesy*, 8 Neb. 520, 1 N. W. 521; *Watkins v. Thornton*, 11 Ohio St. 367; *McMasters v. Negley*, 152 Pa. St. 303, 25 Atl. 641; *Burgess v. Muldoon*, 18 R. I. 607, 29 Atl. 298, 24 L. R. A. 798; *Withers v. Jenkins*, 14 S. C. 597; *Guion v. Anderson*, 8 Humph. 298; *Porter v. Porter*, 27 Gratt. 599; *Carpenter v. Garrett*, 75 Va. 129; *Muse v. Friedenwald*, 77 Va. 57; *Winkler v. Winkler's Exr.*, 18 W. Va. 455.

b. Origin and General Characteristics of the Estate.—Inasmuch as the birth of issue was one of the essential requirements of an estate of curtesy under the common law, it is quite likely that the estate was given to the husband for the purpose of aiding him in the performance of his duty to support and educate the issue born of the marriage: *Carter v. Cantrell*, 16 Ark. 154; *Heath v. White*, 5 Conn. 228; *Kemph v. Belknap*, 15 Ind. App. 77, 43 N. E. 891; *Winkler v. Winkler's Exr.*, 18 W. Va. 455; *Kingsley v. Smith*, 14 Wis. 360. It must, however, be observed that the continued existence of the issue after birth was not required in order to sustain the tenancy, but that fact loses its significance when it is considered that the estate of curtesy initiate which came into being upon the birth of issue was a freehold estate: *Kibbie v. Williams*, 58 Ill. 30. In *Billings v. Baker*, 15 How. Pr. 525; the court in considering the origin of this estate, said: "If the reasons for the introduction of this peculiar feature of the common law called 'tenancy by the curtesy, in estates in land, have ceased to exist, if in

practice the law fails to be useful, or if it had become an evil, or is inapplicable to our American system of law, it presented a reason, perhaps a necessity, for a remedial act to abrogate it—and such remedial statute must then be construed with reference to a condition of things thus presented. One of the reasons for the introduction of this estate into the English system was that the husband, being the natural guardian of his child, was entitled to the profits of the land in order to maintain the child; but a more prominent and important idea of the system was the reason that then existed in England, in regard to all estates in land under the feudal law, to wit, that the husband, having become dignified by having an interest in lands, was bound to do homage to his superior lord; and the interest being once vested in him, it was the policy of the feudal system not to suffer it to determine during the life of the husband, as otherwise the lord might lose the homage that was his due from the land. To this estate the husband never had any natural right: Bacon's Abridgment, 'Tenant by the Curtesy.'

"Sir J. Jekyl says: 'This estate has no moral foundation to support it': Greenleaf's Cruise, tit. 5, sec. 3. Crabb, an English writer, says: 'The term "curtesy" is derived from "courtesie," Latin "curialitas," to signify suavity or urbanity, to denote that the custom sprung from favor to the husband, rather than from any right.' By thus becoming the vassal or tenant of his superior lord, he was permitted 'by the curtesy of England,' to attend his lord's court, or curtis (as it was called), and to do him homage, by reason of having become the husband of a wife who had died possessed of an estate in lands after issue born. Such were the reasons for the introduction of such a title to lands into the law of England."

There is some diversity among the courts in their characterizations of the nature of the estate itself. Thus it has been characterized as a marital right: *McBreen v. McBreen*, 154 Mo. 323, 77 Am. St. Rep. 758, 55 S. W. 463. And it has been said that it is a mere continuation of the right preserved by the husband during the coverture: *Watkins v. Thornton*, 11 Ohio St. 367. Or, as was said in the principal case, it is in many respects but a continuation of the estate of the wife: *Collins v. Russell*, 184 N. Y. 74, ante, p. 569, 76 N. E. 731, and being considered in many respects as a continuation of the wife's estate, the husband takes it after her death with all the encumbrances which would affect it in her possession if she were living: *Matter of Winne*, 2 Lans. 21. In *Watson v. Watson*, 13 Conn. 83, an attempt was made by the husband to disclaim the estate. The court observed: "Is he, in this respect, like a grantee or an heir? This species of estate has sometimes been classed with those acquired by purchase. But it is rather an estate thrown upon the tenant by operation of law: *Coke's Littleton*, 18b. It partakes more of the character of an estate acquired by descent than by purchase. Immediately upon the death of the wife, the estate vests in him. Like the heir, he cannot, by

refusing to take it, cause it to remain in the wife; nor can he, by a disclaimer, transfer it to others. The estate thus vested in him becomes immediately liable for his debts; and he cannot, by any refusal to take the property, defeat the claims of his creditors."

Neither can the wife bar the right of the husband, in the absence of statutory authorization, by devising the property to third persons: *Anderson's Admr. v. Alderson*, 46 W. Va. 242, 33 S. E. 228. But the husband's right to the estate by the curtesy is contingent upon his surviving the wife: *Beach v. Miller*, 51 Ill. 206, 2 Am. Rep. 290. The husband's interest as tenant by the curtesy is a legal estate in the land and not a mere charge or encumbrance: *Adair v. Lott*, 3 Hill, 182. The estate of tenancy by the curtesy is a freehold estate at common law: *Day v. Coehran*, 24 Miss. 261; *Stewart v. Ross*, 50 Miss. 776; *Gillespie v. Worford*, 2 Cold. 632. But it does not always become a vested estate until it becomes tenancy by the curtesy consummate: *Hayden v. Peirce*, 165 Mass. 359, 43 N. E. 119; *McNeeley v. South Penn Oil Co.*, 52 W. Va. 616, 44 S. E. 508, 62 L. R. A. 562.

c. Distinction Between Curtesy Initiate and Curtesy Consummate.

The general distinction may be said to be this, namely, that the tenancy is curtesy initiate on the birth of issue alive and that it does not become curtesy consummate until the death of the wife before that of the husband: *Winestine v. Ziglitzke-Marks Co.*, 77 Conn. 404, 59 Atl. 496; *Wolf v. Wolf*, 67 Ill. 55; *Hathon v. Lyon*, 2 Mich. 93; *Nicholls v. O'Neill*, 10 N. J. Eq. 88; *Matter of Winne*, 1 Lans. 508; *Schermerhorn v. Miller*, 2 Cow. 439; *Winkler v. Winkler's Exr.*, 18 W. Va. 455. The character of the estate vesting in the husband, under the common law, on the birth of a child, was not affected by the subsequent death of the child: *Watson v. Watson*, 13 Conn. 83; *Witham v. Perkins*, 2 Me. 400; *Comer v. Chamberlain*, 6 Allen, 166; *Jackson v. Johnson*, 5 Cow. 74, 15 Am. Dec. 433. The interest of the tenant by the curtesy initiate was deemed a vested legal estate distinct from that of the wife: *Shortall v. Hinckley*, 31 Ill. 219; *Mitchell v. Violet*, 104 Ky. 77, 47 S. W. 195. The husband's interest as tenant by the curtesy initiate was really an interest for life in his own right: *Baker v. Prewitt*, 64 Ala. 551; *Plumb v. Sawyer*, 21 Conn. 351; *Pinneo v. Goodspeed*, 104 Ill. 184; *Foster v. Marshall*, 22 N. H. 491; *Williams v. Lanier*, Bush (44 N. C.), 30. His interest as tenant by the curtesy initiate was a freehold estate during the lives of himself and wife, with a freehold in remainder to himself for life as tenant by the curtesy consummate and a remainder thereafter to the heirs of the wife in fee. The interest which remained in the wife upon the creation of the curtesy initiate was a mere reversionary interest depending upon the life of the husband: *Winestine v. Ziglitzke-Marks Co.*, 77 Conn. 404, 59 Atl. 496; *Mettler v. Miller*, 129 Ill. 630, 22 N. E. 529; *Ro Bards v. Murphy*, 64 Mo. App. 90. The husband had a right to alienate the estate of curtesy initiate: *Stewart*

v. Ross, 50 Miss. 776. He could when vested with the curtesy initiate sue alone for the possession of the land: *Wilson v. Arentz*, 70 N. C. 670. As tenant by the curtesy initiate he occupied a position like that of other tenants for life: *Jacobs v. Rice*, 33 Ill. 369; and he was held to have such an estate during his life which entitled him to compensation for land taken for a highway: *Ross v. Town Council etc.*, 10 R. I. 461. The estate of tenancy by the curtesy initiate has been abolished by statute in nearly all the states: *Kingsley v. Smith*, 14 Wis. 360; *Oatman v. Goodrich*, 15 Wis. 589. But the estate of tenancy by the curtesy initiate, as it existed under the common law and before it became qualified by the statutes enlarging the rights of married women, was such a vested right as could not be destroyed by legislation subsequently to the time of its creation by the birth of issue, although it could properly be made the subject of legislative action while the right was in the expectancy, that is, until it became initiate: *McNeer v. McNeer*, 142 Ill. 388, 32 N. E. 681; 19 L. R. A. 256.

d. Distinction Between the Estate of Curtesy and the Estate Jure Uxoris.—At the common law, a husband was before the birth of issue seised jointly of the freehold with his wife but as the freehold of his wife and not as his own. After the birth of issue he had an independent life estate in his own right. This independent life estate was that known as the curtesy initiate: *Wyatt v. Smith*, 25 W. Va. 813. The marital estate was held by him solely in right of the wife while the estate by the curtesy initiate was held in his own right: *Dyer v. Wittler*, 14 Mo. App. 52; *Churchhill v. Hudson*, 34 Fed. 14. He was not, however, solely seised of the marital estate, but jointly with his wife. In order for him to have become a tenant by the curtesy consummate, it was, of course, necessary for him to survive her: *Weisinger v. Murphy*, 2 Head, 674.

The court in *Bozarth v. Sargent*, 128 Ill. 95, 21 N. E. 218, in speaking of this distinction, observed: "At common law a husband held in right of his wife all her lands in possession, and owned the rents and profits thereof absolutely: 1 Washburn on Real Property, 276; Tiedeman on Real Property, sec. 90; *Haralson v. Bridges*, 14 Ill. 37; *Clapp v. Inhabitants of Houghton*, 10 Pick. 463; *Decker v. Livingston*, 15 Johns. 479. The birth of issue was not necessary to this right of the husband, which continued during the joint lives of the husband and wife. It was called an estate during coverture, or the husband's freehold estate jure uxoris: *Kibbie v. Williams*, 58 Ill. 30; *Butterfield v. Beall*, 3 Ind. 203; *Montgomery v. Tate*, 12 Md. 615; *Croft v. Wilbar*, 7 Allen, 248. It differed from curtesy initiate, in its being a vested estate in possession, while the latter is a contingent future estate, dependent upon the birth of issue: *Wright v. Wright's Lessee*, 2 Md. 429, 56 Am. Dec. 723. It is held in right of the wife, and was not added to or diminished when curtesy initiate arose. Subject to the husband's beneficial enjoyment during coverture, the ownership remained in the wife, and,

on dissolution of the marriage, was discharged from such estate of the husband: *Stewart on Husband and Wife*, sec. 146. Where there was marriage, seisin of the wife, and birth of issue capable of inheriting, the husband, by the common law, took an estate in the wife's land during coverture. This was an estate of tenancy by the curtesy initiate, and which would become consummate upon the death of the wife in the lifetime of the tenant. A tenant by the curtesy was seised of an estate of freehold, which was subject to alienation, and was liable to be taken on execution for his debts: *Tiedeman on Real Property*, sec. 101; *Howey v. Goings*, 13 Ill. 95, 46 Am. Dec. 427; *Jacobs v. Rice*, 33 Ill. 369; *Cole v. Van Riper*, 44 Ill. 58; *Beach v. Miller*, 51 Ill. 206, 2 Am. Rep. 290; *Lang v. Hitchcock*, 99 Ill. 550."

This distinction was also remarked upon by Judge Patton in *Winkler v. Winkler's Exr.*, 18 W. Va. 455, wherein he said: "The mere marital rights of the husband before the creation of the separate estates of married women was the right absolutely to the personal property of the wife and to the rents and profits of the realty during coverture. That right to the rents and profits during coverture from the mere marital relation terminated upon the death of either husband or wife, because it was a right growing out of the marriage, which ceased when the marriage relation ceased. But the husband might have a right to the enjoyment beyond the mere marital right of the rents and profits of the real estate of the wife, not growing out of the marital right but growing out of a wholly different principle. The marital right grew out of the marital relation and ceased with it, but during the marital relation another right grew up, where in addition to the marriage there was issue born alive. In this case the husband was not only entitled to the enjoyment of the real estate by virtue of the marital right, but was also entitled to it upon another principle—that of being tenant by the curtesy initiate, a tenancy created upon the theory that the husband was the natural guardian of the child, and that it was his duty to maintain it and equip it for the inevitable struggle of after-life.

"Whether the marital right ceased, and the right of tenant by the curtesy initiate began, upon the birth of issue, it is not necessary to consider; for so far as I have been able to discover, there is no difference in the rights of tenant by the marital right and tenant by the curtesy initiate during the lifetime of the wife. Each was entitled to the enjoyment of the property, and it was liable to the same encumbrances of the husband during the coverture, and the wife's rights ceased during her life and the lifetime of her husband as fully in the one case as the other, the only difference being that upon the death of the wife the tenancy by the curtesy initiate ceased or was enlarged into the tenancy by the curtesy consummate, a tenancy which in its attributes and consequences can only begin in fact after the wife's death."

e. **Distinction Between the Estates of Curtesy and Dower.**—Although the estates of curtesy and dower have much in common, still

there is considerable difference between them. The wife's inchoate right to dower attaches upon marriage, while the husband's right to curtesy is dependent upon having issue born alive after the marriage: *Garner v. Wills*, 92 Ky. 386, 17 S. W. 1023. And in *Rouse v. Directors of the Poor*, 169 Pa. St. 116, 32 Atl. 541, the court said: "Nor does the estate, as argued by appellees, stand upon the same plane as the wife's inchoate right of dower. The husband, in a degree, has the present enjoyment of the initiate estate during the life of the wife, which she cannot divest by her deed or mortgage; either, if not joined in by the husband, is an absolute nullity—so that by no deed of her estate, or mortgage pledge thereof, can she defeat his during her life or peril his possession. On the other hand, his deed to a purchaser of his own land will support ejectment, and dispossess both during his life. His mortgage sued out to judgment and sale will divest her dower, so as to bar any claim by her after his death. Hence, the right of dower and estate by the curtesy are not of the same nature and are clearly not of the same value."

II. Matters Relating to the Marriage.

a. **Necessity for the Existence of a Valid Marriage.**—One of the essential requirements in order to create an estate of tenancy by the curtesy, whether it be initiate or consummate, is that there be a marriage between the person claiming the right of such tenancy and the person claimed to be the wife of such party: Subd. I, a. The fact of such marriage may, of course, be shown in the same manner that such fact would be shown in any other proceeding in which such a question would arise. Hence, the fact of the marriage which is to serve as a basis for the establishment of a tenancy by the curtesy may be established by showing that the parties lived together and cohabited as husband and wife for a series of years, and always recognized each other as such, and were so reputed and treated in the community in which they lived, even though there be no record evidence of the marriage or the evidence of any witness who saw them married: *Bruner v. Briggs*, 39 Ohio St. 478.

b. **Effect of Divorce upon the Right to Tenancy by the Curtesy.**—An absolute divorce between the husband and wife, naturally, prevents the husband from acquiring a tenancy by the curtesy consummate in the lands of his former wife, because one of the requisites of such a tenancy is the death of the wife, and the divorce severing the marital relation destroys the possibility of the woman dying as his wife: *Baykin v. Rain*, 28 Ala. 332, 65 Am. Dec. 349; *Wheeler v. Hotchkiss*, 10 Conn. 225; *Townsend v. Griffin*, 4 Harr. (Del.) 440; *Howey v. Goings*, 13 Ill. 95, 54 Am. Dec. 427; *Emmert v. Hays*, 89 Ill. 11; *Doe v. Brown*, 5 Blackf. 309; *Hays v. Sanderson*, 7 Bush (Ky.), 489; *Oldham v. Henderson*, 5 Dana (Ky.), 254; *Wright v. Wright's Lessee*, 2 Md. 429, 56 Am. Dec. 723; *Moran v. Somes*, 154 Mass. 200, 28 N. E. 152; *Doyle v. Rolwing*, 165 Mo. 231, 88 Am. St. Rep. 416, 65 S. W. 315, 55 L. R. A. 332; *Renwick v. Renwick*,

10 Paige, 420; *Schult v. Moll*, 10 N. Y. Supp. 703; *Davis v. Davis*, 68 N. C. 180; *Arrington v. Arrington*, 102 N. C. 491, 9 S. E. 200; *Burgess v. Muldoon*, 18 R. I. 607, 29 Atl. 298, 24 L. R. A. 798; *Mattocks v. Stearns*, 9 Vt. 326; *Porter v. Porter*, 27 Gratt. 599. In some of the cases some emphasis seems to be placed upon the circumstance of which party is the one guilty of matrimonial misconduct, but that circumstance is clearly not necessary to be considered. Indeed, statutes declaring that in case of divorce the guilty party "shall forfeit all rights and claims under and by virtue of the marriage" do not have the effect of preserving to the husband, though he be the innocent party, his previous potential right to curtesy: *Doyle v. Rolwing*, 165 Mo. 231, 88 Am. St. Rep. 416, 65 S. W. 315, 55 L. R. A. 332. But it has been held in an earlier case in Missouri that under such a statute declaring that the guilty party shall forfeit all his rights under and by virtue of the marriage, that the guilty husband forfeits his rights to curtesy in property standing in the name of his wife: *Schuster v. Schuster*, 93 Mo. 438, 6 S. W. 259. Likewise, it has been held that a statute providing that a divorce bars all claims of curtesy or dower applies to all valid divorces wherever obtained: *Hawkins v. Ragsdale*, 80 Ky. 353, 44 Am. Rep. 483.

A decree of divorce *a mensa et thoro* does not bar the husband's right to curtesy, since it does not sever the marital relation as does a divorce *a vinculo*: *Hunter v. Whitworth*, 9 Ala. 965. An absolute divorce does not, however, in the absence of a statute to the contrary, affect the rights of the husband, as tenant by the curtesy initiate, during his own lifetime, if he was a tenant by the curtesy initiate at the time where the divorce was granted: *Pinneo v. Goodspeed*, 104 Ill. 184; *Meacham v. Bunting*, 156 Ill. 586, 47 Am. St. Rep. 239, 41 N. E. 175, 28 L. R. A. 618. And naturally, under such circumstances, it would not affect the title of a purchaser from the husband of his title as such tenant by the curtesy initiate: *Gillespie v. Worford*, 42 Tenn. (2 Cold.) 632.

III. Matters Relating to the Birth of Issue.

a. **Necessity for Birth of Issue Capable of Inheriting.**—One of the essential requirements for the creation of a tenancy by the curtesy under the common law is the birth of living issue during coverture: *Nicrosi v. Phillippi*, 91 Ala. 299, 8 South. 561; *In Matter of Winne*, 1 Lans. 508; *Childers v. Baumgarner*, 8 Jones, 297. The issue must be legitimate issue: *Hunter v. Whitworth*, 9 Ala. 965. It must be such issue as would be capable of inheriting. Hence, if the inheritance be in tail male and the issue born be a female, it would not be sufficient to create a tenancy by the curtesy initiate: *Heath v. White*, 5 Conn. 228; *Day v. Cochran*, 24 Miss. 261; *Barker v. Barker*, 2 Sim. 249; *Sumner v. Partridge*, 2 Atk. 47. It is not material whether the issue be born before or after the seisin of the wife: *Comer v. Chamberlain*, 6 Allen, 166. And it is not es-

sentia] that the issue continue to live: *Hunter v. Whitworth*, 9 Ala. 965.

In some of the states, the necessity for the birth of issue in order to give the husband an estate of curtesy has been abolished by statute. In such states the common-law estate of curtesy initiate has, as a general rule, been also abolished: *Stewart v. Ross*, 50 Miss. 776; *Forbes v. Sweesy*, 8 Neb. 520, 1 N. W. 571; *Denny v. McCabe*, 35 Ohio St. 576; *Bruner v. Briggs*, 39 Ohio St. 478; *Rouse v. Directors of the Poor*, 169 Pa. St. 116, 32 Atl. 541.

b. What Constitutes the Birth of Live Issue.—Children born within six months after conception are considered by the civil law as incapable of living, and therefore though they are apparently born alive, if they do not in fact survive long enough to rebut the presumption of law, they cannot inherit so as to transmit the property to others. And there is dicta to the effect that the delivery of a living child by Caesarean operation, after the mother's death, is not sufficient to enable the father to take as tenant by the curtesy, even though the child might have been considered in esse before birth for its own benefit: *Marsellis v. Thalhimer*, 2 Paige Ch. 35, 21 Am. Dec. 66. A child is born alive, within the rule requiring such birth as a basis for curtesy, where after delivery it makes a distinct effort to breathe while the umbilical cord is yet uncut, though no effort is made thereafter: *Goff v. Anderson*, 91 Ky. 303, 15 S. W. 866, 11 L. R. A. 825. Likewise, proof of the beating of the heart and pulsation of the arteries, even without proof of breathing, is sufficient to create a tenancy by the curtesy: *Cannon v. Killen*, 5 Houst. 14. The court in *Matter of Winne*, 1 Lans. 508, said: "The issue must be born alive and during the marriage and capable of inheriting as heir to the mother; and the issue must be born during the life of the mother, for if the mother dies in labor, and the Caesarean operation is performed, the husband in this case shall not be tenant by the curtesy, because at the instant of the mother's death he was clearly not entitled, as having no issue born, but the land descended to the child while he was yet in his mother's womb, and the estate being once so vested shall not afterward be taken from him: 2 Blackstone's Commentaries, 127; Coke's Littleton, 29b; *Marsellis v. Thalhimer*, 2 Paige Ch. 42, 21 Am. Dec. 66; *Greenleaf's Cruise*, tit. 5, c. 1, sec. 17."

Of course as far as the kind of evidence and the weight of the evidence to prove the fact of the issue having been born alive is concerned, the same rules apply as are applicable in other cases: *Thomas y. Hughes* (Ky.), 25 S. W. 591.

IV. Matters Relating to the Seisin.

a. Necessity for Seisin and Character of Seisin Required.—The greater part of the litigation arising over the assertion of a right to an estate of tenancy by the curtesy arises over misapprehensions as to whether the wife was seised of the property in question. The rule at common law was very strict in this respect.

"Seisin as applied to land is a technical term that implies the possession of an estate of freehold. Seisin in law is the right to have such possession. Seisin, in deed, is the actual possession of the freeholder. It means more than the mere possession—it is possession with the legal right to the estate in the land": *Nixon v. Williams*, 95 N. C. 103.

Under the common law seisin of the wife during the coverture was an essential requirement to constitute tenancy by the curtesy: *Bogy v. Roberts*, 48 Ark. 17, 3 Am. St. Rep. 211, 2 S. W. 186; *Stinebaugh v. Wisdom*, 13 B. Mon. 467; *Redus v. Hayden*, 43 Miss. 614; *Dozier v. Toalson*, 180 Mo. 546, 103 Am. St. Rep. 586, 79 S. W. 420; *Withnell v. Withnell*, 69 Neb. 605, 96 N. W. 221; *Hopper v. Demarest*, 21 N. J. L. 525; *De Camp v. Crane*, 19 N. J. Eq. 166. But under the strict rule of the common law it was required that the seisin be actual and not merely a legal seisin: *Connor v. Donner*, 4 Bush, 631; *Stevens v. Smith*, 4 J. J. Marsh. 64, 20 Am. Dec. 205; *Vanarsdall v. Fautle-roy's Heirs*, 7 B. Mon. 401; *Petty v. Malier*, 15 B. Mon. 591; *Adams v. Logan*, 6 T. B. Mon. 175; *Valentine v. Hutchinson*, 43 Misc. Rep. 314, 88 N. Y. Supp. 862; *Howells v. McGraw*, 97 App. Div. 460, 90 N. Y. Supp. 1; *Collins v. Russell*, 184 N. Y. 74, ante, p. 569, 76 N. E. 731; *Gentry v. Wagstaff*, 3 Dev. 270; *Carpenter v. Garrett*, 75 Va. 129; *Fulton v. Johnson*, 24 W. Va. 95; *Bragg v. Wiseman*, 55 W. Va. 330, 47 S. E. 90; *De Hart v. Dean*, 2 MacAr. (D. C.) 60; *Mercer v. Selden*, 1 How. 37, 11 L. ed. 38. The terms "seisin in fact" and "seisin in deed" are used synonymously by many courts in discussing this subject: *Dozier v. Toalson*, 180 Mo. 546, 103 Am. St. Rep. 586, 79 S. W. 420.

The reason for the strictness of the common law in that respect is somewhat obscure. The court, in *Todd v. Oviatt*, 58 Conn. 174, 20 Atl. 440, 7 L. R. A. 693, in discussing this phase of the question, said: "But the counsel for the defendant contend that the reason for requiring actual seisin in the wife is to be found in the fact that the common law confined inheritance to the stock of actual seisin. If it clearly appeared that this was the sole reason, the defendant would be entitled to the benefit of the rule 'that when the reason of any particular law ceases, so does the law itself.' The citation from 2 Blackstone's Commentaries, 128, and from 1 Greenleaf's Cruise, title 'Curtesy,' section 23, to the effect that the rule as to seisin in curtesy probably arose from the rule as to inheritance, at first impressed us as furnishing strong support for this position. But, on turning to Williams' able treatise on Real Property (4th ed., App. E. 491-502), we found an exhaustive discussion of this question, in which he clearly shows, by many citations from Coke, Littleton, and Blackstone, as well as by other reasons, that this supposition is not true; and his conclusion is 'that the reason why an actual seisin was required to entitle the husband to curtesy was that his wife may not suffer by his neglect to take possession of her lands, and, in order to induce him to do so, the law allowed him curtesy of all

lands of which an actual seisin had been obtained, but refused him his curtesy out of such lands as he had taken no pains to obtain possession of.' In 2 Blackstone's Commentaries, 131, under the head 'Dower,' it is said: 'A seisin in law of the husband will be as effective as a seisin in deed, in order to render the wife dowable; for it is not in the wife's power to bring the husband's title to an actual seisin, as it is in the husband's power to do with regard to the wife's lands, which is one reason why he shall not be tenant by the curtesy, but of such lands whereof the wife, or he himself, in her right, was actually seised in deed.' Lord Coke also has a statement to the same effect."

But even in the English court there was a strong tendency toward doing away with the necessity of actual seisin by a liberal construction of what acts amounted to an actual seisin. Thus it was said in *Ellsworth v. Cook*, 8 Paige Ch. 643, that: "It was unquestionably the law of England at an early day that to entitle the husband to an estate for life in his wife's real estate after her death, as tenant by the curtesy, he must have been actually seised of the land in right of his wife at some time during the coverture: Coke's Littleton, 29a. That principle undoubtedly arose out of the ancient law of disseisin and the principle of the ancient common law, that the disseisin of the tenant of the freehold actually divested his estate in the land and reduced it to a mere right. Hence, even the English courts have been struggling for more than a century to sustain the right of the husband to his curtesy in the estate of his wife, and of the wife to her dower in the lands of her husband, in every case in which there was not an actual disseisin. Thus it has been held that the possession of a lessee, under a lease reserving rent, is an actual seisin of the husband so as to entitle him to a life estate in the land as tenant by the curtesy, although he neither received nor demanded rent during the life of the wife: *De Gray v. Richardson*, 3 Atk. 469. And in another case, where the wife was entitled to an undivided third part of the premises as the heir of her brother, but was kept out of the possession during the continuance of the coverture by the other tenant in common, who claimed possession, for the brother, of that third of the estate, upon the supposition that he was still living, this was held a good constructive seisin of the husband during coverture, to entitle him to a life interest in that part of the estate as tenant by the curtesy: *Sterling v. Penlinton*, 3 Eq. Cas. Abr. 730."

But the strict rule of the common law has been modified in many of the states of the Union to the extent that only legal seisin is necessary as distinguished from actual seisin: *Kline v. Beebe*, 6 Conn. 494; *Wass v. Buckman*, 38 Me. 356; *Day v. Cochran*, 24 Miss. 261; *Rabb v. Griffin*, 26 Miss. 579; *Redus v. Hayden*, 43 Miss. 614; *Stephens v. Hume*, 25 Mo. 349; *Martin v. Trail*, 142 Mo. 85, 43 S. W. 655; *Merritt's Lessee v. Horne*, 5 Ohio St. 307, 67 Am. Dec. 298. The reasons why actual seisin served no useful purpose and should, accord-

ing to the maxim "*Cessante ratione cessat ipse lex*," be abolished, were exhaustively set forth by Judge Thurman in *Borland's Lessee v. Marshall*, 2 Ohio St. 308. Even those courts which do not positively assert that mere legal seisin is sufficient, still, under the policy of softening the harshness of the ancient rule at common law, now admit that any possession which protects the title of the wife from such intrusion and possession as might, by its continuance, endanger her title is equivalent to actual seisin: *Sweeney v. Montgomery*, 85 Ky. 55, 2 S. W. 562; *Ellis v. Dittey*, 94 Ky. 620, 23 S. W. 366. From an early period the courts have decided that actual seisin was not necessary of lands which were wild or uncultivated, in order to create a tenancy by the curtesy in the husband, provided that they had not been held adversely to the wife: *Wells v. Thompson*, 13 Ala. 793, 48 Am. Dec. 76; *Mettler v. Miller*, 129 Ill. 630, 22 N. E. 529; *Neely v. Butler*, 10 B. Mon. 48; *Malone v. McLauren*, 40 Miss. 161, 90 Am. Dec. 320; *Jackson v. Sellick*, 8 Johns. 262; *Pierce v. Wanett*, 10 Ired. 446; *McCorry v. King's Heirs*, 3 Humph. 267, 39 Am. Dec. 265; *Guion v. Anderson*, 8 Humph. 298; *Seim v. O'Grady*, 42 W. Va. 77, 24 S. E. 994; *Barr v. Galloway*, 1 McLean, 476, Fed. Cas. No. 1037; *Davis v. Mason*, 1 Pet. 503, 7 L. ed. 239; *Merceer v. Selden*, 1 How. 37, 11 L. ed. 38. A husband is not entitled to curtesy in lands of his wife which are in the possession of persons claiming adverse title: *Den ex dem. Hopper v. Demarest*, 21 N. J. L. 525; *Baker v. Oakwood*, 49 Hun, 416, 3 N. Y. Supp. 570; *Crow v. Kightlinger*, 25 Pa. St. 343; *Stokely v. Hayden*, 8 Baxt. 307.

The receipt of the rents and profits of land by the wife is deemed a sufficient seisin by her to enable the husband to have curtesy in the lands, notwithstanding the interposition of a trustee for the separate use of the wife: *Powell v. Gossom*, 18 B. Mon. 179; *Withers v. Jenkins*, 14 S. C. 597; *Frey v. Allen*, 9 App. D. C. 400. And where the wife is an heir, and her husband rents the land of her ancestor's widow, the fact that the wife lived on the land with the husband has been held to constitute a sufficient actual seisin to allow the husband curtesy in the lands: *Nixon v. Williams*, 95 N. C. 103. But under the North Carolina statutes, it appears to have been sufficient if the wife had any interest in the land, regardless of whether it was actual seisin or not: *Sears v. McBride*, 70 N. C. 152.

b. General Rule Respecting the Determination of Whether Curtesy Attaches to an Estate.—Although the many decisions involving the attaching of the tenancy by the curtesy to various kinds of tenures would seem to indicate that there is much confusion upon the subject, still a close examination of the decisions will show that the real principle back of the question was whether the estate which the wife had in the land amounted to an estate for a period longer than her life, or whether her interest in the estate was limited strictly to her own life.

The right of the husband to curtesy in the estate of his wife depends upon the estate which the wife had in the property in her

lifetime, and not upon the estate which the heirs of her body would take by descent: *Haynes v. Bourn*, 42 Vt. 686. Any circumstance which would have defeated or determined the estate of the wife, if living, will put an end to the curtesy, since the right of curtesy will arise or be defeated with the estate out of which it is to be derived. This condition obtains with respect to both legal and equitable estates: *Withers v. Jenkins*, 14 S. C. 597.

c. Various Kinds of Estates to Which Tenancy by the Curtesy may Attach.

1. **In General.**—The property, in order to be the subject of a tenancy by the curtesy, should be an inheritable freehold: *Hall v. Crabb*, 56 Neb. 392, 76 N. W. 865; *Young v. Langbein*, 7 Hun, 151; *Matter of Kirk v. Richardson*, 32 Hun, 434; *Thornton's Exrs. v. Krepps*, 37 Pa. St. 391; *Withers v. Jenkins*, 14 S. C. 597. In other words, curtesy attaches to any estate of inheritance of which the wife is seised during coverture: *City of Clinton v. Franklin (Ky.)*, 83 S. W. 142. And the tenancy by the curtesy is an incident to both legal and equitable estates: *Ogden v. Ogden*, 60 Ark. 70, 46 Am. St. Rep. 151, 28 S. W. 796; *Dugan v. Gittings*, 3 Gill, 138, 43 Am. Dec. 306; *Cushing v. Blake*, 30 N. J. Eq. 689; *Dubs v. Dubs*, 31 Pa. St. 149; *Ege v. Medlar*, 82 Pa. St. 86. Likewise the husband is entitled to curtesy in lands held by a guardian of his minor wife to her use: *Phillips v. Ditto*, 2 Duvall, 549; *Nightingale v. Hidden*, 7 R. I. 115.

Since there is no such thing as joint seisin of husband and wife in right of the wife in her separate estate, the husband is not entitled to curtesy in such an estate: *Bottoms v. Corley*, 5 Heisk. 1.

And it has been held that under the common law an alien could not acquire an estate by the curtesy in the lands of his wife: *Foss v. Crisp*, 20 Pick. 121; *Copeland v. Sauls*, 1 Jones, 70; *Quinn v. Ladd*, 37 Or. 261, 59 Pac. 457; *Reese v. Waters*, 4 Watts & S. 145.

2. **Equitable Estates in Trust for the Wife.**—“At common law the husband could not be the tenant by the curtesy of a use; but it is now settled otherwise in equity, and the husband may be a tenant by curtesy if the wife has an equitable estate of inheritance, notwithstanding the rents and profits are to be paid to her separate use during coverture: 1 Atk. 607; 4 Kent's Commentaries, 30.

“The receipt of the rents and profits, it is stated, is a sufficient seisin of the wife: *Morgan v. Morgan*, 5 Madd. 408. Mr. Washburn, volume 1, *130, says: ‘In respect to the seisin of the wife, it must, in general terms, be of an estate of inheritance; but this must be either a legal or equitable one. In giving effect to the estates under the statute of uses, courts of equity intended to follow the law, and in most respects have followed it in regard to the nature and incidents of such estates. Among these was the right of curtesy, and husbands of cestuis que trust were allowed to take their estates by curtesy if they were estates of inheritance of which the wife had what answered in equity to a seisin at law of legal estates in posses-

sion. And the receipt of rents and profits by the wife as such cestui que trust during coverture is ordinarily sufficient seisin in equity to give the husband curtesy': *Morgan v. Morgan*, 5 Madd. 408. But, he adds, 'it does not seem to be sufficient seisin of a trust estate to give her husband curtesy thereof.' That the wife had the rents and profits by the terms of the trust deed to her own and separate use, her seisin, in such case, not inuring to the benefit of the husband, he cites *Hearle v. Greenback*, 3 Atk. 710; *Sweetapple v. Bindon*, 2 Vern. 536. It seems, then, that nothing less than the receipt of the rents and profits by the wife during coverture will constitute an equitable seisin in a trust estate': *Withers v. Jenkins*, 14 S. C. 597.

No matter how rigid the exclusion of the marital rights may be during the life of the wife through the terms of the trust for her separate use, yet, if at her death the trust terminates and the estate vests in heirs, his estate, by the curtesy, becomes consummate: *Frey v. Allen*, 9 App. D. C. 400. But where a testator devises realty in trust for his daughter and heirs for her separate use free from control of her husband and without power of alienation, her surviving husband will be entitled to curtesy: *Dubs v. Dubs*, 31 Pa. St. 149. And he may become tenant by the curtesy of his wife's separate equitable estate, as, for instance, where he holds the legal title as trustee of a resulting trust for her: *Taylor v. Smith*, 54 Miss. 50. And likewise, where a trust deed contained no words of limitation descriptive of her interest, and did not define the interest of the cestui que trust and left no remainder over after the termination of the estate granted to her, the husband of the cestui que trust takes an interest as tenant by the curtesy: *Freyvogle v. Hughes*, 56 Pa. St. 228. And where a testator devised land to a trustee for the benefit of his daughter and her two children, she having two children at the time that the will was made, the husband of the daughter is entitled to curtesy in one-third of the devised land: *Hunt v. Satterwhite*, 85 N. C. 73. So, also, where lands are devised to trustees in trust for the separate use of the wife during her life with the legal title to vest in her upon the death of her husband, the husband takes curtesy: *Payne v. Payne*, 11 B. Mon. 138. But where land is conveyed to a married woman for her sole and separate use, free from all debts, liabilities and contracts of her husband, and to her children begotten by said husband, the husband takes no curtesy, since the wife had only a separate life estate, and on her death the entire estate passed to her children by the terms of the deed: *Beecher v. Hicks*, 7 Lea, 207. Neither does the husband take an estate of curtesy in land conveyed to his wife in trust for her children by a former marriage: *Norton v. McDevit*, 122 N. C. 755, 30 S. E. 24. And where the estate was conveyed to a trustee for a married woman during coverture or the joint lives of herself and her husband, but with a provision that if the wife survive the husband, the trustee, upon demand of the wife, should convey the property to her and her

heirs, it was held that the husband took no curtesy: *Graves v. Trueblood*, 96 N. C. 495, 1 S. E. 918.

3. Effect Where the Trust Estate was Created by the Husband.—

The general rule with respect to the creation of separate equitable estates for the wife was stated by the court in *Jones v. Jones' Exr.*, 96 Va. 749, 32 S. E. 463, in the following language: "A husband, if he survives his wife and the common-law requisites exist, is entitled to curtesy in any real estate held by her as her equitable separate estate, which may remain at her death undisposed of by her during the coverture or by will, under a power to that effect vested in her by the instrument creating the separate estate just as in any other real estate of inheritance owned by her, unless his marital rights are excluded by such instrument. Whether they are excluded or not depends upon the intention of the grantor. This may appear from the instrument creating the separate estate in the wife or may result from the nature of the transaction. Where the separate estate is created by a stranger, the intention to exclude must be plain and unequivocal, or the husband will be entitled to curtesy: *Burk's Separate Estates*, 14, 15; *Chapman v. Price*, 83 Va. 392, 11 S. E. 879; *Mitchell v. Moore*, 16 Gratt. 275; *Nixon v. Rose*, 12 Gratt. 425; *Charles v. Charles*, 8 Gratt. 486, 56 Am. Dec. 155.

"But where the equitable separate estate is created by the husband, the intention to exclude is presumed or results from the transaction itself, except so far as he may have reserved his marital rights in the instrument creating the separate estate. The law attaches to every absolute conveyance complete alienation of the entire interest of the grantor, so far as the alienation is permitted by the principles of law and equity. Upon this principle the law presumes that a husband, by an absolute conveyance creating an equitable separate estate in the wife, intended to vest in her his entire interest in the subject conveyed, including all his marital rights, present and future, and the conveyance is so construed. Consequently a husband has not an estate as tenant by the curtesy in land conveyed by him in such manner as to create an equitable separate estate in his wife, whether the conveyance be made directly to her or to another person for her, in the absence of a reservation in the conveyance of his right thereto at her death: *Burk's Separate Estates*, 16; *Sayers v. Wall*, 26 Gratt. 354, 21 Am. Rep. 303; *Irvine v. Greever*, 32 Gratt. 411; *Dugger v. Dugger*, 84 Va. 130, 4 S. E. 171."

The rule above stated was followed in *Ratliff v. Ratliff*, 102 Va. 880, 47 S. E. 1007. A husband is, however, entitled to curtesy in land conveyed by him in trust for the sole and separate use and benefit of his wife, her heirs and assigns, even though it is to be free from liability for his debts, contracts and control: *Soltan v. Soltan*, 93 Mo. 307, 6 S. W. 95; *Frazer v. Hightower*, 12 Heisk. 94. And he is likewise entitled to curtesy where he has conveyed the land to a trustee for the sole and separate use of his wife with covenants by the trustee to convey the property at the wife's death as she may

appoint, and in default of appointment, then to her heirs: *Tremmel v. Kleiboldt*, 75 Mo. 255. But he is not entitled to curtesy where the deed to the wife is by a trustee, acting under a power and direction of the husband, in fee simple for her sole use and benefit, free from the control and ownership of the husband: *Zenst v. Staffan*, 16 App. D. C. 141.

4. Effect Where the Instrument Creating an Estate for the Separate Use or in Trust for the Wife Expressly Excludes the Husband.

A. Conveyances or Devises Directly to the Wife.—It was at one time considered doubtful whether there was, under the common law, an estate of curtesy in the separate estate of the wife: *Radford v. Carwile*, 13 W. Va. 572. In West Virginia the doubt was removed by statute: *Winkler v. Winkler's Exr.*, 18 W. Va. 455. The right of the husband to curtesy may, however, be excluded by the grantor of a conveyance to the wife by either express declaration of such intent or by necessary implication from the language employed in the conveyance: *Jenkins v. Hall*, 26 Or. 79, 37 Pac. 62; *Jenkins v. Withers*, 14 S. C. 597. But in order to exclude him from his right to curtesy in the property of his wife, the excluding words must leave no doubt of the intention to do so: *Cushing v. Blake*, 30 N. J. Eq. 689; *Carter v. Dale*, 3 Lea, 710, 31 Am. Rep. 660. In the case last cited, the court observed: "Words which merely create a separate estate in the wife during coverture will not be sufficient for the purpose; so words which merely deprive the husband of any right to control the estate during coverture or to make it liable for his debts will not have this effect. For to secure the estate to the sole use of the wife has the effect to deprive the husband of such rights, and the addition of these words in express terms denying to the husband any control, or providing that his creditors shall not reach the estate, though often used as a matter of precaution, in this respect add nothing to the force of the general words securing the estate to her sole and separate use. The intent to cut off the husband's right to the curtesy must, in some form, be expressed": *Carter v. Dale*, 3 Lea, 710, 31 Am. Rep. 660. That is, the creation of a separate estate for the wife does not, by the fact of its mere existence, preclude the husband from curtesy therein unless there are words excluding him from marital rights after her death. The use of the word "heirs" or "descendants" in the creation of a separate estate for a married woman will not, at her death, exclude the marital rights of the husband except as to the children: *Wood v. Reamer* (Ky.), 82 S. W. 572.

The cases involving the question whether the husband has a tenancy by the curtesy under deeds or devises containing language tending to exclude the husband from an estate therein are not always harmonious, for the same reason that produces a want of harmony in all cases involving the construction of language employed in any contract or conveyance.

Thus, under a devise to a woman "to her sole and separate use for life, wholly free from the interference or control of her husband, or

any future husband, and without the same being liable in possible event for his debts or engagements," it was held that the husband acquired no tenancy by the curtesy: *Hatfield v. Sohler*, 114 Mass. 48.

A similar conclusion was reached where the deed to the wife was to her sole and separate use, "free and clear of any and all marital rights of her present or any husband she may have hereafter": *McBreen v. McBreen*, 154 Mo. 323, 77 Am. St. Rep. 758, 55 S. W. 463. Neither does he obtain curtesy where the conveyance to the wife declares that it is "to her sole support and use, free from the interference and control of her said husband or any husband, and her heirs and assigns, to her and their only proper use and benefit forever": *Haight v. Hall*, 74 Wis. 152, 17 Am. St. Rep. 122, 42 N. W. 109, 3 L. R. A. 857. Likewise he has no curtesy where the property was a gift from the wife's father, "to have and to hold in her own right, free from any claims or demands from her husband or any person or persons claiming through or against him in any way, now or at any time hereafter": *Chapman v. Price*, 83 Va. 392, 11 S. E. 879. And where the wife held the property under a will devising it to her, but providing that no part of such property shall ever be responsible, in whole or in part, for payment of any debt of the husband of the devisee, it was construed to exclude the husband from curtesy: *Monroe v. Van Meter*, 100 Ill. 347. The husband acquires no curtesy where he, on purchasing land, has it conveyed to the wife "for her sole and separate use," free from all use, interest or control of her said husband or any other, with a habendum clause to the same effect: *Rautenbusch v. Donaldson* (Ky.), 18 S. W. 536. And where the conveyance to the wife was to her sole and separate use, but with power of disposition, and she has disposed of it by will duly executed, the husband acquires no curtesy in the property: *Pool v. Blakie*, 53 Ill. 495. And also where a deed from the husband to the wife to her sole and separate use discharged from all his control and liabilities, but giving her full power to sell, convey or mortgage the same at her pleasure, it is held to deprive him of his curtesy: *Bingham v. Weller*, 113 Tenn. 70, 106 Am. St. Rep. 803, 81 S. W. 843, 69 L. R. A. 370.

But a mere restraint or limitation in a devise to a wife, such as a provision that the property shall "not in any manner be subject to the sale or disposal of her said husband, in any way, manner or form whatever," does not prevent the husband from acquiring an estate of curtesy therein: *Mullany v. Mullany*, 4 N. J. Eq. 16, 31 Am. Dec. 238. And where a grant was to the wife, her heirs and assigns, "exclusively of her said husband," it does not deprive him of his curtesy, since it merely means that it was to her separately and not jointly with him: *Rank v. Rank*, 120 Pa. St. 191, 13 Atl. 827.

B. Antenuptial Agreements or Conveyances.—A husband may relinquish by an antenuptial agreement all his rights in the property of his intended wife, in which event she is to all intents a feme sole in respect to her property: *Charles v. Charles*, 8 Gratt. 486, 56 Am.

Dec. 155. Thus, where in an antenuptial agreement the husband agrees not to claim any interest in her property, and in case of her death not to claim any interest in any part of the estate or income, but to remit it to her heirs at law as if she were unmarried, he is precluded from acquiring any tenancy by the curtesy in her estate: *White v. White*, 20 Misc. Rep. 481, 46 N. Y. Supp. 658. But a mere reservation in a marriage settlement of rents and profits to the sole and separate use of the wife for life does not amount to such an exclusion of the husband as will deprive him of curtesy: *Tillinghast v. Coggeshall*, 7 R. I. 383. And likewise where an antenuptial agreement, made before 1889, provided that the property of the intended wife, then held by her or to be acquired, should be "her own separate property, apart from her intended husband, unaffected by the marriage and not subject to his debts," and allowing her "freedom and power to sell during coverture," it does not prevent his curtesy, since it merely created a statutory separate estate in the wife and did not authorize her to convey it without her husband joining in the conveyance: *Kennedy v. Koopman*, 166 Mo. 87, 65 S. W. 1020. And a husband is entitled to curtesy where he, before the marriage, but in contemplation of it, conveys lands to a trustee in trust for the sole and separate benefit of his intended wife, and upon the further trust to convey to such persons as she, during life, might appoint, but the husband survives the wife, who died without appointment: *Cushing v. Blake*, 29 N. J. Eq. 399.

C. Conveyances or Devises in Trust for the Wife.—A tenancy by the curtesy initiate is created in a husband by a conveyance of land to him for the use and benefit of his wife, if no intention to exclude him from the curtesy is shown: *Meacham v. Bunting*, 156 Ill. 586, 47 Am. St. Rep. 239, 41 N. E. 175, 28 L. R. A. 618. But he is not entitled to curtesy where the land is conveyed to a trustee for the sole and separate use of the wife in fee with terms expressly excluding the husband from any control: *Cochran v. O'Hern*, 4 Watts & S. 95, 39 Am. Dec. 60; *Stokes v. McKibbin*, 13 Pa. St. 267. A conveyance by the husband in trust for the wife and her heirs, "so that the same shall not be subject in anywise to the future control, debts or liabilities of her present or any future husband," precludes him from acquiring curtesy therein: *Rigler v. Cloud*, 14 Pa. St. 361. A husband takes no curtesy where the property was devised to trustees for the benefit of testator's daughter and her children, but the "husband to have no control over the same whatever," and also provided that the estate after her death was to be to the sole and separate use and benefit of her children: *McCulloch v. Valentine*, 24 Neb. 215, 38 N. W. 854.

5. Conditional Estates, Estates in Fee Tail and Estates Subject to Disposition by the Wife.—The mere fact that the estate in the wife is conditional does not preclude the husband from acquiring a tenancy by the curtesy therein, but of course he takes the estate subject to the conditions attached to it, and if the conditions are

such that the wife becomes disseised before her death, there will be nothing upon which the right of curtesy can operate: *Wright v. Herron*, 6 Rich. Eq. 406; *Thornton's Exrs. v. Krepps*, 37 Pa. St. 391; *Withers v. Jenkins*, 14 S. C. 597; *Crumley v. Deake*, 8 Baxt. 361. Thus where an estate in fee is determinable upon some particular event, and that event happened during coverture, no curtesy exists, but where the land is given to a woman and the heirs of her body, the surviving husband is entitled to curtesy if issue has been born alive: *Northcut v. Whipp*, 12 B. Mon. 65. So, also, where an estate is devised to two persons in language that conveys to them an absolute estate subject to be defeated upon their dying without living issue or descendants, the birth of issue gives the husband of the devisee an estate of curtesy: *Webb v. Trustees, etc.*, 90 Ky. 117, 13 S. W. 362. But where a devise to testator's daughter provided that in case she died before twenty-five years of age without leaving any issue, that the devise would revert and become part of the residuary estate, and she died before twenty-five without issue, her husband acquired no curtesy: *McMasters v. Negley*, 152 Pa. St. 303, 25 Atl. 641.

Where property is devised to a woman for life, with a provision that it is to be turned into a fee if she has a child living at her death, she is not seised of an estate, where she dies without leaving a child that entitles her husband to an estate of curtesy: *Hatfield v. Sneden*, 42 Barb. 615. A curtesy is an incident of an estate tail, even though the issue in tail fail by the death of the child or children in the lifetime of the wife, whereby her estate at her death is at an end: *Holden v. Wells*, 18 R. I. 802, 31 Atl. 265.

Where the land held by the wife is held by her subject to a power of sale on her part, the husband's right to curtesy is defeated by her alienation of the land pursuant to the power: *Garner v. Wills*, 92 Ky. 386, 17 S. W. 1023; *Harvey v. Brisbin*, 143 N. Y. 151, 38 N. E. 108.

6. Estates in Remainder or Reversion.—Curtesy does not attach to lands of the wife where she had only a remainder or reversion expectant upon a prior estate which did not determine during coverture: *Baker v. Flournay*, 58 Ala. 650; *Todd v. Oviatt*, 58 Conn. 174, 20 Atl. 440, 1 L. R. A. 693; *Ward v. Ives*, 75 Conn. 598, 54 Atl. 730; *Moore v. Darby*, 6 Del. Ch. 193, 18 Atl. 768, 13 L. R. A. 346; *Malone v. McLaurin*, 40 Miss. 161, 90 Am. Dec. 320; *Adair v. Lott*, 3 Hill, 182; *Taylor v. Gould*, 10 Barb. 388; *Ferguson v. Tweedy*, 43 N. Y. 543; *Hallyburton v. Slagle*, 132 N. C. 947, 44 S. E. 655; *Watkins v. Thornton*, 11 Ohio St. 367; *Prater v. Hoover*, 1 Cold. 544; *Reed v. Reed*, 3 Head, 491, 75 Am. Dec. 777. Where a will devises property to a woman for her natural life, remainder to her legal heirs, the husband of the devisee takes no estate by the curtesy, since her estate terminates with her life: *Waller v. Martin*, 106 Tenn. 341, 82 Am. St. Rep. 882, 61 S. W. 73. No curtesy attaches where the wife was never in actual possession of the property and died before the termination of the life estate preceding the estate in remainder:

Moore v. Calvert, 6 Bush, 356; Cox v. Boyce, 152 Mo. 576, 75 Am. St. Rep. 483, 54 S. W. 467; Collins v. Russell, 184 N. Y. 74, ante, p. 569, 76 N. E. 731. Neither is the husband entitled to curtesy in lands of the wife in reversion where she dies before the termination of the precedent estate: Martin v. Trail, 142 Mo. 85, 43 S. W. 655. There is no curtesy of a reversion or remainder which is subject to a life estate: Shores v. Carley, 8 Allen, 425; Orford v. Benton, 36 N. H. 395. Neither does the husband take curtesy in land held in trust for the benefit of the wife during her life with remainder in trust for her children: Churchill v. Reamer, 8 Bush, 256. The husband of a woman entitled to a remainder is not so seised during the life of the tenant for life as to even make the husband a tenant by the curtesy initiate: Mackey v. Proctor, 12 B. Mon. 433.

Where the limitation of one-sixteenth of the residue after payment of certain legacies was made to a woman, subject to the life estate of the husband of the testatrix, but the devisee died during the lifetime of the husband who took the life estate, the husband of the devisee took no curtesy: Webster v. Ellsworth, 147 Mass. 602, 18 N. E. 569.

But where land is devised in trust to pay the income to the testator's widow for life, and at her death to convey the estate to such of his children or their issue as shall survive her, the husband of one of the children, after issue born, acquires an equitable tenancy by the curtesy: Gardner v. Hooper, 3 Gray, 398. And seisin in law of a reversion by the wife during the coverture gives her husband curtesy in the land, although during the coverture the land was held under a life estate by the wife's mother: McKee v. Cottle, 6 Mo. App. 416. And where a life estate and the immediate reversion meet in the same person, the particular estate is merged in the greater estate. And if the two estates unite in a feme covert, her husband is entitled to a life estate as tenant by the curtesy: Tayloe v. Gould, 10 Barb. 388. And of course where the remainder vests in possession during coverture, the husband is entitled to curtesy: Trolan v. Rogers, 79 Hun, 507, 29 N. Y. Supp. 899. So, also, where a remainder in fee after a life estate is limited to several cotenants, one of whom is a married woman, and the life estate is terminated during coverture, the husband is entitled to curtesy: Rhodes v. Robie, 9 App. D. C. 305. And where a tenant of a particular estate surrenders to the owner of a vested remainder in tail, who is a married woman, the latter thereby obtains such an estate as entitles her husband to curtesy: Pierce v. Hakes, 23 Pa. St. 231.

7. Leases, Life Estates and the Like.—Under the common law, curtesy did not attach to a mere leasehold: Lewis v. Glass, 92 Tenn. 147, 20 S. W. 571. But where a feme sole, in contemplation of marriage, grants a term of seventy-five years of her real estate to a trustee in trust for her own use during said term, it does not preclude her husband from acquiring a tenancy by the curtesy therein: Lowry's Lessee v. Steele, 4 Ohio, 170. Curtesy does not attach to lands which

are assigned to a woman for her dower: *Reed v. Reed*, 3 Head, 491, 75 Am. Dec. 777. And where the wife was entitled to an undivided interest in property to which her mother was entitled to a dower interest which had been assigned to the mother, and the wife died during the lifetime of her mother, the husband is not entitled to curtesy in the one-third of the premises assigned to the mother as dower, neither before nor after the termination of the mother's life estate: *Howells v. McGraw*, 97 App. Div. 460, 90 N. Y. Supp. 1. But where the wife, who had an estate in fee subject to the dower of her mother, conveys a life estate to another, the husband is still entitled to his curtesy in the fee which the wife had in the property, subject, however, to the dower interest of the mother where the wife dies during the lifetime of the mother: *Valentine v. Hutchinson*, 43 Misc. Rep. 314, 88 N. Y. Supp. 862.

The husband obtains no curtesy in an estate held by the wife *per autre vie*: *Folwell v. Folwell*, 65 N. J. Eq. 526, 56 Atl. 117.

8. Coparceners, Joint Tenants and Tenants in Common.—Actual possession by one of several coparceners is sufficient to give the husband of a coparcener an estate of curtesy: *Carr v. Givens*, 9 Bush, 679, 15 Am. Rep. 747; *Arnold v. Bunnell*, 42 W. Va. 473, 26 S. E. 359; *Bragg v. Wiseman*, 55 W. Va. 330, 47 S. E. 90.

“If the wife be one of two or more joint tenants, though she is actually seised, yet if she die, living her cotenant, her husband cannot claim curtesy from the very nature of the estate, which becomes at her death the absolute and several estate of the survivor”: *Washburn on Real Property*, sec. 327. But it appears that where the statute has abolished the doctrine of survivorship in joint tenancies and tenancies by the entirety, and turned such estates into one of a tenancy in common, a different rule prevails: *McNeeley v. South Penn Oil Co.*, 52 W. Va. 616, 44 S. E. 508, 62 L. R. A. 562.

Since the seisin of one cotenant inures to the other cotenants, a husband is entitled to curtesy in a tenancy in common where the other requirements exist: *Daniel v. Bratton*, 1 Dana, 209; *City of Clinton v. Franklin* (Ky.), 83 S. W. 142; *Wass v. Buckman*, 38 Me. 356; *Romaine v. Hendrickson's Exr.*, 24 N. J. Eq. 231; *Rhodes v. Robie*, 9 App. D. C. 305.

9. Mere Possessory Estates, Such as Pre-emption or Redemption Rights.—A mere possessory right in lands is not an interest which will entitle the husband to curtesy: *Brown v. Watkins*, 98 Tenn. 454, 40 S. W. 480. Thus, a husband is not entitled to curtesy in a pre-emption right of the wife in public lands, since there is no such an estate in land as a pre-emption right: *McDaniel v. Grace*, 15 Ark. 465. Neither has the husband a right of curtesy in an equity of redemption in his wife's lands: *Robinson v. Lakeman*, 28 Mo. App. 135; *De Camp v. Crane*, 19 N. J. Eq. 166.

V. How the Right to Curtesy may be Alienated, Waived or Forfeited by the Husband.

a. Conveyances in Nature of Alienations.—The right of the husband to curtesy cannot be divested by the act of the wife, in the absence of a statute authorizing her to dispose of her property without the husband joining in the conveyance: *Camp v. Quimby*, 3 N. J. L. 985; *Johnson v. Fritz*, 44 Pa. St. 449. But he may divest himself of his right to curtesy by joining with her in a conveyance of the property: *Wood v. Reamer*, 118 Ky. 841, 82 S. W. 572; *Stewart v. Ross*, 50 Miss. 776; *Haines v. Ellis*, 24 Pa. St. 253; *Jackson v. Hedges*, 2 Tenn. Ch. 276. And such a joinder by him in a conveyance is effective against him, even though the conveyance is void as against the wife: *Harrod v. Myers*, 21 Ark. 592, 76 Am. Dec. 409; *Mettler v. Miller*, 129 Ill. 630, 22 N. E. 529. He may divest himself of his interest by an instrument purporting to convey a fee: *Meraman's Heirs v. Caldwell's Heirs*, 8 B. Mon. 32, 46 Am. Dec. 537; *Jackson v. Mancius*, 2 Wend. 357; *Reaume v. Chambers*, 22 Mo. 36; *French v. Rollins*, 21 Me. 372; *Flagg v. Bean*, 25 N. H. 49; *Koltenbrock v. Cracroft*, 36 Ohio St. 584. The husband may also release his rights to the curtesy by a deed to the wife for her sole and separate use: *Bingham v. Weller*, 113 Tenn. 70, 106 Am. St. Rep. 803, 81 S. W. 843, 69 L. R. A. 370. But of course such a deed to the wife must contain language showing the intention of the husband to divest himself of his right to curtesy: *Ball v. Ball*, 20 R. I. 520, 40 Atl. 234. And the joinder of a husband with the wife in a mortgage of her lands releases his right to curtesy in favor of the mortgagee: *Chambers v. Ringstaff*, 69 Ala. 140; *Hayden v. Peirce*, 165 Mass. 359, 43 N. E. 119; *Baker v. Baker*, 167 Mass. 575, 46 N. E. 391.

b. Separation Agreements Between Husband and Wife.—The husband and wife may, by a separation agreement, release to each other all claims for dower and curtesy which they otherwise would have one against the other: *Luttrell v. Boggs*, 168 Ill. 361, 48 N. E. 171; *McBreen v. McBreen*, 154 Mo. 323, 77 Am. St. Rep. 758, 55 S. W. 463; *Dooley v. Baynes*, 86 Va. 644, 10 S. E. 974. And they may settle a dispute between themselves by conveying property to each other through a third party in order to bar the husband's right to curtesy, but the instrument should have some provisions relating to the subject of curtesy: *Vanderveer v. Vanderveer*, 49 Hun, 608, 1 N. Y. Supp. 897. In several instances, however, mutual releases of the rights of dower and curtesy have not been sustained: *Pinkham v. Pinkham*, 95 Me. 71, 85 Am. St. Rep. 392, 49 Atl. 48; *McCrary v. Biggers* (Or.), 81 Pac. 356.

c. Acts Amounting to a Waiver of the Right to Curtesy.

1. In General.—After an estate by the curtesy has vested, it cannot be divested by a disclaimer addressed to all whom it may concern, made under seal and recorded, since it is not the purpose of redemption in his wife's lands: *Robinson v. Lakenan*, 28 Mo. App.

it has been held that a husband has no curtesy in land bought with personalty settled by him on his wife, since that would defeat the gift: *Dugger v. Dugger*, 84 Va. 130, 4 S. E. 171. The title of a tenant by the curtesy may be barred by limitations: *Shortall v. Hinckley*, 31 Ill. 219.

2. **Assent to or Acceptance Under a Will in Lieu of Curtesy.**—In New Jersey it has been held that the right of the husband to his curtesy was not waived by his consenting in writing to the will of his wife which divested him of his interest in such curtesy, though the contrary was held in Pennsylvania: *Middleton v. Steward*, 47 N. J. Eq. 293, 20 Atl. 846; *In re McBride's Estate*, 81 Pa. St. 303. In many of the states it has been held, but generally under statutory provisions, that the husband could be compelled to elect whether to take his right by the curtesy or take under a will made by his wife, although in some cases the provisions in favor of the husband have also been held not to preclude him from also asserting his curtesy: *Sill v. White*, 62 Conn. 430, 26 Atl. 396, 20 L. R. A. 321; *Scheible v. Rinck*, 195 Ill. 636, 63 N. E. 497; *Brightman v. Morgan*, 111 Iowa, 481, 82 N. W. 954; *George v. Bussing*, 15 B. Mon. 558; *Kerrigan v. Conelly* (N. J. Eq.), 46 Atl. 227; *Appeal of Clark*, 79 Pa. St. 376; *Cunningham v. Cunningham*, 30 W. Va. 599, 5 S. E. 139; *Beirne's Exrs. v. Beirne*, 33 W. Va. 663, 11 S. E. 46.

d. **Misconduct on Part of the Husband as a Forfeiture of His Curtesy.**—"Though the wife's dower be lost by his adultery, no such misconduct on the part of the husband will work a forfeiture of his curtesy; nor will any forfeiture of her estate by the wife defeat the curtesy": 4 Kent's Commentaries, 34. So, also, in Alabama it was held that his right to curtesy was not forfeited by his adultery: *Wells v. Thompson*, 13 Ala. 793, 48 Am. Dec. 76. But in Pennsylvania it was held, under the statute, that willful desertion of the wife for one year previous to her death would deprive him of his curtesy: *Weller v. Weller*, 213 Pa. St. 265, 62 Atl. 859. But a man's right to curtesy is not forfeited to the commonwealth by his attainder for treason: *Pemberton's Lessee v. Hicks*, 1 Binn. (Pa.) 1.

VI. Extent of the Rights of the Husband or His Creditors in the Estate of Curtesy.

a. **Rights of the Tenant by the Curtesy in General.**—The heirs have no right of entry during the life of the tenant by the curtesy: *Branson v. Thompson*, 81 Ky. 387; *Grant v. Townsend*, 2 Hill, 554. The tenant by the curtesy is entitled to the rents and profits of the land during his life: *Hart v. Chase*, 46 Conn. 207; *Hatton v. Weems*, 12 Gill & J. 83; *Muldowney v. Morris etc. R. Co.*, 42 Hun, 444; *Matthews v. Copeland*, 79 N. C. 493. And in the event that the lands are sold, he is entitled to a life estate in the proceeds just the same as if they were unsold: *Wear etc. Co. v. Smith*, 66 Ark. 609, 49 S. W. 493; *Dunscomb v. Dunscomb*, 1 Johns. Ch. 508, 7 Am. Dec. 504; *Jacques v. Ennis*, 25 N. J. Eq. 402; *Forbes v. Smith*, 5 Ired. Eq. 369. Of

course, the tenant by the curtesy takes the property subject to the debts of the wife in the same manner that an heir takes any inheritance: *Arrowsmith v. Arrowsmith*, 8 Hun, 606; *Bennett v. Camp*, 54 Vt. 36.

The tenant by the curtesy must keep the premises in repair, not excepting the dilapidation occasioned by ordinary wear and tear: *In re Steele*, 19 N. J. Eq. 120. And he is liable to the heirs where he commits waste: *Beach v. Royce*, 1 Root, 244; *Porch v. Fries*, 18 N. J. Eq. 204. He is not entitled to remove from the premises buildings of a permanent character: *McCullough v. Irvine's Exr.*, 13 Pa. St. 438. He commits waste where he cuts or allows to be cut timber for profit, but not so where he merely cuts timber to be used in connection with the proper use, occupation and enjoyment of the premises: *McLeod v. Dial*, 63 Ark. 10, 37 S. W. 306; *Armstrong v. Wilson*, 60 Ill. 226; *Learned v. Ogden*, 80 Miss. 769, 92 Am. St. Rep. 621, 32 South. 278.

But he is entitled to the royalties accruing from the lease of the land during his life estate: *Bubb v. Bubb*, 201 Pa. St. 212, 50 Atl. 759. But where a demise of all the coal under the surface of a specified piece of ground to be paid in the shape of royalties was made, it is regarded as purchase money of real estate, and the husband of the lessor does not acquire a curtesy in such royalties: *Fairchild v. Fairchild (Pa.)*, 9 Atl. 255. Where the property to which the curtesy attaches is mineral ground, the tenant by the curtesy may work the property as a mining property through the workings already opened up, but it appears to be doubtful whether he will be permitted to conduct new exploration work: *Appeal of Rankin (Pa.)*, 16 Atl. 82; *Alderson's Admr. v. Alderson*, 46 W. Va. 242, 33 S. E. 228; *Barnsdall v. Boley*, 119 Fed. 191.

Where the husband erects buildings upon the estate, he is regarded as making the improvements as tenant for life in his own right: *Doak v. Wiswell*, 38 Me. 569. In the event that it becomes necessary to ascertain the value of the life estate held by the husband as tenant by the curtesy, the same rules of computation are applicable as are used in the fixing of the valuation of any other kind of a life estate: *Valentine v. Hutchinson*, 43 Misc. Rep. 314, 88 N. Y. Supp. 862; *Appeal of Shippen*, 80 Pa. St. 391; *Bond v. Godsey*, 99 Va. 564, 39 S. E. 216.

b. Liability of the Estate of Curtesy for the Debts of the Tenant. The interest of a tenant by the curtesy initiate, being under the common law a vested estate, was held liable to be taken for the debts of the husband under execution or like process: *Gay v. Gay*, 123 Ill. 221, 13 N. E. 813; *Roberts v. Whiting*, 16 Mass. 186; *Day v. Cochran*, 24 Miss. 261; *Van Duzer v. Van Duzer*, 6 Paige Ch. 366, 31 Am. Dec. 257; *Wickes v. Clarke*, 8 Paige Ch. 161; *Mattocks v. Stearns*, 9 Vt. 326. And the interest of the husband as tenant by the curtesy in the lands of the wife, after her death, being a vested life estate, was likewise held subject to execution for his debts: *Stanley v. Bonham*,

52 Ark. 354, 12 S. W. 706; Hampton v. Cook, 64 Ark. 353, 62 Am. St. Rep. 194, 42 S. W. 535; Coquard v. Pearce, 68 Ark. 93, 56 S. W. 641; Beale v. Knowles, 45 Me. 479; Robie v. Chapman, 59 N. H. 41; Schermerhorn v. Miller, 2 Cow. 439; Canby's Lessee v. Porter, 12 Ohio, 79; Uhler v. Adams, 1 App. D. C. 392; Freeman on Executions, sec. 186. In some of the states, statutes existed which made such estates exempt from execution: Mitchell v. Violet, 104 Ky. 77, 47 S. W. 195; Curry v. Bolt, 53 Pa. St. 400; Welsh v. Solmberger, 85 Va. 441, 8 S. E. 91; Hitz v. National Metropolitan Bank, 111 U. S. 722, 4 Sup. Ct. Rep. 613, 28 L. ed. 577; Mattoon v. McGrew, 112 U. S. 713, 5 Sup. Ct. Rep. 369, 28 L. ed. 824.

And upon the insolvency or bankruptcy of the tenant by the curtesy, his interest in the land of his deceased wife passes to his assignee in bankruptcy or receiver as the case may be: Conoly v. Gayle, 54 Ala. 269; Webb v. Trustees etc., 90 Ky. 117, 13 S. W. 362; Dugan v. Gittings, 3 Gill, 138, 43 Am. Dec. 306.

c. Right of Tenant by the Curtesy to have Partition of the Estate. "A tenant by the curtesy, as he has a life interest in the lands of his deceased wife, is, when such lands are held in cotenancy, clearly entitled to a partition thereof": Freeman on Cotenancy and Partition, sec. 456; citing Otley v. McAlpine's Heirs, 2 Gratt. 340; Riker v. Darke, 4 Edw. Ch. 668; Allnatt on Partition, 59; Coke's Littleton, 175a. The decisions in Buckley v. Buckley, 11 Barb. 43; Tilton v. Vail, 53 Hun, 324, 6 N. Y. Supp. 146; Reed v. Reed, 107 N. Y. 545, 14 N. E. 442, are also to the same effect.

VII. Right of Legislature to Abolish Tenancies by the Curtesy.

Where the husband has become vested with a tenancy by the curtesy initiate or a tenancy by the curtesy consummate, the legislature cannot interfere with the rights thus acquired, but it can legislate so as to affect the future abolishment or modification of the common-law right of estates by the curtesy: Rose v. Sanderson, 38 Ill. 247; Noble v. McFarland, 51 Ill. 226; Carpenter v. Davis, 72 Ill. 14; Jackson v. Jackson, 144 Ill. 274, 36 Am. St. Rep. 427, 33 N. E. 51; Lucas v. Sawyer, 17 Iowa, 517; Phillips v. Farley, 112 Ky. 837, 66 S. W. 1006; Chapman v. Chapman, 48 Kan. 636, 29 Pac. 1071; McLellan v. Nelson, 27 Me. 129; Barbour v. Barbour, 46 Me. 9; Hatton v. Lyon, 2 Mich. 93; Magee v. Young, 40 Miss. 164, 90 Am. Dec. 322; Clay v. Mayr, 144 Mo. 376, 46 S. W. 157; Merrill v. Sherburne, 1 N. H. 199, 8 Am. Dec. 52; Albany County Sav. Bank v. McCarty, 149 N. Y. 71, 43 N. E. 427; Morris v. Morris, 94 N. C. 613; Hallyburton v. Slagle, 132 N. C. 947, 44 S. E. 655, 1 L. R. A. 125; Alexander v. Alexander, 85 Va. 353, 7 S. E. 335; Hitz v. National Metropolitan Bank, 111 U. S. 722, 4 Sup. Ct. Rep. 613, 28 L. ed. 577. See, also, note on the constitutionality of statutes affecting rights based on pre-existing marriages attached to Rose v. Rose, 84 Am. St. Rep. 444.

Inasmuch as a review of the statutes in the various states abolishing or modifying the common-law estate of curtesy would be outside

of the scope of this note, we will not discuss the nature or effect of such statutes further than to say that in most of the states the tenancy of curtesy initiate has been abolished, while in many of the states statutory enactments have abolished some of the features essential at the common law to constitute a tenancy by the curtesy, while in other states the estate of curtesy has been completely substituted by a statutory system of descent and distribution which completely covers the rights of the husband and wife in the property of each other. In a few of the states the life estate accruing to the husband by the curtesy has been reduced to a life estate in only one-third of the property of the deceased wife.

WORMSER v. METROPOLITAN STREET RAILWAY COMPANY.

[184 N. Y. 83, 77 N. E. 1198.]

CORPORATIONS, Stockholders, Ratification by of Ultra Vires Acts by Taking Benefit Therefrom.—Where the acts of a corporation are ultra vires, but not mala prohibita nor mala in se, a stockholder who accepts some pecuniary benefit thereunder, with knowledge of the character of the acts, cannot subsequently maintain a suit previously commenced by him to enjoin the corporation from carrying out such acts and plans and to have them declared illegal and void, and it is not material that the plaintiff purported to sue in behalf of all stockholders similarly situated if none joined in the prosecution of the suit. (pp. 598, 600.)

PLEADING AND PRACTICE.—**Matters Occurring Pendente Lite** may be asserted as a defense to an equitable action, as where the plaintiff, after instituting suit to enjoin certain acts, knowingly accepts benefit therefrom and thereby becomes estopped from claiming that they were illegal or unauthorized. (p. 600.)

Action by a stockholder purporting to act for himself, and all other stockholders similarly situated who might elect to come in, against the Metropolitan Street Railway Company to enjoin it from carrying out an agreement with the Metropolitan Securities Company claimed to be ultra vires. It was a part of the scheme thus assailed that the stockholders of the first-named corporation should have the privilege of subscribing at par for forty-five per cent of the capital stock of the second corporation. After the commencement of the suit and before the answer was filed plaintiff availed himself of his option to subscribe for the stock of the Metropolitan Securities Company by selling the privilege to a third person

for the sum of five thousand dollars. The plaintiff's bill was dismissed, and he appealed.

Francis K. Pendleton and Albert Stickney, for the appellant.

Charles F. Brown, Paul D. Cravath and William D. Guthrie, for the respondents.

⁸⁷ BARTLETT, J. Where the objection to the acts of a corporation is that they are *ultra vires*, without being either *mala prohibita* or *mala in se*, a stockholder cannot maintain an action in his own behalf based on such objection where he himself, with knowledge of the character of the acts, has acquired and accepted pecuniary benefits thereunder. Whether his conduct in so doing constitutes an estoppel in the strict sense of that term, or a quasi estoppel, as Mr. Bigelow puts it (*Bigelow on Estoppel*, 4th ed., c. 19), or be denominated merely an acquiescence or an election, or the assumption of a position inconsistent with an attack, makes no essential difference here. The point is, that the seeking and acceptance of a substantial benefit which would be unavailable to the stockholders except as a result of the acts which he would attack as *ultra vires* preclude him from assailing those acts on that ground. A litigant is not at liberty to deny the validity of a contract, which is neither prohibited by law nor evil in itself, after he has knowingly sought and obtained pecuniary advantages, pay or compensation under and by virtue of such contract.

This doctrine applies to the present case, and is conclusive against the maintenance of this action by the plaintiff. He has sold the privilege attaching to eight hundred and eighty-five of his Metropolitan Railway Company shares to subscribe to the stock of the Metropolitan Securities Company for between five thousand dollars and six thousand dollars. This privilege would have been absolutely nonexistent, except for the plan and lease which he attacks in this ⁸⁸ suit. He was well aware of this, and he cannot avail himself of the privilege and at the same time prosecute the suit.

The officers of a corporation who are sued by stockholders for damages due to carrying on business not authorized by its charter may defend by showing the stockholders' acquiescence in or assent to the business, express or implied: *Holmes v. Willard*, 125 N. Y. 75, 25 N. E. 1083, 11 L. R. A. 170.

In *Post v. Beacon Vacuum Pump etc. Co.*, 84 Fed. 371, 28 C. C. A. 431, the United States circuit court of appeals in the first circuit considered the sufficiency of a bill in equity filed by stockholders of the Beacon Vacuum Pump and Electrical Company to rescind a transfer of its property to the Beacon Lamp Company; and it was held that the complainants, being minority stockholders who opposed the transfer, were estopped from maintaining a suit for rescission on the ground of *ultra vires*, because they had subscribed for their proportion of the stock of the new corporation, although under protest, and had permitted such company to conduct the business for eighteen months. "It is clear," said Putnam, C. J., "that the complainants have not maintained that consistent position necessary to relieve them against an equitable estoppel. They admit that they have subscribed for their proportion of the thirty-two thousand shares of stock in the new corporation. They do not state the date when they made the subscription. The transfer of the assets to this corporation was made in July, 1895, and the bill was not filed until the twelfth day of January, 1897, so that, although at the outset they protested against the reorganization, yet their subscriptions, in the absence of any proper allegation otherwise, must be presumed to have been made at such time as justified the respondents in assuming that the lamp company was authorized, so far as the complainants were concerned, to receive the transfer of the property of the old corporation, and to commence and carry on its manufacturing business, thus involving itself in the liabilities and other complications inevitably arising therefrom. That this raised an estoppel in equity as against a bill praying rescission is too clear to ⁸⁹ need discussion. It is true that complainants allege that this subscription was under protest, and only to preserve their rights; but the bill does not give the court any details which would enable it to perceive that by any possibility the effect of the subscription, which of itself would be an accomplished fact, could be overcome by any protest or other formal reservation which might accompany it."

In *Towers v. African Tug Company*, [1904] L. R. 1 Ch. 558, which was a suit by two shareholders of the defendant to compel the directors to repay to the company the amount of a dividend illegally, though honestly, declared and paid, the decision of the English court of appeal is accurately stated in the headnote as follows: "A shareholder in a limited com-

pany who has, with full notice or knowledge of the facts, himself received part of the proceeds of an ultra vires act committed by the directors—such as payment of a dividend out of capital—and who still retains the money, cannot, either individually or as suing on behalf of the general body of shareholders, maintain an action against those directors.” Lord Justice Vaughn-Williams, in the course of his opinion, says: “If it be the fact, as I think it is, that these plaintiffs knew of all that had been done, received their dividends with knowledge of all the facts, and then brought this action with the money still in their pockets, ought they to be allowed to bring this action, which, as I have pointed out, is to my mind an action such as they can bring in consequence of their personal interest in the matter? I think not. I think that an action cannot be brought by an individual shareholder complaining of an act which is ultra vires if he himself has in his pocket at the time he brings the action some of the proceeds of that very ultra vires act. Nor, in my opinion, does it alter matters that he represents himself as suing on behalf of himself and others. I think that the reason which requires us to say that he ought not to bring such an action equally requires us to say that he ought not to be the peg upon which such an action is to be hung for the benefit of others.”

⁹⁰ The proposition that one may not deny the validity of a contract under which he has taken advantages was forcibly asserted by the supreme court of the United States in the case of *United States v. Lamont*, 155 U. S. 303, 15 Sup. Ct. Rep. 97, 39 L. ed. 160. There the relator applied for a writ of mandamus against the Secretary of War to compel him to execute and deliver a contract under an advertisement for bids for dredging, which contract the relator claimed to have entered into with the secretary, so as to render it enforceable. The supreme court refused to consider any question as to whether the contract was to be regarded as complete or as to the authority of the Secretary of War in the premises, because it appeared that at the time when the application for the mandamus was made the relator had voluntarily entered into a second contract to do the same work at a lower price and on different terms, and had already been paid on account thereof. “Even if the writ of mandamus could be so perverted as to make it serve the purposes of an ordinary suit,” said Mr. Justice White, “the relator is in no position to avail himself of such relief. He entered of his own accord into the second

contract, and has acted under it and has taken advantages which resulted from his action under it, having received the compensation which was to be paid under its terms. Having done all this, he is estopped from denying the validity of the contract: Citing *Oregonian R. Co. v. Oregon R. etc. Co.*, 10 Saw. 464, 22 Fed. 245. Nor does the fact that in making his second contract the relator protested that he had rights under the first better his position. If he had any such rights and desired to maintain them, he should have abstained from putting himself in a position where he voluntarily took advantage of the second opportunity to secure the work. A party cannot avoid the legal consequences of his acts by protesting at the time he does them that he does not intend to subject himself to such consequences."

As was said by the supreme court of Alabama in *Robinson v. Pebworth*, 71 Ala. 240, estoppel in a case of this character "simply means that you shall not take the fruits of an illegal⁹¹ transaction and afterward set the transaction aside as illegal." In holding that the plaintiff here is precluded from attacking the plan and lease in question by reason of his sale of the privileges acquired by him thereunder as a stockholder in the Metropolitan Railway Company, we do not pass upon the legality of the scheme, either to condemn or approve it; we simply decide that, even assuming it to be as unlawful as he alleges, he is in no position to assail it.

This defense is available to the respondents notwithstanding the fact that the plaintiff did not sell his privileges until after the beginning of the suit. Matters which arise between the bill and plea may be pleaded in equity: *Turner v. Robinson*, 1 Sim. & St. 3. Under the old chancery system in this state there was no rule of equity pleading whereby a defendant was precluded from availing himself of matters arising between the filing of the bill and answer, by way of avoidance or defense: *Lyon v. Brooks*, 2 Edw. Ch. 110. Nor is there any such prohibition under the code: See *Beebe v. Dowd*, 22 Barb. 255. As was said by the late Mr. Justice Hardin in *Mann v. City of Utica*, 44 How. Pr. 334: "It is a familiar rule in equity cases which permits courts to take into consideration subsequent events happening after the commencement of the action in equity and determining what relief shall be granted, especially where part of the relief asked for is an injunction from the court to restrain parties."

For the reasons which have been stated, and without considering or deciding the other questions discussed by counsel, we conclude that this judgment should be affirmed, with costs.

Cullen, C. J., O'Brien, Haight, Vann, Werner and Hiscock, JJ., concur.

Judgment affirmed.

The Doctrine of Ultra Vires as applied to the contracts of private corporations is discussed in the monographic note to *In re Assignment of Mutual etc. Ins. Co.*, 70 Am. St. Rep. 156-180. The plea of ultra vires is not favored. When a corporation has received the benefits of a contract in good faith performed by the other party, and the contract is not immoral in itself nor forbidden by any statute, the corporation cannot ordinarily raise the defense of ultra vires: *Wisconsin Lumber Co. v. Greene etc. Tel. Co.*, 127 Iowa, 350, 109 Am. St. Rep. 387; *White v. Commercial etc. Bank*, 66 S. C. 491, 97 Am. St. Rep. 803. Generally speaking, minority stockholders can sue to enjoin the doing of ultra vires acts by the corporation: See the monographic note to *Johns v. McLester*, 97 Am. St. Rep. 43.

PAKAS v. HOLLINGSHEAD.

[184 N. Y. 211, 77 N. E. 40.]

CONTRACT for the Delivery of Goods in Installments, What is a Breach of.—If the seller of goods to be delivered and paid for in installments refuses to deliver an installment, this amounts to a repudiation and breach of the contract for which the buyer may recover damages. (p. 602.)

CONTRACT to Deliver Goods in Installments, Successive Recoveries for Breaches of.—One who contracts for goods to be delivered and paid for in installments cannot, on the breach of the contract by the refusal to deliver some of the installments, elect to treat the contract as in force and maintain successive actions from time to time as installments of goods were to be delivered. (p. 603.)

JUDGMENT for Breach of Contract Precludes all Further Recovery.—If there is a breach by the vendor of a contract for the sale of goods to be delivered and paid for in installments, and the vendee maintains an action therefor and recovers damages, he cannot maintain a subsequent action to recover for the failure to deliver later installments. To sustain such a recovery would be to allow the plaintiff to split a single cause of action into two or more, and this is not permissible. (p. 606.)

Joseph Fischer and Louis J. Vorhaus, for the appellant.

Edmond E. Wise, for the respondents.

212 O'BRIEN, J. On the 30th of August, 1898, the defendants, by an executory contract in writing, agreed to sell and deliver to the plaintiff fifty thousand pairs of bicycle pedals, the goods ²¹³ to be delivered and paid for in installments, as specified in the contract. It has been found by the trial court that the defendants delivered two thousand six hundred and eight pairs of pedals under the contract, and refused to make further deliveries. When the fact is established that the seller of goods to be delivered and paid for in installments, as in this case, refuses to deliver the goods, that amounts to a repudiation of the contract and a breach of it, for which the buyer may recover damages. So we start in this case with a breach of a contract on the part of the defendants by their refusal to be bound by its obligations.

It is found that on the 15th of March, 1899, the plaintiff commenced an action against the defendants in the city court of New York for breach of this contract, in that they failed to deliver to the plaintiff the pedals which, by the terms of the agreement, the defendants were bound to deliver up to the 1st of March, 1899, to wit, nineteen thousand pair, of which the defendants had delivered only the two thousand six hundred and eight pairs, and had failed to deliver sixteen thousand eight hundred and ninety-two pairs, which were to be delivered up to the 1st of March, 1899. This action was put at issue, and after a trial the plaintiff recovered judgment against the defendants for the full amount claimed in the complaint in the action as damages for the breach of the contract, which judgment has been paid by the defendants in full.

Subsequently, and in February, 1900, the plaintiff commenced the present action to recover damages for a failure to deliver the balance of the goods, and both parties have pleaded the former suit and judgment. The plaintiff claims that it is conclusive evidence in his favor with respect to the existence, validity, terms and breach of the contract, while the defendants interpose it as a bar to the present action. This situation presents the question of law involved in the case. Judgment was given at the trial court in favor of the defendants, and this judgment was affirmed on appeal. The question of law arising upon these facts is whether the former judgment concludes the plaintiff and is a bar to a ²¹⁴ second action to recover damages on the same contract. There can be no doubt that the contract was entire. It could not be performed on the part of the defendants without delivery of

the property stipulated in the contract and the whole of it. As was said by Judge Bradley in *Brook v. Knowler*, 37 Hun, 609, the fact that the property was deliverable and the purchase money payable at different times in the future did not necessarily deprive the contract of the character of entirety or make it other than a single one in respect to all the goods embraced in its terms. The learned counsel for the plaintiff contends that the former judgment did not constitute a bar to the present action, but that the plaintiff had the right to elect to waive or disregard the breach, keep the contract in force, and maintain successive actions for damages from time to time as the installments of goods were to be delivered, however numerous these actions might be. It is said that this contention is supported in reason and justice, and has the sanction of authority at least in other jurisdictions.

We do not think that the contention can be maintained. There is not, as it seems to us, any judicial authority in this state that gives it any substantial support. On the contrary, we think that the cases, so far as we have been able to examine them, are all the other way, and are to the effect that inasmuch as there was a total breach of the contract by the defendant's refusal to deliver, the plaintiff cannot split up his demand and maintain successive actions, but must either recover all his damages in the first suit or wait until the contract matured or the time for the delivery of all the goods had arrived. In other words, there can be but one action for damages for a total breach of an entire contract to deliver goods, and the fact that they were to be delivered in installments from time to time does not change the general rule.

This question arose in this state at an early day. In *Miller v. Covert*, 1 Wend. 487, it was held that where a party brings an action for a part only of an entire and indivisible demand and obtains judgment in such action, he cannot subsequently, ²¹⁵ avail himself of the residue by way of offset in an action against him by the opposite party.

It was held in the case of *Bendernagle v. Cocks*, 19 Wend. 207, 32 Am. Dec. 448, that where a party had several demands or existing causes of action growing out of the same contract or resting in matter of account which may be joined and sued for in the same action, they must be joined; and if the demands or causes of action be split up and a suit brought for part only, and subsequently a second suit for the residue is brought, the first action may be pleaded in abatement or in

bar of the second action. That, it seems to us, is what has been decided in this case. The case referred to was elaborately discussed by Judge Cowen, and the English authorities on the subject cited and distinguished.

Colburn v. Woodworth, 31 Barb. 381, was an action by an employé to recover wages under a contract to work for the plaintiff for three years from August 1, 1857, payable quarterly, and damages for a breach of the contract by the defendant in discharging the plaintiff from his employment on the twenty-sixth day of December, 1857, without cause. The defendant pleaded and proved that in January, 1858, after the plaintiff was discharged, he commenced an action against the defendant, and in his complaint claimed one quarter's wages and damages for the wrongful discharge. The cause was referred and the referee reported in favor of the plaintiff for one quarter's wages, and the plaintiff had judgment on the report. Subsequently, the plaintiff brought another action for wages and damages, but the trial court held that the former judgment was a bar, and granted a nonsuit. Judge Johnson, in delivering the opinion of the court, said: "There can be no doubt that the cause of action here alleged is in its nature indivisible. All the damages which the plaintiff could, under any circumstances, recover, were such as flow directly and necessarily from the breach, which is the sole cause of action. The contract is not in the nature of a continuing covenant, like a covenant running with land. It is idle to suppose that when such a contract has been once put an end to by one ²¹⁶ party entirely, though without sufficient cause, and the other party has brought his action for the damage occasioned by such breach, and had the judgment of the court upon his claim, the contract still remains in force so as to entitle such other party to the compensation provided for in case of its performance. When the action is brought to recover damages for a breach of that character, it is necessarily an election on the part of the party presenting it to consider the contract at an end, so far, at least, as performance on his part is concerned. The action operates as a rescission by him as to further performance. If the party thus situated brings his action before the entire measure of damages has been filled or before the damages have all become known so as to be susceptible of proof, it is his folly or misfortune. He cannot

sever them and recover in one action and the residue, when discovered, in another": *Schell v. Plumb*, 55 N. Y. 592.

The English cases point to but two alternative remedies open to the buyer upon a breach of contract for the sale of goods to be delivered in installments. One is to sue upon repudiation for a total breach before the time for performance has arrived, and the other is to await the time for full performance and then sue for the damages. No suggestion is to be found in any of the cases that I have observed, to the effect that the buyer had an option to bring successive actions as the time for the delivery of each installment matures. It is said in many of the cases that the injured party had an option, but that option was not to bring several successive actions, but to elect whether, upon a breach, he shall proceed to recover all his damages or to await the time for full performance. The cases in the English courts on this question are very numerous, but they were all reviewed and the rule approved and followed in the case of *Roehm v. Horst*, 178 U. S. 1, 20 Sup. Ct. Rep. 780, 44 L. ed. 953, where it was held that the English rule was reasonable and just.

We are unable to see how the contention of the learned counsel for the plaintiff can be reconciled with the case of *Samuel v. Fidelity & Casualty Co.*, 76 Hun, 308, 27 N. Y. Supp. 741, which was ²¹⁷ affirmed in this cause on the opinion below (150 N. Y. 583, 44 N. E. 1128). Other cases in this court seem to us to be entirely adverse to the plaintiff's contention: *Howard v. Daly*, 61 N. Y. 362, 19 Am. Dec. 285; *Nichols v. Scranton Steel Co.*, 137 N. Y. 471, 33 N. E. 561. The cases bearing upon this question have been very fully collated in 2 *Black on Judgments*, section 734, where the rule is stated in these words: "When a demand or right of action is in its nature entire and indivisible, it cannot be split up into several causes of action and made the basis of as many separate suits, but a recovery for one part will bar a subsequent action for the whole, the residue or another part. . . . If it appears that the first judgment involved the whole claim or extended to the whole subject matter, and settled the entire defense to the whole series of notes or claims, and adjudicated the whole subject matter of a defense equally relevant to and conclusive of the controversy between the parties, as well in respect of the claim or defense in judgment as in respect to other claims and defenses, thereto, pertaining to the same transaction or subject matter, then the first judgment

operates as an estoppel as to the whole": Black on Judgments, sec. 751; Bouchaud v. Dias, 3 Denio, 238.

It is elementary law that a former judgment is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose: Cromwell v. County of Sac, 94 U. S. 351, 24 L. ed. 195.

It was admitted upon the argument of this case, and is admitted upon the brief of plaintiff's counsel, that the plaintiff could have recovered all his damages for a breach of the whole contract in the first action. The only contention is that he was not obliged to do so, but could maintain as many other actions as there were deliveries provided for in the contract in case of default. It does not seem to us that this proposition can be supported in reason or upon authority. The plaintiff claims in this action that the former judgment was conclusive as to him—that is, that it cuts off the defendants ²¹⁸ from any defense which they might originally have made, and thus it is sought to make this case an exception to the general rule that estoppels must be mutual; that is, that in general if the judgment is binding on one party it is equally binding in its effect upon the other. I think it would not be wise to engraft such a distinction upon the law of this state as was said in the case of Sykes v. Gerber, 98 Pa. St. 179: "The law does not tolerate a second judgment for the same thing between the same parties, whether the claim is upon a contract or tort. . . . The general rule is that it is against the policy of the law to permit a plaintiff to prosecute in a second action for what was included in, and might have been recovered in, the first, because it would harass the defendant and expose him to double costs": Guernsey v. Carver, 8 Wend. 492, 24 Am. Dec. 60.

We think the judgment below was right and should be affirmed, with costs.

Chief Justice Cullen Dissented. He maintained that the plaintiff, as the aggrieved party, had the option to treat the contract as still continuing in force, and therefore to assert his right to recover damages for each default as it occurred.

Only One Action can be Maintained for the breach of an indivisible contract, and the judgment therein is a bar to a second action. Thus

a wrongfully discharged employé, who sues and recovers damages up to the time of the suit, cannot maintain another action to recover for the remainder of the period covered by his contract of employment: *Alie v. Nadeau*, 93 Me. 282, 74 Am. St. Rep. 346; note to *McMullan v. Dickinson Co.*, 51 Am. St. Rep. 516.

ROBERTS v. ROBERTS-WICKS COMPANY.

[184 N. Y. 257, 77 N. E. 13.]

CORPORATIONS, Preferred Stock, Contract in Favor of, When Valid.—An agreement that the preferred stock of a corporation is to be paid out of the surplus profits arising from its business a dividend equal to six per cent per annum before any dividend shall be paid to the common stock is valid, binds all the stockholders, and is inviolable. (p. 611.)

CORPORATIONS—Preferred Stock, Dividends Agreed to be Paid to, Whether a Charge for all Time.—An agreement that the preferred stock of a corporation shall be paid a dividend of six per cent per annum out of the surplus profits arising from the business of the corporation is a charge on its profits for all time, and all arrears of such dividends must be paid out of such profits before any payment can be made to the common stockholders. (p. 611.)

CORPORATIONS, Preferred Stock, Reducing the Amount of, Effect of on Previously Accrued Right to Dividends.—If by agreement the preferred stockholders of a corporation are to be paid dividends of six per cent per annum out of the profits arising from its business, and the amount of the preferred stock is subsequently reduced, such reduction does not diminish the dividends to be paid up to the time the reduction takes place, though a stockholder acquiesces therein and accepts stock diminished in proportion thereto. The reduction leaves the affairs of the corporation just as before, except that it diminishes the capitalization. The dividends in default at the reduction continue in default until paid, and so long as the corporation is a going concern, the dividends accrued prior to the reduction remain payable whenever in the future the corporation accumulates profits from its business. (pp. 611, 612.)

CORPORATIONS, Dividends, Power of Directors in Declaring. The directors of a corporation have a wide discretion in the management of its affairs, and their declaration of a dividend from the surplus assets, when honestly exercised, will not be interfered with by the courts, but they cannot by such declaration impair any right to such assets, as, for instance, the right of preferred stockholders to be paid therefrom. (p. 612.)

CORPORATIONS—Preferred Stockholders, When Have No Right to Surplus Above the Amount of the Capital Stock.—If the capital stock of a corporation is reduced from three hundred thousand dollars to two hundred thousand dollars, and this leaves in the possession of the corporation a surplus of capital above the sum last named, such surplus cannot be regarded as profits arising from its business, nor as subject to appropriation in satisfaction of dividends due and unpaid to preferred stockholders under an agreement that they shall be paid a dividend of six per cent per annum out of the surplus profits arising from the business of the corporation. (p. 614.)

H. J. Cookinham, for the appellant.

William Kernan, for the respondent.

258 GRAY, J. It appears that the defendant was duly incorporated under the business corporations law, for the manufacture and sale of clothing, in 1895, with a capital stock of \$200,000, divided into two thousand shares; five hundred shares (\$50,000) being preferred stock, and fifteen hundred shares (\$150,000) being common stock; each share being of the par value of \$100.

The certificate of incorporation provided that "out of the surplus profits arising from the business of the corporation the holders and owners of the preferred stock shall be first entitled to, and be paid each year, a dividend equal to six per cent, . . . payable in equal semi-annual payments, before any dividends shall be paid on the common stock; such dividend shall be cumulative, and, in case of nonpayment, shall bear interest at the rate of six per cent from the date **259** when payable. All the remaining surplus profits of such corporation shall belong to the common stock, and be divided among the holders and owners thereof as the board of directors shall direct. In all other respects the preferred and common stock shall be alike."

On the sixteenth day of April, 1898, the capital stock of the corporation was duly increased to \$300,000, divided into \$75,000 of preferred stock and \$225,000 of common stock, represented by three thousand shares of the par value of \$100 each. There was no change made in the form of the certificate of incorporation in the preference of the preferred stock. All of the stock was duly issued and paid for in cash at par.

Prior to July 1, 1901, the plaintiff became the owner of two hundred and fifty shares, or \$25,000, of the preferred stock of the defendant and held a certificate therefor. The certificate provided, as before, that the owners of the preferred stock of the company were entitled to an annual dividend of six per cent, payable in equal semi-annual payments out of the surplus profits of the company, before any dividend was payable on the common stock; that such dividend on the preferred stock was cumulative, and, in case of nonpayment, should bear interest at the rate of six per cent from the date when payable; that all the remaining surplus profits of the company should belong to the common stock, and that in all other respects the preferred and common stock were alike.

From July, 1901, to June 25, 1904, the defendant had made no surplus profits from its business, and its capital of \$300,000 had become impaired to the extent of \$90,861.85. On the latter date the defendant duly reduced its capital stock from \$300,000 to \$200,000, divided into \$50,000 of preferred stock and \$150,000 of common stock, and the corporate capital was as it had been prior to the increase of April, 1898. This reduction left a surplus of \$9,138.15 over the capital stock of \$200,000.

The plaintiff voted against the reduction of the capital stock of the defendant; but after the said reduction, and in October, 1904, she surrendered her certificate for two hundred and fifty shares ²⁶⁰ (\$25,000) of preferred stock and received a new certificate, in the same form, for one hundred and sixty-six shares and scrip for fractional parts of a share. Through purchase of additional scrip and the exchange thereof she now holds certificates for one hundred and sixty-seven shares (\$16,700) of the preferred stock. Semi-annual dividends, at the rate of six per cent per annum, were paid upon the preferred stock up to July 1, 1901. Since that time none had been paid upon such stock until December, 1904. Between June, 1904, when the capital stock was reduced, and December 1, 1904, the defendant gained surplus profits, to the amount of \$15,087.40.

On December 20, 1904, the board of directors adopted a resolution directing "the amount due to the preferred stockholders in full of dividends and accrued interest thereon to December 1, 1904, upon the \$50,000 preferred stock of the company, be paid January 2, 1905, to the preferred stockholders of record December 26, 1904." The board further declared a dividend of one per cent upon the \$150,000 of common stock, payable on May 1, 1905.

The dividends declared on the preferred stock included all the dividends to which the plaintiff was entitled upon her then holding of \$16,700 of preferred stock, and the interest accrued thereon from the time the last dividend had been paid up to December 1, 1904. The plaintiff claims that she was entitled to be paid the dividends payable on \$25,000 of preferred stock up to June 25, 1904, the date of the reduction of the capital stock cumulatively; so that interest should be added to each unpaid dividend from the date when payable upon such amount of preferred stock. The appellate division,

in the fourth department, awarded judgment to the defendant, and the plaintiff has appealed to this court.

²⁶² From the foregoing facts, which the parties have stipulated as resuming the whole situation, it is apparent that our consideration of this appeal is in no degree embarrassed by any question of the power of the directors to increase the capitalization of this company in 1898 or to reduce it in 1904. In each case, we may assume, it was duly and legally effected, and the only question is whether when, subsequently to the reduction of the capital stock in June, 1904, a distribution of the surplus profits was declared, the plaintiff, as a preferred stockholder, was entitled to be paid for arrears of dividends, payable during the years prior to the reduction, upon the one hundred and sixty-seven shares of preferred stock, of which she was then the actual holder, or upon the two hundred and fifty shares of which she had previously been the holder.

When, in 1898, the capital stock was increased to three thousand shares, or \$300,000, the plaintiff became the holder of two hundred and fifty shares of preferred stock, and she received the six per cent dividends thereon down to July 1, 1901. From that time down to June, 1904, the company made no surplus profits from its business; the capital had become impaired to the extent of upward of \$90,000, and no dividends had been declared to its stockholders. A reduction of the capital stock being then resolved upon, it was accomplished, so as to establish it at its former amount of two thousand shares, or \$200,000. Thereafter, the business prospered; so that in the following six months the earnings had so increased as to show a surplus of profits accumulated in the corporate treasury, and the directors resolved to distribute them by way of a dividend. By their resolution a payment was to be made of "the amount due to the preferred stockholders in full of dividends and accrued interest thereon to December 1, 1904, upon the ²⁶³ \$50,000 preferred stock of this company," etc., and a further dividend of one per cent was declared upon the common stock. The payment to the preferred stockholders, however, as to arrears of dividends being made upon the number of shares as reduced, the complaint of this appellant, in effect, is that the defendant has measured its obligation to its preferred stockholders, with respect to the past, by the amount of their present holdings; whereas its obligation upon that much of the preferred stock which had been theirs prior to

the reduction of the capital stock had never been fulfilled nor released.

In the charter and in the certificates issued to the preferred stockholders it was stated most explicitly what was the nature of the preference which was accorded to that class of stockholders; namely, to be paid "out of the surplus profits arising from the business of the corporation . . . a dividend equal to six per cent per annum on the preferred stock, payable in equal semi-annual payments before any dividend shall be paid on the common stock; such dividend on the preferred stock shall be cumulative, and in case of nonpayment shall bear interest at the rate of six per cent per annum from the date when payable." This was a valid contract between the company and the preferred stockholders, which was binding upon all other stockholders: *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159. Each class of stock was a part of the whole capital stock, and both classes were made by the charter alike, in all respects, except in the one respect that the preferred stock was entitled to have "the surplus profits arising from the business" appropriated, in first order, to the payment of six per cent dividends cumulatively. Now, this was as much an agreement of the common stockholders as it was the agreement of the corporation, and the right of the preferred stockholder was inviolable. It assured to him, in effect, that if the corporate earnings failed to show surplus profits sufficient to pay a dividend due on the preferred stock, to the extent of the default in payment and of the accruing interest thereon, there would be a specific ²⁶⁴ charge upon all subsequent surplus profits gained by the company. In other words, the dividends agreed to be paid upon such shares of stock were a charge upon the profits of the company for all time, and all arrears of such dividends, with accrued interest, were to be paid out of any moneys applicable to such payment before any payment should be made to the common stockholders: *Boardman v. Lake Shore etc. R. Co.*, 84 N. Y. 157; *Sturge v. E. N. R. R. Co.*, 31 Eng. L. & Eq. 406; *Henry v. G. N. R. Co.*, 3 Jur., N. S., pt. 1, 1117. This right necessarily survived the reduction of the capital stock, as to previous arrears of dividends, unless the obligation of the company had, in some way, been discharged. Concededly, it survived as to the preferred stock in its reduced amount, and what was there in the action of reducing the capital stock which was operative to cancel it as to the arrears of unpaid dividends upon the shares of

stock which were retired or cut off by the reduction? The stock corporation law, chapter 688, section 44, authorized the reduction to be made; but that statute and the proceedings under it could not affect any vested right, nor impair the force of any corporate obligation. Nor was it intended to accomplish any such thing, or anything more than to authorize the holders of a majority of the stock, when the circumstances seemed to them to justify it, to increase or to reduce the amount of the capital stock. Its reduction left the affairs and obligations of the corporation just as they had been, with the sole difference of the lessened capitalization of the concern. There would still remain the obligation of the corporation upon any unperformed agreement, for no obligation was satisfied thereby. Its agreement to pay dividends on the preferred stock had not been fulfilled, and so long as the corporation was a going concern, this default created an indebtedness, which was payable whenever, in the future, it should accumulate surplus profits from the conduct of the business.

The preferred stockholders, as the result of the reduction of capital stock, would hold a less number of shares, but they would still be creditors for the arrears of dividends due by ²⁶⁵ the company on the shares of preferred stock which they had previously held. They may not have been creditors of the corporation in a technical sense; but, as between themselves and other stockholders, they were as creditors, with demands to be fully paid certain arrears of dividends before any of the surplus profits should be appropriated to a dividend upon the common stock. The common stockholders held their shares of stock subject to that prior charge upon the net earnings. No acts of theirs could destroy that right, and it, of course, in no wise depended upon any declaration of the board of directors. Directors have a wide discretion in the management of the corporate affairs, and their declaration of a dividend from surplus assets, when honestly exercised, will not be interfered with by the courts; but that does not mean that they have the power to discriminate in the division of the surplus to the impairment of any prior right thereto.

When the defendant's directors met, in December, 1904, to act upon the question of dividends, their duty was, in dividing the surplus profits, to apply them, in first order, to the satisfaction of the debt to the preferred stockholders for arrears of dividends on the whole number of their shares which were outstanding during the three years prior to July,

1904, before the capital stock was reduced. For the purpose of such a dividend, however, only such surplus as represented the profits of the business could legally be availed of, and this brings us to consider the question of the disposition of the surplus of capital left upon the reduction of the capital stock, which the appellant claims to be equivalent to surplus profits, and hence to be applicable upon the company's debt to the preferred stockholders for arrears of dividends. As it has been stated, the capital of the defendant had become impaired by June, 1904, to the extent of \$90,861.85, and this necessitated the reduction as then effected. The reduction to \$200,000 thus left the sum of \$9,138.15, which was an excess or surplus of capital. Whether it consisted in funds or in property we are not informed, and it is not material to our consideration. We may assume that the directors could ²⁶⁶ have converted it into cash and have distributed it by way of dividends; but the preferential right of the preferred stockholders did not reach to a distribution of that which was capital, nor create any charge upon capital. That which constitutes the capital stock of a corporation belongs to all of its stockholders proportionately to their holdings. It is divided into shares and each share represents the holder's proportionate interest: *Jermain v. Lake Shore etc. R. Co.*, 91 N. Y. 483. Upon dissolution, or in liquidation, it entitles him to share ratably in the assets. If the directors had undertaken to divide this surplus of capital, it was apportionable only among all the stockholders ratably. The statute contemplated nothing else than that. Indeed, it is inferable, perhaps, that the only authorization to dispose of such corporate property is to return it to the stockholders. The statute reads (Stock Corporation Law, sec. 46): "If the capital stock is reduced, the amount of capital over and above the amount of the reduced capital shall, if the meeting or consents so determine or provide, be returned to the stockholders pro rata, at such times and in such manner as the directors shall determine." But assuming that the directors in their discretionary management of the company's affairs concluded, and were empowered, to distribute this surplus of capital, the preferred stockholders would have no legal or equitable claim upon it in satisfaction of past due and unpaid dividends. That was not the contract. Their only right would be to share in such a distribution ratably with the common stockholders: *Strong v. Brooklyn etc. R. R. Co.*, 93 N. Y. 435. The charter and the con-

tract made them alike in all respects except as to dividends. Dividends, as the rule, are not payable out of the capital of a corporation; but only from the surplus profits arising from the business carried on, and that was the contract here. When the property of a corporation has accumulated in excess of its chartered capital, the excess may be regarded and dealt with as constituting a surplus of profits. For a fuller discussion of such questions, I may refer to the cases of *Kent v. Quicksilver Min. Co.*, 78 N. Y. 267 159, *Williams v. Western Union Tel. Co.*, 93 N. Y. 162, *Strong v. Brooklyn etc. R. R. Co.*, 93 N. Y. 426, and *Beveridge v. New York etc. R. Co.*, 112 N. Y. 1, 19 N. E. 489, 2 L. R. A. 648. In the present case it must be borne in mind that the \$9,138.15 remained in the corporate accounts, after the reduction of capital stock, as a portion of the former capital, and it was in no sense like an excess of property which had been accumulated in the conduct of the business beyond the fixed capital. It did not represent "surplus profits arising from the business"; it was not within the intendment of the agreement with respect to dividends on the preferred stock, and its distribution, when made, could only be legally effected by dividing it among all the stockholders ratably and without preference: See *Seeley v. New York Exchange Bank*, 8 Daly, 400, affirmed on opinion below, 78 N. Y. 608, and *Cook on the Law of Stock and Stockholders*, sec. 278.

I have, therefore, reached the conclusion as to this surplus of capital left on hand after the reduction of the capital stock from \$300,000 to \$200,000, that it was not applicable to the claim of the preferred stockholders for the arrears of unpaid dividends. I am equally clear in the conclusion that, in making the distribution of the surplus profits arising from the conduct of the business, the directors were obliged to apply them, in first order, toward the satisfaction of all claims which the preferred stockholders at any time held against the company, based upon arrears of unpaid dividends and the stipulated interest accrued thereon. Such was the express obligation of the corporation, which, so far as the record shows, has never been discharged or released.

I advise the reversal of the judgment appealed from and that the plaintiff-appellant have judgment against the defendant-respondent entitling her to be paid, from the surplus profits arising from the corporate business, the annual dividends of six per cent per annum in arrears upon her two hun-

dred and fifty shares, or \$25,000, of preferred stock up to June 25, 1904, and on her one hundred and sixty-seven shares, or \$16,700, of such stock thereafter, with interest at the rate of six per cent per annum from the date ²⁶⁸ when each dividend was payable until the date of payment, before any dividend is paid upon the common stock, with costs to the appellant in both courts.

Cullen, C. J., Haight, Vann, Willard Bartlett and Chase, JJ., concur.

Edward T. Bartlett, J., dissents.

Judgment accordingly.

What is Preferred Stock and what are the special rights of its holders are discussed in the monographic note to *Heller v. National Marine Bank*, 73 Am. St. Rep. 227-244.

DUHME v. HAMBURG-AMERICAN PACKET COMPANY.

[184 N. Y. 404, 77 N. E. 386.]

CARRIERS OF PASSENGERS by Water, Duty of at Piers.—A passenger steamship company owes no duty to persons upon its piers awaiting the embarkation of passengers except to have such piers in a reasonably safe condition for access and for remaining or standing upon. (p. 617.)

THE OPERATION of the Doctrine of Res Ipsa Loquitur, Where Relations are not of a Contractual Nature, can only be where there are actually shown facts and circumstances in the nature of the defendant's undertaking and of the accident itself from which the jury are able, if not compelled, to draw the inference of negligence. It was not intended that this doctrine should exempt the plaintiff from the burden of proving, affirmatively, negligence, or circumstances making negligence a legitimate, if not an irresistible, inference. (p. 619.)

CARRIER OF PASSENGERS, When not Liable to Person Injured at Its Pier by the Breaking of an Appliance.—If a person goes to the pier of a steamship company, and while standing there for the purpose of meeting a relative who is expected to arrive, is injured by the parting of a wire rope or hawser, he cannot recover of the company if such hawser had been recently purchased, was in good condition, and of a size usual for the purpose for which it is used, and there is nothing beyond the happening of the accident to show that the company had been guilty of negligence or had failed in any duty it owed to the person injured. (pp. 619, 620.)

Frank Verner Johnson, for the appellant.

Nathan D. Stern, for the respondent.

406 GRAY, J. The plaintiff seeks to recover damages of the defendant for personal injuries sustained through the breaking of a hawser while one of its steamships was being brought into its pier. The result of the trial of the action, so far as our review is concerned, was the dismissal of the complaint by the trial court upon the case, as made by the evidence of both parties. The appellate division, in the second department, reversed the judgment thereupon entered in favor of the defendant and ordered a new trial. The defendant has appealed to this court, and the question for our consideration relates to the sufficiency of the evidence as to the defendant's negligence to make the case one for the determination of the jury.

The plaintiff, a boy about nine years of age, accompanied by his mother, was upon the defendant's pier, at Hoboken, New Jersey, expecting a relative to arrive upon the steamship "Moltke." Upon the steamship reaching the pier, and when in the course of being warped in alongside of it, the plaintiff and his mother were standing at an opening of the pier shed or building, which was guarded by a rope drawn across. A wire rope or hawser which ran from the vessel to a mooring post on the pier parted and, in the recoil consequent thereupon, the plaintiff was struck violently in the face. The wire rope itself did not break, but the "shackle," as it is termed, which fastened an end of the rope brought around upon it so as to form a loop, gave way. It was alleged in the complaint, as the cause of action, that the defendant "was negligent and careless in the management and operation of the pier or dock and of said vessel, while so attempting to make the same fast to said pier or dock, and so carelessly and negligently operated and managed the same that, in consequence thereof . . . a hawser parted and broke." Upon the trial the plaintiff's evidence was confined to the nature of the injuries sustained and to occurrences upon the pier. Beyond the statement of the sudden breaking of the hawser, there was no evidence tending in the remotest degree to prove the allegation of negligence made in the complaint. There was evidence of **407** the presence of a large number of persons upon the pier and that, in consequence, the plaintiff and his mother were

pressed upon and pushed forward in the opening. On the defendant's part the evidence could furnish no explanation of the cause of the parting of the hawser; but it did show that it had been recently purchased; that it was of the size usual for the purpose for which it was then used; that it was in good condition, and that the shackle showed a clean break—that is, one not the result of some flaw or defect in the metal. It also showed that efforts were made by the employés of the defendant upon the pier to keep the people away from the openings, which were necessarily there for the purpose of the business, by pushing them back and by warning them of the danger of remaining in such a place. That these precautionary efforts had been made appeared also from the cross-examination of the plaintiff's witnesses.

It was the view of the court below, in reversing the judgment upon the nonsuit, that the doctrine of *res ipsa loquitur* was applicable to a casualty of the character disclosed by the proof, and that, in the absence of explanation by the defendant, the inference of negligence was authorized under the circumstances. I think that there was error in the reversal and that the doctrine of *res ipsa loquitur* had no place in the determination of the issue. It was incumbent upon the plaintiff to give some evidence establishing, or tending to establish, negligence on the part of the defendant, and it was not sufficient for his case to merely prove the accident. I think that the plaintiff was upon the pier as a mere licensee, for he and his mother had no permission to be there from the defendant or from the custom-house authorities; but if we assume that they were there lawfully, because of an implied invitation, I cannot perceive that the defendant was under any other obligation to them, or owed them any other duty, than to have its pier in a reasonably safe condition for access: *Beck v. Carter*, 68 N. Y. 283, 23 Am. Rep. 175. If we shall assume, further, that its duty extended to the exercise of such ordinary care in the process of docking its vessel as to render it reasonably safe for ⁴⁰⁸ persons to remain upon the pier, we shall have stated the fullest measure of the defendant's obligations. It was under no other, and before it could be held to a liability for the accidental injury to this plaintiff, it would be necessary to show a neglect of duty in the respects mentioned, if not by direct testimony, at least by such facts or circumstances as would permit the jury fairly to infer the existence of negligence. The burden of proof was upon the

plaintiff to show the defendant to have been at fault; but there was no such evidence, and, when the case was closed, neither carelessness in management nor any defect in appliances was made to appear. Indeed, upon the plaintiff's evidence the trial court might well have dismissed the complaint, for the failure to show any negligence; but when the evidence of the defendant was in, any suggestion of there having been a failure to exercise care was completely negatived.

We may admit that the doctrine of *res ipsa loquitur* is not, or should not be, confined to cases of contractual relations, such as those sustained with a carrier or a bailee (*Griffen v. Manice*, 166 N. Y. 188, 82 Am. St. Rep. 630, 59 N. E. 925, 52 L. R. A. 922); but that does not advance the argument for the appellant. That doctrine, plainly, is based upon the general consideration that where the management and control of the thing which has occasioned the injury are in a defendant, it is within his power to produce evidence of the actual cause of the accident, which the plaintiff may be unable to do. "Its application," as was observed by Judge Cullen in *Griffen v. Manice*, 166 N. Y. 188, 82 Am. St. Rep. 630, 59 N. E. 925, 52 L. R. A. 922, "presents, principally, the question of the sufficiency of circumstantial evidence to establish, or to justify the jury in inferring, the existence of the traversible or principal fact in issue—the defendant's negligence." When it is claimed that the accident is such as, in the ordinary course of the business, does not happen, with the exercise of reasonable care, and, therefore, that it speaks for itself, as imputing neglect to the defendant, the case should be one where, if not the relations of contract between the parties, the circumstances that bring them into relation are such as to create a duty to exercise care, which an injured party may legally ⁴⁰⁹ complain of if neglected. If the plaintiff were a passenger, that relation would require the exercise of the important degree of care commensurate with the contract of carriage. It would render the defendant liable for the slightest neglect against which human prudence and foresight might have guarded, as to results from defective conditions, found to exist in machinery, appliances, or other matters essential to safety of operation: *Stierle v. Union Ry. Co.*, 156 N. Y. 70, 684, 50 N. E. 419, 834; *Morris v. New York etc. R. R. Co.*, 106 N. Y. 678, 13 N. E. 455; *Miller v. Ocean S. S. Co.*, 118 N. Y. 199, 23 N. E. 462; *Breen v. New York etc. R.*

R. Co., 109 N. Y. 297, 4 Am. St. Rep. 450, 16 N. E. 60; Holbrook *v.* Utica etc. R. R. Co., 12 N. Y. 236, 64 Am. Dec. 502. In all such cases the conditions may be such as to warrant the application of the rule of *res ipsa loquitur*. Its operation, where the relations are not of a contractual character, can only be, as in *Griffen v. Manice*, 166 N. Y. 188, 82 Am. St. Rep. 630, 59 N. Y. 925, 52 L. R. A. 922, where there are actually shown such facts and circumstances, in the nature of the defendant's undertaking and of the accident itself, from which the jury are able, if not compelled, to draw the inference of negligence. It was not intended that it should exempt the plaintiff from the burden of proving, affirmatively, negligence or circumstances making negligence a legitimate, if not an irresistible, inference. In *Peck v. New York etc. R. R. Co.*, 165 N. Y. 347, 59 N. E. 206, where the plaintiff, who owned a building near the defendant's track, sued for compensation for the destruction of his property by fire, it was held that it was necessary for him to affirmatively establish negligence on the part of the defendant, either in the condition or in the operation of its engine, for which the mere occurrence of the fire was not sufficient; but that "it was not necessary that he should prove either the specific defect in the engine, or the particular act of misconduct in its management or operation constituting the negligence causing the injury complained of. It was sufficient if he proved facts and circumstances from which the jury might fairly infer that the engine was either defective in its condition or negligently operated." It was in those terms that the present chief judge found the expression of the underlying ⁴¹⁰ principle of the maxim under discussion: *Griffen v. Manice*, 166 N. Y. 188, 82 Am. St. Rep. 630, 59 N. E. 925, 52 L. R. A. 922. It will be observed that in the present case the record is absolutely bare of any facts or circumstances permitting of an inference of negligence. The parting of the hawser did not speak for itself, as imputing negligence to the defendant, and to leave it to jurors to say whether it was the result of negligence would be to invite them to speculate upon possibilities, without any basis in fact. The pier was a safe place had the plaintiff and his mother kept within its shelter and had they heeded the warnings of the defendant's servants. The breaking of the shackle was not shown to be due to any defect in its manufacture, or to the omission of any care in handling, and the circumstances disclosed simply

permit the natural inference that it yielded to the tremendous strain put upon the hawser in bringing the vessel from the channel into its berth at the pier. Clearly, as I think, this plaintiff was not so circumstanced toward the defendant as that the mere fact of the accident furnished a reason for the inference of negligence, or exempted him from the general rule that negligence must be established, actually or inferentially, from facts proved, when charged as a cause of action.

I advise the reversal of the order of the appellate division and the affirmance of the judgment dismissing the complaint, with costs in both courts to the appellant.

Cullen, C. J., Werner, Hiscock and Chase, JJ., concur.

Edward T. Bartlett, J., dissents.

O'Brien, J., absent.

Ordered accordingly.

It is the Duty of Railway Companies to keep their station-house or depot and the appurtenant premises in a reasonably safe and proper condition for their patrons: Kengherz v. Chicago etc. Ry. Co., 90 Minn. 17, 101 Am. St. Rep. 384, and cases cited in the cross-reference note thereto.

MACKENNA v. FIDELITY TRUST COMPANY.

[184 N. Y. 411, 77 N. E. 721.]

REDEMPTION, Right to Based on Inchoate Right of Dower.

A wife, by virtue of her inchoate right of dower, may, during the lifetime of her husband, maintain a suit to redeem from a mortgage and also from a foreclosure sale thereunder pursuant to a judgment to which she was not a party. (p. 623.)

DOWER, Wife Having Right to, Whether Necessary Party to a Foreclosure.—A wife has, through her husband, an interest in all real property of which he is seised during the marriage, and is therefore a necessary party to an action to foreclose a mortgage executed by him on such property. (p. 624.)

DOWER, Right of Wife to Redeem from Judicial Sale, Limitation of to Her Dower Interest.—If a wife has a right to redeem from a foreclosure sale because she was not a party to the action and judgment on which it was based, such right applies only to her dower interest, and the court may deny her the right to redeem if the purchaser will release her dower or pay her the value of her inchoate right of dower. (p. 626.)

THE RULE That He Who Seeks Equity Must Do Equity does not extend to requiring him, as a condition to maintaining his suit, to

satisfy an obligation having no connection therewith. Hence, in a suit to redeem from a judicial sale, the complainant, as a condition precedent to the relief claimed, may not be required to satisfy an independent judgment against him held by the defendant in the suit. (p. 626.)

Action by a married woman during the lifetime of her husband to redeem from a judicial sale. In June, 1900, a judgment was rendered against her husband and in favor of the Fidelity Trust Company foreclosing a mortgage on certain real property, and thereunder such property was sold to such trust company, and a conveyance thereof executed to it as purchaser. The plaintiff knew of the pendency of the action and the time and place of the sale, but took no measures to protect her interests. In June, 1901, the trust company recovered a deficiency judgment against the plaintiff. Before the recovery of this latter judgment, the plaintiff tendered to the trust company the amount due on the judgment foreclosing the mortgage on her husband's property, but the tender was refused. Subsequently, and in March, 1902, she brought this action to redeem, the value of the premises then having increased to thirty-eight thousand dollars. The defendant denied the right of the plaintiff to redeem and also insisted that if the right were accorded to her, that she be required to pay the amount of the deficiency judgment recovered against her, though it did not relate to any of the property involved in this action. The trial court decreed that plaintiff's right to redemption should be denied if the trust company should release her right of dower from the mortgage, or pay her the value of her inchoate right of dower, and allowed her thirty days to elect between these alternatives. It also decreed that if defendant should fail to release the dower or to pay its value in case she elected to accept either form of relief, she should have the right to redeem upon paying the amount due on the mortgage, to wit. eighteen thousand nine hundred and ninety-eight dollars and nineteen cents, with interest from December 3, 1898, and all taxes paid by the defendants.

Both parties appealed to the appellate division, which modified the judgment by requiring the plaintiff to pay the judgment against her of one thousand and nineteen dollars and forty-eight cents, to redeem her share, or to permit that sum to be deducted from the sum to be paid by the defendant in case plaintiff elected to receive the value of her inchoate

right of dower. In other respects the judgment was modified. The plaintiff appealed.

Ulysses S. Thomas, for the appellant.

Louis L. Babcock, for the respondents.

⁴¹⁴ VANN, J. The primary question is whether the plaintiff had the right to redeem, although her husband was still alive and her right of dower inchoate only. The question has been discussed somewhat but never decided by this court. It was not involved in *Mills v. Van Voorhies*, 20 ⁴¹⁵ N. Y. 412, but in considering the question whether the inchoate right of a married woman to dower was affected by a foreclosure to which she was not a party, it was said by Selden, J.: "A feme covert who executes a mortgage jointly with her husband is nevertheless entitled to dower in the equity of redemption of which her husband is seised notwithstanding the mortgage, and this right, as we have seen, is not affected by a foreclosure in equity unless she is made a party. If omitted, she can come in at any time afterward and redeem, notwithstanding a decree and sale in the foreclosure suit." After commenting upon *Bell v. Mayor etc. of New York*, 10 Paige, 50, the learned judge continued: "In that case the foreclosure was not completed until after the death of the mortgagor, and hence it did not become necessary to determine the effect of a foreclosure in his lifetime. There is not the slightest reason, however, for giving to such a foreclosure any greater effect in cutting off the dower rights of the wife of the mortgagor than to one which takes place after his death. The inchoate rights of the wife are as much entitled to protection as the vested rights of the widow. Neither can be impaired by any judicial proceeding to which she is not made a party."

In *Moore v. Mayor etc. of New York*, 8 N. Y. 110, 59 Am. Dec. 473, it was held, under a statute then in force, that when lands are taken under the power of eminent domain the public acquire an absolute title free from the wife's inchoate right of dower, even if she is not made a party to the proceeding. Still, in *Simar v. Canaday*, 53 N. Y. 298, 13 Am. Rep. 523, it was said: "We think that it must be considered as settled in this state, notwithstanding *Moore v. Mayor*, 8 N. Y. 110, 59 Am. Dec. 473, and some dicta in the other cases, that, as between a wife and any other than the state or its

delegates or agents exercising the right of eminent domain, an inchoate right of dower in the lands is a subsisting and valuable interest which will be protected and preserved to her; and that she has a right of action to that end." Accordingly, it was held that a married woman had a right of action for damages sustained by the loss of her inchoate right of dower against one ⁴¹⁶ who had procured a conveyance of lands from her husband by means of fraudulent representations, although he was still living and she had joined in the conveyance. "Public policy allows a wife to maintain in the lifetime of her husband an action to cancel, as forged, a recorded deed purporting to have been executed by her, together with her husband, instead of waiting for an admeasurement of dower after her husband's death": *Clifford v. Kampfe*, 147 N. Y. 383, 42 N. E. 1.

The supreme court has repeatedly held that a wife can maintain an action to redeem during the lifetime of her husband: *McMichael v. Russell*, 68 App. Div. 104, 74 N. Y. Supp. 212; *Campbell v. Ellwanger*, 81 Hun, 259, 30 N. Y. Supp. 792; *Taggart v. Rogers*, 49 Hun, 265, 1 N. Y. Supp. 900. This is the rule in other states without exception so far as our researches disclose: *Davis v. Wetherell*, 13 Allen, 60. 90 Am. Dec. 177; *Gatewood v. Gatewood*, 75 Va. 407; *Smith v. Hall*, 67 N. H. 200, 30 Atl. 409; *Vaughan v. Dowden*, 126 Ind. 406, 26 N. E. 74; *Williams v. Stewart*, 25 Minn. 516. The elementary works lay down the same rule: 2 Jones on Mortgages, 6th ed., sec. 1067; *Thomas on Mortgages*, 2d ed., sec. 622.

We adopt the rule as sustained by authority and founded on sound and just principles. The right to redeem is a necessary incident of a mortgage, and it extends beyond the mortgagor to all who claim through or under him. As to the mortgagor, it is the right to pay the mortgage as soon as it is due and relieve his lands from the lien thereon. If he fails to redeem, however, anyone who claims through him may pay the mortgage and thereupon by operation of law that person becomes subrogated to his rights. The right of redemption in such a case involves the right of subrogation, which will be treated in equity as an assignment to the extent required to adequately protect the one who redeems: *Arnold v. Green*, 116 N. Y. 566, 23 N. E. 1. The person who, in order to protect his interests, is thus "compelled to pay a debt which ought to have been paid by another is entitled to exercise all

the remedies which the creditor possessed against that other and to indemnify from the fund out of which should have been made the payment which he has made": Sheldon on ⁴¹⁷ Subrogation, sec. 11. The one thus redeeming does not take as an absolute purchaser, but is simply subrogated to the place of the mortgagee for protection and indemnity unless, as may be the case, he is reimbursed and redemption is made from him: Sheldon on Subrogation, sec. 51. An inchoate right of dower depends on marriage and the seisin of the husband. The wife thus acquires an interest through her husband, and it is well established that she is a necessary party to an action of foreclosure, because she has an interest to protect: *Kursheedt v. Union Dime Sav. Inst.*, 118 N. Y. 358, 23 N. E. 473, 7 L. R. A. 229. She can protect that interest only through the right of redemption, unless she purchases at the sale, as even a stranger may. The logical effect of the rule that she is a necessary party in order to give a good title through the foreclosure of a mortgage is that she can redeem before judgment, although her husband is alive. There is no reason for making her a party unless she can protect her inchoate right of dower by redeeming during the pendency of the action. If she can redeem *pendente lite*, when made a party, she can redeem after judgment and sale, when not made a party, through an action brought for that purpose.

As, however, she comes into a court of equity for relief, she must do equity herself, and cannot be permitted to secure more than adequate protection of her rights or to make a profit out of her own delay and the mistake in the suit to foreclose. She cannot speculate at the expense of the purchaser by waiting, as she did, until the lands have materially increased in value, or, as it may be, until improvements have been made thereon, and then seek to redeem as matter of right, provided the purchaser offers, or the court requires him, to fully protect her in some other way: *Mickles v. Dillaye*, 17 N. Y. 80. As she is made whole by the right to elect between a release of her dower right from the lien of the mortgage under which the trust company took title, or the payment to her of the value thereof, with the right to full redemption if the company does neither, she has no cause to complain, for that is exact justice. She thus secures such ⁴¹⁸ protection as places her in a better condition than she was before, for she may now have the value of her inchoate right, and can retain it even if her husband survives her. After

thus recovering her own, she cannot ask a court of equity to do an inequitable thing for her in violation of one of its primary rules. She must accept full protection of her own rights, without injury to the rights of others.

This subject was considered by our present chief judge, who presided at the second trial in *Taggart v. Rogers*, 49 Hun, 265, 1 N. Y. Supp. 900. His opinion does not appear to have been reported, but a copy was furnished upon the argument before us, and we quote with approval the following therefrom: "The foreclosure was not void, for the owner of the equity of redemption was made a party to it and his estate was cut off by the decree and sale. The plaintiff was not affected by the foreclosure, for she was not served with process. Her right to redeem rests in equity upon the principle that her rights should not be cut off without her day in court. But it seems plain on principle that equity will go only to the extent of protecting her rights and not give her any greater right by reason of the irregular foreclosure than she had before. The rule that a party must redeem the entire premises from the lien of the whole mortgage is primarily for the benefit of the mortgagee, and is not of universal application. Here the plaintiff had, before the foreclosure, an inchoate right of dower in the premises. It is not only possible, but in many cases probable, that on account of the enhancement in value of the premises the purchaser, treating him as a mortgagee in possession, may have been entirely repaid the mortgage debt out of the rents and profits. It may be also in this case. Is, then, the property to be conveyed to the plaintiff without consideration? Conceding that the defective foreclosure in no wise impaired her rights, on what principle of law or equity can it be contended that a defect in a suit to which she was not a party operated to convey to her an estate she never before possessed? In case there should prove to be something still unpaid on the mortgage, as long as such sum in addition to the value of the ⁴¹⁹ estate or lien sought to be protected by the redemption is less than the value of the premises, the injustice of a general redemption still exists. The difference between the two cases is in degree, not in kind. The foreclosure passed to the defendant the title of all parties in interest, save that of the plaintiff. Of the title so acquired by the defendant he should not be deprived if he is willing to release the estate of the plaintiff from the lien of the mortgage or to satisfy her claim. Thus

the plaintiff's rights will be protected and the defendant will not be deprived of his purchase: Citing *Boqut v. Coburn*, 27 Barb. 230."

The judgment rendered in that case, which was on all-fours with that rendered by the trial court in this, was affirmed by the general term: *Taggart v. Rogers*, 58 Hun, 608, 12 N. Y. Supp. 113. We think the plaintiff had no absolute right of redemption under the circumstances, and that the conditions imposed by the trial judge were such as were required from a court of equity.

This brings us to the modification made by the learned appellate division by requiring as a further condition of redemption that the plaintiff should pay the judgment for one thousand and nineteen dollars and forty-eight cents, recovered against her by the trust company in another action, or deduct the amount thereof from the sum to be paid her, if she elects to accept the value of her inchoate right of dower. The trial judge denied this relief, and the theory upon which the appellate division proceeded in granting it was, that inasmuch as the judgment was a just debt, the trust company should not be compelled to collect it "by circumlocution," but that "all of the equities should be adjusted now, and all matters in any way connected with the property finally adjusted between the parties." The subject received only incidental consideration in the opinion, and we think that error was inadvertently committed by the modification.

The circumstances did not call for a general adjustment of equities between the parties, but only such as were directly connected with the land in question, and "for which the purchaser would be entitled to hold the land as security": *Parmer* ⁴²⁰ v. *Parmer*, 74 Ala. 285; 2 Jones on Mortgages, sec. 1070. The judgment which the plaintiff was in effect ordered to pay had no connection with that land and was never a lien thereon. There was no more reason for deducting it than if it had been recovered on a promissory note, given for a grocery bill and purchased by the trust company. If she ever redeems, the judgment will attach as a lien on the premises at the moment of redemption, and it does not appear that there is any other judgment against her to get in ahead. Her suit to redeem cannot be turned into an agency of collecting general debts from her. That would not be equitable, for it would introduce a contract made with a third person, foreign to that on which redemption is based, and the result

might defeat redemption if the plaintiff was unable to pay the judgment. As was well said by the trial justice in his opinion: "Had the plaintiff been made a party to the foreclosure and offered to redeem before the sale, she could not have been required to pay as a condition of such redemption a deficiency judgment obtained on another foreclosure relating to other property." It was not owing to her mistake that she was not made a party, and she should not be required to pay more now, taxes and interest excepted, than she would if the foreclosure action had been regular and she had redeemed therein. As we bound the relief in her favor by the rule of equity, we must limit the relief against her by the same rule.

The judgment of the appellate division should be modified by striking out the provision "requiring the plaintiff to pay the judgment of one thousand and nineteen dollars and forty-eight cents if redemption is had, or in the alternative deducting the amount of the judgment from the sum to be paid by the defendant," and also the provision allowing costs to the defendant, the Fidelity Trust Company, and, as thus modified, affirmed, without costs to either party in either court. The appeal from the intermediate order should be dismissed, without costs.

Cullen, C. J., Gray, Edward T. Bartlett, Haight, Willard Bartlett and Chase, JJ., concur.

Judgment accordingly.

The Barring of a Wife's Right to Dower by a mortgage foreclosure sale of her husband's lands is discussed in *Newhall v. Lynn Sav. Bank*, 101 Mass. 428, 3 Am. Rep. 387; *Bank of Commerce v. Owens*, 31 Md. 320, 1 Am. Rep. 60; *Mooney v. Maas*, 22 Iowa, 380, 92 Am. Dec. 395; *Verry v. Robinson*, 25 Ind. 14, 87 Am. Dec. 346; *Lewis v. Smith*, 9 N. Y. 502, 61 Am. Dec. 706; *Hawley v. Braford*, 9 Paige, 200, 37 Am. Dec. 390. The inchoate contingent statutory interest of a husband or wife in the real estate of his or her spouse is not divested or affected by a sale of the property on execution against such spouse: *Johnson v. Minnesota Loan etc. Co.*, 75 Minn. 4, 74 Am. St. Rep. 438.

PEOPLE v. REARDON.

[184 N. Y. 431, 77 N. E. 970.]

CONSTITUTIONAL LAW—Statutes, Provision Respecting Enactment, When Mandatory.—The provision of the constitution of New York that no bill shall be passed or become a law unless it shall have been printed and upon the desks of the members in its final form at least three calendar legislative days prior to its final passage is mandatory. (p. 630.)

STATUTES, Provision Requiring to be Printed and on the Desks of the Members Three Days Before Enactment, Construction of.—The provision of the constitution of New York that no bill shall be passed unless it shall have been printed and on the desks of the members in its final form at least three calendar legislative days prior to its final passage is complied with if, on being introduced, it is printed and placed on the desks of members of both Houses in its final form for three consecutive days prior to its passage in the House in which it originated. It need not, on being sent to the other House, be again printed and placed on the desks of its members for three days more before it can be enacted. (p. 632.)

TAXATION, Classification for the Purposes of.—The legislature has power to classify as it sees fit by imposing a burden on one class of property and no burden at all on another. The remedy for injudicious action is in the hands of the people, not of the court. (p. 635.)

TAXATION on Sales of Shares of Stock.—A statute imposing a tax on all sales or agreements to sell, or memoranda of sales, or deliveries or transfers of shares or certificates of stock in any domestic or foreign association, company, or corporation of two cents on each one hundred dollars of face value or fraction thereof is not invalid as creating a classification not permitted by the constitution, nor because it fixes the amount of the tax regardless of the value of the certificates sold or of the sums for which they are sold. (pp. 636, 638.)

TAXATION of Sales of Stock in Foreign Corporations Owned by Nonresidents.—A statute imposing a tax on the transfer or sales of stock in any corporation of two cents on each one hundred dollars of face value is not unconstitutional as authorizing, as applied to stock of foreign corporations owned by nonresidents, the taxation of property without the jurisdiction of the state. (p. 641.)

INTERSTATE COMMERCE—Tax on Transfers of Stock of Corporations.—A statute imposing a tax on transfers or sales of stock of any corporation of two cents on each one hundred dollars of the face value thereof does not violate the commerce clause of the constitution of the United States. (p. 647.)

John G. Milburn and John F. Dillon, for the appellant.

Julius M. Mayer, attorney general, and John R. Dos Passos, for the respondent.

437 VANN, J. The issue of law joined by the petition, return and reply is whether the legislature had power to en-

act, and did in fact enact, chapter 241 of the Laws of 1905, which provides for a tax on the sale and transfer of stock certificates. That act is part of the tax law, which it amends by adding a new article known as No. 15. It imposes a tax "on all sales, or agreements to sell, or memoranda of sales or deliveries or transfers of shares or certificates of stock in any domestic or foreign association, company or corporation, made after the first day of June, 1905," of two cents "on each hundred dollars of face value or fraction thereof." Payment of the tax must be denoted by an adhesive stamp or stamps affixed in a manner adapted to the circumstances of the sale.

438 A violation of the act by a transfer without payment of the tax is made a misdemeanor and may be punished by fine or imprisonment, or both, and the offender is also subject to "a civil penalty of five hundred dollars for each violation," to be recovered by the state comptroller in any court of competent jurisdiction. The statute further provides that no transfer of stock without payment of the tax "shall be made the basis of any action or legal proceedings, nor shall proof thereof be offered or received in evidence in any court in this state." The taxes thus imposed "and the revenues thereof shall be paid by the state comptroller into the state treasury and be applicable to the general fund, and to the payment of all claims and demands which are a lawful charge thereon."

The act is attacked as invalid on the ground that it was prematurely passed before it had been on the desks of the members of the legislature in its final form for at least three calendar legislative days prior to its final passage, as required by section 15, article 3 of the constitution; that it makes an improper classification; that the tax is imposed on a wrong basis; that it is imposed upon property without the state, and that the act violates the commerce clause of the federal constitution.

After carefully considering these objections, we have reached the conclusion that they are not well founded, and the following are our reasons, so far as we have found time to express them:

1. The statute in question originated, as a bill, in the Senate, where it was amended from time to time and reprinted as often as it was amended. Printed copies thereof, as it was when introduced and as it was each time after it was amended, were promptly placed on the desks of the members of both Houses when it was introduced and after each amendment.

This was not required by any written rule of the legislature but was in accordance with the general practice that has prevailed since the constitution of 1894 was adopted. The bill was passed by the Senate on the 3d of April, 1905, was sent to the Assembly for its concurrence on the 4th, and was ⁴³⁹ finally passed by that body on the 5th, neither the governor nor the acting governor having certified to the necessity of its immediate passage. The journal of the Assembly states that the bill was "printed and on the desks of the members in its final form at least three calendar legislative days prior to its final passage." These are, in substance, the facts relating to the subject as alleged in the petition for the writ and not denied in the return.

The constitution provides that "No bill shall be passed or become a law unless it shall have been printed and upon the desks of the members, in its final form, at least three calendar legislative days prior to its final passage, unless the governor, or the acting governor, shall have certified to the necessity of its immediate passage, under his hand and the seal of the state": Const., art. 3, sec. 15.

The object of this provision, which first appeared in the constitution of 1894, is to prevent hasty and careless legislation, to prohibit amendments at the last moment, and to secure more publicity than had been required before. Care was taken to provide for emergencies by a certificate of necessity from the governor, which authorizes immediate action. The requirement is not directory, but mandatory, as is obvious from the form of the command, which prohibits a bill from becoming a law without compliance therewith. The question is, Who are meant by "the members" upon whose desks the printed bill is to be placed? Does the provision mean that the members of the legislature are to have the bill on their desks for three days prior to its final passage, which was the fact in the instance before us; or that the members of the House in which it originated must first have it on their desks for three days, and after they have passed it the members of the other House must have it on their desks for three days more before they can pass it? If the latter is the true meaning of the requirement, it was not obeyed, for the bill was passed by the Assembly on the second day after it was passed by the Senate.

The constitution created the legislature as an entity, consisting ⁴⁴⁰ of two Houses, the Senate and Assembly. In every

article, except the last, which relates only to the date of operation, and in almost every section it recognizes the existence of the legislature, as such. Grants of power are made to the legislature and restrictions upon the exercise of power are directed to the legislature, not to the Senate and Assembly. Both senators and assemblymen are members of the legislature, and as such are required to take an oath of office: Art. 13, sec. 1. The command of the people is addressed to the legislature continuously throughout the fundamental law. Thus it provides that "no member of the legislature shall receive any civil appointment within this state . . . during the time for which he shall have been elected," and that "no person shall be eligible to the legislature" under certain circumstances (art. 3, secs. 7, 8); directs that "the members" shall not be questioned "for any speech or debate in either House of the legislature" (art. 3, sec. 12); that senators and members of Assembly shall be elected on a day named "unless otherwise directed by the legislature" (art. 3, sec. 9); that "no private or local bill which may be passed by the legislature shall embrace more than one subject" (art. 3, sec. 16); that "the legislature shall not pass a private or local bill" in certain cases (art. 3, sec. 18); that "the legislature shall neither audit nor allow any private claim or account against the state" (art. 3, sec. 19); that the governor may "convene the legislature or the Senate only on extraordinary occasions," and shall "communicate by message to the legislature" (art. 4, sec. 4); speaks of "the final adjournment of the legislature" (art. 4, sec. 9), "the legislature at its next meeting" (art. 4, sec. 5), and the "next session of the legislature" (art. 5, sec. 7); authorizes the legislature to alter judicial districts and create judicial departments (art. 6, secs. 1, 2); prohibits "the legislature" from selling certain canals (art. 7, sec. 8), and from suspending specie payments (art. 8, sec. 5); requires it to provide a system of free common schools (art. 9, sec. 1); to provide for filling vacancies in office (art. 10, sec. 5); to organize the militia (art. 11, sec. 3); to incorporate cities and villages ⁴⁴¹ (art. 12, secs. 1, 2), and to submit proposed amendments to the people (art. 14, sec. 1).

Many other sections containing similar provisions might be cited, but the foregoing are sufficient to show that while the Senate and Assembly are separate bodies, they constitute the legislature; that their united action becomes the act of the legislature, and that the members of both Houses are mem-

bers of the legislature. A bill is the draft of a proposed statute submitted to the legislature for enactment. It cannot become a law by the action of the Senate alone, or of the Assembly alone, but only by the action of both, when it becomes an act of the legislature, subject to the approval of the governor. It may originate in either House, and when introduced in either it is before the legislature, or else no bill can ever get before it, for each House is part of the legislature. When, therefore, the constitution provides that no bill shall be passed unless it shall have been printed and upon the desks of "the members" in its final form for a certain period, it means the members of the legislature, not the members of the Senate and Assembly, merely as such. This is emphasized by the contrast in the form of the command when action is required by the members of each House separately, as in section 20 of article 3 relating to the requirement of "a two-third vote" upon a bill "appropriating the public moneys or property for local or private purposes." There the command is addressed "to the members elected to each branch of the legislature," separately, instead of to the members of the legislature, collectively, which is the usual form. When the constitution speaks of three calendar legislative days, it means three calendar days of the legislature, or days when the legislature is in session. It does not mean six days, which the construction contended for would involve. The bill in its final form—that is, in the form in which it becomes a law—must be on the desks of all members of both Houses for three days before it is passed by either. But one occasion for placing it on the desks is named, not two separate occasions, the first confined to one House and the second to the other.

⁴⁴² All members of the legislature are thus given notice of every bill when introduced into either House, and when amended by either House. No reprinting is required, as the bill goes from one House to the other unless it has been amended, and whenever amended it must be reprinted. Every member is informed at once of bills pending in either House, so that he can promptly study the proposed legislation, communicate with his constituents, note the comments of the press, observe the state of public opinion, and appear before the committee to which the bill is referred in the House of its origin for the purpose of making suggestions before he is called upon to vote in his own House. It prevents artful and dangerous amendments just before the final vote, which was

formerly a great evil. It has the same effect, so far as publicity and opportunity for deliberate consideration are concerned, as if every bill were introduced into each House at the same time. The construction thus indicated is reasonable and proper, for it follows the constitution as written, complies with its spirit and fulfills its purpose. It is in accordance with the practical construction of every legislature that has been in session since the provision was adopted, and the constitutional debates show that this was the construction of the convention which adopted it: Revised Records, 887, 917.

We can give no heed to the criticism of counsel that there is no statute or written rule requiring bills to be placed on the desks of members, for it is not the province of the courts to direct the legislature how to do its work. It is sufficient for us that the constitution requires each House "to keep a journal of its proceedings," and that the journal of the Assembly, which may be consulted to support a statute, shows that the constitutional provision in question was complied with when the act before us was passed: Art. 3, sec. 11.

2. The classification made by selecting one kind of property and taxing the transfer of that only is assailed as so arbitrary, discriminating and unreasonable as to deprive certain persons of their property without due process of law and to withhold from them the equal protection of the laws.

443 All taxation is arbitrary, for it compels the citizen to give up a part of his property; it is generally discriminating, for otherwise everything would be taxed, which has never yet been done, and there would be no exemption on account of education, charity or religion, and frequently it is unreasonable, but that does not make it unconstitutional, even if the result is double taxation: *People v. Home Ins. Co.*, 92 N. Y. 328. The right to tax is not granted by the constitution, but of necessity underlies it, because government could not exist or perform its functions without it. While it may be regulated and limited by the fundamental law, it exists "independently of it as a necessary attribute of sovereignty": *People v. Adirondack Ry. Co.*, 160 N. Y. 225, 54 N. E. 689. "The power of taxation being legislative, all the incidents are within the control of the legislature. The purposes for which a tax shall be levied; the extent of taxation; the apportionment of the tax; upon what property or class of persons the tax shall operate; whether the tax shall be general or limited to a particular locality, and in the latter case, the fixing of a

district of assessment; the method of collection, and whether a tax shall be a charge upon both person and property, or only on the land—are matters within the discretion of the legislature and in respect to which its determination is final”: *Genet v. City of Brooklyn*, 99 N. Y. 296, 1 N. E. 777.

“A tax may be imposed only on certain callings and trades, for when the state exerts its power to tax it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. It would be an intolerable burden if the state could not tax any property or calling unless at the same time it taxed all property or all callings”: *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. Rep. 431, 46 L. ed. 679; *Armour Packing Co. v. Lacey*, 200 U. S. 226, 50 L. ed. 451.

“We cannot say that treating stocks of corporations as a class subject to special restrictions was unjust discrimination or denial of the full protection of the laws”: *Otis v. Parker*, 187 U. S. 606, 23 Sup. Ct. Rep. 168, 47 L. ed. 323.

“The legislature must decide when and how and for what ⁴⁴⁴ public purposes a tax shall be levied, and must select the subject of taxation”: 1 *Cooley on Taxation*, 3d ed., 255.

There is no express restriction upon this power in our state constitution and no implied restriction, except by the primary guaranties relating to life, liberty, property and due process of law. The same is true of the federal constitution except as to certain subjects of national interest under the control of Congress, such as imports, patent rights and agencies used to carry the powers of Congress into execution. Subject to these restraints, the legislature has supreme control of the power to tax, and its action, even if arbitrary, discriminating and unreasonable, is binding upon all persons and property within the boundaries of the state. The state retained all the power of legislation that it did not part with in adopting the federal constitution or consenting to the amendment thereof, and, subject to that exception, it is as supreme as the British parliament, which is restrained only by the custom of the realm and the conservatism of the people. Taxes upon the right of succession to property by will and intestate law, on special franchises and upon the sale of intoxicating liquors, are recent instances of the exercise of this power by the state through the selection of special subjects of taxation, involving the exemption of all others, each of which was attacked as in violation of both constitutions, but all were sustained by the

courts. The tariff and internal revenue laws show that the same power of selection has been exercised by Congress, and the federal courts have uniformly upheld it. Indeed, the prototype of the statute before us was an act of Congress passed in 1898, known as the "war revenue act," imposing a stamp tax on sales, transfers and deliveries of stock certificates, which was sustained without dissent by the circuit and supreme courts of the United States: 30 U. S. Stats. 448; *United States v. Thomas*, 115 Fed. 207; *Thomas v. United States*, 192 U. S. 363, 24 Sup. Ct. Rep. 305, 48 L. ed. 481. A like tax on sales of merchandise, although expressly limited to those made at "any exchange or board of trade," leaving all other sales untouched, was also sustained, and the declaration made that "a sale at an exchange does form a proper ⁴⁴⁵ basis for a classification which excludes all sales made elsewhere from taxation": *Nicol v. Ames*, 173 U. S. 509, 19 Sup. Ct. Rep. 522, 43 L. ed. 786.

The legislature has power to classify as it sees fit by imposing a heavy burden on one class of property and no burden at all upon others, the remedy for injudicious action being in the hands of the people, not of the courts. Arbitrary selection and discrimination characterize the history of legislation, both state and national, with reference to taxation, yet, when all persons and property in the same class are treated alike, it has uniformly been sustained both by the state and federal courts. The tax on tobacco, on oleomargarine and the like is not less arbitrary or discriminating than the tax in question. While a tax upon a particular house or horse, or the houses or horses of a particular man, or on the sale thereof, would obviously invade a constitutional right, still a tax upon all houses, leaving barns and business buildings untaxed, or upon all horses or the sale thereof, leaving sheep and cows untaxed, however unwise, would be within the power of the legislature. This is true of a tax on all houses with "more than one chimney," or "with more than one hearthstone," or on all race-horses. The power of taxation necessarily involves the right of selection, which is without limitation, provided all persons in the same situation are treated alike and the tax imposed equally upon all property of the class to which it belongs: *Matter of McPherson*, 104 N. Y. 306, 58 Am. Rep. 502, 10 N. E. 685; *Matter of Gould*, 156 N. Y. 423, 51 N. E. 287. The equal protection of the laws "only requires the same means and methods to be applied impartially to all the constituents

of each class, so that the laws shall operate equally and uniformly upon all persons in similar circumstances": Kentucky R. R. Cases, 115 U. S. 321, 6 Sup. Ct. Rep. 57, 29 L. ed. 414. Or, in other words, all persons must "be treated alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed": *Magoun v. Illinois Trust etc. Bank*, 170 U. S. 283, 18 Sup. Ct. Rep. 594, 42 L. ed. 1037; *Hayes v. Missouri*, 120 U. S. 68, 7 Sup. Ct. Rep. 350, 30 L. ed. 578; *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. Rep. 357, 28 L. ed. 923. "Let it reach all of a class, either of persons or things, it matters not whether those included in it be one or many, or ⁴⁴⁶ whether they reside in any particular locality or are scattered all over the state": 1 *Cooley on Taxation*, 3d ed., 260.

The tax in question is not imposed upon property, but on the transfer of a certain class of property extensively bought and sold throughout the state. It does not discriminate between different kinds of stock, taxing the sale of some and leaving others untaxed, but treats all in the class alike. The class includes all sales of certificates issued by any domestic or foreign association, company or corporation. It is a large and comprehensive class, as is shown by the revenue produced, which amounts to five or six millions per annum. The sales affected are made chiefly for speculation which may have influenced the legislature in making the selection. The statute operates equally and uniformly upon all transfers of the class named when made by any person within the state. All persons who sell stocks are treated alike, and all parts of the state are treated alike. It applies with equal force to all sales, whether in the city or country, in exchanges, offices or on the street, by farmers, mechanics, brokers and others. The classification violates neither constitution.

3. It is claimed that the statute is invalid because it fixes the amount of the tax regardless of the value of the certificates sold or of the sum for which they are sold.

The tax in question is an excise tax which need not depend upon any principle of valuation or on any notice to the taxpayer. It is not a direct tax governed by the rule of appraisal, but an indirect tax governed by the rule of uniformity. It is not like a general tax upon the bulk of property in the state which must be paid in any event, for if there is no sale there is no tax. Neither notice nor grievance day is required, for no valuation is made except by the statute itself, and there

is no provision in either constitution requiring such a tax to be laid on an ad valorem basis. There can be no tax without a sale, even if the property is of great value and is owned in every household. When a sale is made the tax follows, and the legislature had the right to measure it in any way that it saw fit.

⁴⁴⁷ A tax of two cents on every check, regardless of the amount for which it was drawn, and of five cents on a written contract, whether it covered a transaction involving hundreds or thousands, may be referred to as examples of what has been done without serious question in the imposition of excise taxes. A poll tax does not depend upon the income or earning capacity of the persons subjected to it. A tax on carriages, guns and watches does not rest on the value of the subjects taxed. They are counted, not appraised: *Hylton v. United States*, 3 Dall. 171, 1 L. ed. 556; *Bells Gap R. R. Co. v. Pennsylvania*, 134 U. S. 232, 10 Sup. Ct. Rep. 533, 33 L. ed. 892. The same is true of an excise tax on legal process, domestic animals, avocations and the like, of which there have been many instances during the history of the nation and the different states. Such powers of taxation, as was said in a late case, "have admittedly belonged to state and nation from the foundation of the government": *Knowlton v. Moore*, 178 U. S. 41, 20 Sup. Ct. Rep. 747, 44 L. ed. 969. "Of the different kinds of taxes which the state may impose there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent on the extent of his business), and generally, specific taxes on things, or persons, or occupations. In such cases the legislature fixes its amount, and that is the end of the matter. . . . No right of his is, therefore, invaded. Thus if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard, there is nothing the owner can do which can affect the amount to be collected from him": *Hagar v. Reclamation Dist.*, 111 U. S. 701, 4 Sup. Ct. Rep. 663, 28 L. ed. 569.

Convenience in doing business, the slight cost of collection and the necessity of preventing evasion are important considerations in laying an excise tax, and the rule of counting rather than valuing is almost universally adopted, so that the citizen may know at once the amount of the tax and pay it by affixing the stamps required, which are permanent evi-

dence of the sum paid. The statute itself in all such cases, as well as in the case under consideration, apportions the tax,⁴⁴⁸ and the power of apportionment is part of the power of taxation. As was said by this court many years ago: "The power of taxing and the power of apportioning taxation are identical and inseparable. Taxes cannot be laid without apportionment, and the power of apportionment is, therefore, unlimited, unless it be restrained as a part of the power of taxation. There is not, and since the original organization of the state government, there has not been, any such constitutional limitation or restraint": *People v. Mayor etc. of Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266. The highest federal court sustained without hesitation an assessment upon the nominal or face value of bonds instead of upon their actual value, and also declared that absence of notice to the owners of the bonds was not a taking of the bondholder's property without due process of law: *Bells Gap R. R. Co. v. Pennsylvania*, 134 U. S. 232, 10 Sup. Ct. Rep. 533, 33 L. ed. 892; *Jennings v. Coal Ridge Improvement etc. Co.*, 147 U. S. 147, 13 Sup. Ct. Rep. 282, 37 L. ed. 116. In the *Thomas* case, precisely as in the case before us, the tax was measured by "each hundred dollars of face value or fraction thereof." As our legislature has all the power of legislation with reference to taxation that the state has, of necessity it has as much power to classify and measure as belongs to Congress. Hence, this point as well as the last preceding was involved and decided in the *Thomas* case, even if no expression of consideration appears in the opinions: *United States v. Thomas*, 115 Fed. 207; *Thomas v. United States*, 192 U. S. 363, 24 Sup. Ct. Rep. 305, 48 L. ed. 481. We think that the apportionment, even when so unequal in result as it was in the two sales described in the affidavit of the complainant, is within the exclusive control of the legislature, with no power in the courts to interfere.

4. It is insisted that a tax on the transfer of stock certificates issued by a foreign corporation and owned by a non-resident, although made within this state, is virtually a tax on property without the jurisdiction of the state.

This position is founded on the theory that the shares of capital stock of a corporation represent its property, and if that property is not within the state the shares are not taxable⁴⁴⁹ here unless the owner resides here. The tax, however, is not on property, but on the sale of property, or on a particu-

lar kind of contract when made within this state. The certificate, itself, is not liable for the tax, but the person selling it is. The tax is not a lien on certificates, nor on shares, which may be owned to any extent throughout the state, free from any claim under the statute in question. It is the sale alone that gives rise to the tax, which is imposed through the command of the law to the seller to pay the tax when the contract to sell is made, and it is enforced not by levy and sale, but by civil and penal remedies against the person of the seller. While this tax, the same as all other taxes, must ultimately come out of the property of the seller, it cannot be enforced against the certificate sold as distinguished from his other property.

The question is, whether the state has jurisdiction to impose a tax on a certain class of contracts when made within its territorial limits. Jurisdiction over the persons who make the contract does not depend on their residence, but on their presence within the state when the contract is made. Jurisdiction over property depends on its physical presence here, or, if it is personal property, either its presence here or the residence of the owner here. The fiction of the common law, *mobilia sequuntur personam*, has no foundation in the constitution and does not control the legislature, which rejects or adopts it at will as applied to the subject of taxation. When two citizens of Connecticut come into this state and make a contract here, to be enforced here, both they and their contract are subject to its laws, and they are not only entitled to the protection thereof, but are under the same obligation to obey as if they were citizens. Such a contract is valid or invalid as our laws declare. When the law commands that if they, or any other persons, whether residents or not, make a certain contract here they must pay a certain tax for the privilege, the command is personal, addressed to them as persons then within the state, and is as binding on them as if they resided in the state. Their rights and their obligations in reference to such a contract are the same as if they were citizens, no greater and no less. The fact that the contract, ⁴⁵⁰ though made here, may relate to property, real or personal, situated elsewhere, has no bearing upon the question. By coming into the state they subjected themselves to its laws and to its taxing power, so far as the making of such a contract is concerned. It is immaterial whether the contract is between residents or nonresidents, or between a resident and

a nonresident, for if it is made within the state it is subject to taxation by the state. This necessarily follows from the power of the state over the subject of taxation. It has power to tax all property within its territory, all business done and all contracts made within that territory, provided they are not protected as federal agencies, whether the property is owned or the business is done or the contracts are made by residents or nonresidents. "It has never been questioned that the legislature can impose a tax on all sales of property, upon all incomes, upon all acquisitions of property, upon all business and upon all transfers": *Matter of McPherson*, 104 N. Y. 306, 58 Am. Rep. 502, 10 N. E. 685.

We think such specific or excise taxes are laid upon privileges rather than on property: *Orr v. Gilman*, 183 U. S. 278, 22 Sup. Ct. Rep. 213, 46 L. ed. 196; *Clark v. Titusville*, 184 U. S. 329, 22 Sup. Ct. Rep. 382, 46 L. ed. 569; *Thomas v. United States*, 192 U. S. 363; *Foppiano v. Speed*, 199 U. S. 501, 50 L. ed. 289. This was distinctly held in the *Thomas* case, and necessarily so held, for if a tax on certificates is a tax on property it is a direct tax requiring apportionment "among the several states . . . according to their respective numbers": Art. 1, sec. 2, par. 3. But, even assuming that a tax on the sale of property is, in effect, a tax on the property itself, what are certificates of stock, and how may they be treated by the state for the purpose of taxation? They may be treated as property from the function they perform and the use that is made of them. They may well be regarded as a distinct species of property, for they now represent the bulk of property in the state and are the universal medium of transfer. As we said in a recent case: "The main use of certificates is for convenience of transfer, and they are treated by business men as property for all practical purposes. They ⁴⁵¹ are sold in the market, transferred as collateral security to loans, and are used in various ways as property. They pass by delivery from hand to hand, are the subject of larceny and are taxable generally in this state": *Matter of Whiting*, 150 N. Y. 27, 55 Am. St. Rep. 640, 44 N. E. 715, 34 L. R. A. 232. Although issued by a foreign corporation and owned by a nonresident, if they are found within the state they may be seized under a warrant of attachment: *Simpson v. Jersey City Contracting Co.*, 165 N. Y. 193, 58 N. E. 896, 55 L. R. A. 796. Speaking of the nature of a share of stock, Mr. Justice Nelson declared it to be "a distinct, independent interest or

property, held by the stockholder like any other property that may belong to him, and, of course, subject to like taxation": *People v. Commissioners*, 4 Wall. 244, 18 L. ed. 344. And in another case it was said: "Shares of stock may be within a state and the property of the corporation outside of it": *Kidd v. Alabama*, 188 U. S. 730, 23 Sup. Ct. Rep. 401, 47 L. ed. 669.

It does not appear how long the certificates in question had been in the state, or that they were here for some temporary purpose when they were sold by the relator to the complainant. For aught that appears they had been here for years in the possession of the owner, or deposited for safekeeping and had a situs here, so that they were subject to taxation here. They may have been bought here by the relator on the day of sale, and up to that time they may have been owned and in the possession of a resident of the state for year after year. The state found them here, and the presumption, in the absence of evidence to the contrary, is that they were subject to taxation here. If, owing to special circumstances, they were not, it was incumbent upon the relator to prove the fact. The legislature had the right to treat them as property and make them property for the purpose of taxation the same as it treats a bank deposit as money, although in reality it is a debt: *Matter of Houdayer*, 150 N. Y. 37, 55 Am. St. Rep. 642, 44 N. E. 718, 34 L. R. A. 235; *Matter of Romaine*, 127 N. Y. 80, 27 N. E. 759, 12 L. R. A. 401. We think that the tax, whether it is regarded as a tax on the sale of stock certificates or on the certificates themselves, touched neither person nor property without the jurisdiction of the state.

⁴⁵² 5. The final objection urged against the statute is that it violates the commerce clause of the federal constitution because it taxes the transfer of certificates of stock in a foreign corporation when made by a nonresident in this state.

The commerce clause provides that Congress shall have power "to regulate commerce with foreign nations and among the several states and with the Indian tribes": Art. 1, sec. 8, par. 3. The omission of Congress to exercise this power in any case is an expression of its will that the subject shall be left free from restrictions upon it by the states: *Robbins v. Shelby County*, 120 U. S. 489, 7 Sup. Ct. Rep. 592, 30 L. ed. 694. "Commerce" is the commanding word in the simple but weighty sentence quoted from the constitution. What is commerce? According to the derivation, history and use of

the word, it is the exchange of property, and includes the usual agencies of communication and transportation employed to effect the exchange. Thus it extends to whatever is used to move the property involved and the persons engaged in making the contract. Interstate commerce, or commerce among the states, means the exchange of property in one state for property in another state. Its essential characteristic is that the property affected must be transported to some point without the state. There must be interstate movement of property. The telegraph cases do not conflict with this view, for the telegraph practically transports either news or money. The interchange may be between residents of different states or residents of the same state, but the property exchanged must move from one state to another. There can be no interstate commerce without interstate transportation of property, which includes money as well as merchandise and whatever can become the subject of exchange.

Even upon the assumption that certificates of stock are property, the transaction in question involved no movement of property from one state to another, for, so far as appears, neither money nor property was brought into the state or taken out of it. A citizen of Connecticut met another citizen of that state in the city of New York and there bought the certificates of him, which were delivered and paid for on the ⁴⁵³ spot. There is no statement in the record that the certificates were brought here to sell, or that the money used was brought here to purchase them. As we have seen, the certificates may have been here for years, and this is true of the money also, for it belonged to a broker who carried on business at his office in the city of New York. There was an exchange of certificates for money made in this state, without the transportation of either from another state, as we must presume from the record. This was commerce but not interstate commerce, because no property moved from one state to another. It was not commerce among states, within the meaning of the constitution, as we read it. The fact that both actors in the transaction were nonresidents has no bearing on the question, for commerce among the states does not depend on the residence of the parties, but on the interchange of property between different states. The exchange in question was made here, the property exchanged was situated here, and, so far as we are advised, nothing was brought into or taken out of the state in order to make the exchange, or as the

result of the exchange as made. The fact that the certificates were issued by foreign corporations, operating railroads in other states, did not involve the movement of property from one state to another, any more than if A grants to B lands in Kansas by a deed given in this state. The stockholder's interest in the foreign corporation could not be brought into the state of New York and the certificates, which represent that interest, are presumed to have had a taxable situs here.

The discussion of this point has proceeded thus far on the theory that the tax is in substance a tax on property, but, as we have held, it is in fact a tax only on the privilege of transfer. But it is insisted that a tax on the privilege of transferring certificates issued by foreign corporations, when the transfer, though made here, is between nonresidents, tends to prevent freedom of commercial intercourse, and hence is a restraint upon interstate commerce. The direct effect of a tax on the privilege of making a contract in this state, to be performed ⁴⁵⁴ in this state, does not infringe upon interstate commerce because it does not involve the movement of property between states. Should the indirect effect be regarded as a restraint upon interstate commerce? If so, where is the application of the principle to stop, for if pushed to its logical conclusion the states will be prevented from managing their own affairs. The commerce clause was not intended to hamper state legislation, even if the indirect result should remotely affect commerce "among the several states." It was not designed to hinder the preservation of order or the procurement of means to that end by the taxation of transfers made within the state, even if they are from one nonresident to another, and indirectly touch property without the state. It is the regulation of commerce that is impliedly forbidden, and the regulation of commerce does not include everything distantly connected therewith. Remote and indirect results do not interfere with interstate commerce. A homely illustration will show my meaning. Two boys trade knives; that is commerce in its simplest form. If they live on opposite sides of a state line and the bargain is made on one side but delivery on the other, it is interstate commerce. If one of them is flogged for it, that is not interference with interstate commerce, even if it discourages interstate traffic. This example is not used to belittle an important subject, but to illustrate the fact that the indirect effect of state action is not prohibited, unless it discriminates against persons or property

from other states, or necessarily has the effect of touching interstate commerce in some substantial way. A tax on the transportation of persons or property between states, or on the business of carrying it on, is direct in its effect, and is a tax on commerce, but in a recent case, which held that a cab service maintained by a railroad for the use of interstate passengers is not interstate commerce, it was said: "Many things have more or less close relation to interstate commerce which are not properly to be regarded as a part of it. If the cab which carries the passengers from the hotel to the ferry landing is engaged in interstate transportation, ⁴⁵⁵ why is not the porter who carries the traveler's trunks from his room to the carriage also so engaged? If the cab service is interstate transportation, are the drivers of the cabs and the dealers who supply hay and grain for the horses also engaged in interstate commerce? And where will the limit be placed?" *New York v. Knight*, 192 U. S. 21, 24 Sup. Ct. Rep. 202, 48 L. ed. 325, affirming *People v. Knight*, 171 N. Y. 354, 98 Am. St. Rep. 610, 64 N. E. 152.

While interstate commerce, as such, cannot be taxed at all, the property employed therein may be taxed, even if it is used to facilitate interstate traffic, such as the rolling stock of a foreign railroad corporation running cars into one state from another: *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. Rep. 876, 35 L. ed. 613. In deciding this case the court said: "There is nothing in the constitution or laws of the United States which prevents a state from taxing personal property, employed in interstate or foreign commerce, like other personal property within its jurisdiction: Citing *Delaware R. R. Tax*, 18 Wall. 206, 21 L. ed. 288; *Telegraph Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. Rep. 826, 29 L. ed. 158; *Western Union Tel. Co. v. Attorney General of Massachusetts*, 125 U. S. 530, 8 Sup. Ct. Rep. 961, 31 L. ed. 790; *Marye v. Baltimore etc. R. R. Co.*, 127 U. S. 117, 8 Sup. Ct. Rep. 1037, 32 L. ed. 94; *Leloup v. Mobile*, 127 U. S. 640, 8 Sup. Ct. Rep. 1380, 32 L. ed. 311." A railroad company engaged in interstate commerce and operating a railroad lying partly within and partly without a state "is liable to pay an excise tax according to the value of the business done in the state": *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217, 12 Sup. Ct. Rep. 121, 35 L. ed. 994.

A state cannot regulate interstate commerce, for Congress only has that power, but as it can tax property employed therein the same as all other property, it can tax the privilege of transferring such property, provided it treats nonresidents the same as residents and subjects all transfers in the same class to the same tax. If there is no discrimination in favor of domestic commerce, there is no attack on interstate commerce, for the indirect effect of such a tax is no greater than one laid on property used therein. Taxation of a telegraph company, doing an interstate business, upon its property ⁴⁵⁶ within the state is valid, but a statute authorizing an injunction to restrain the company from transacting business until an overdue tax is paid, is invalid, because it interferes with an act of Congress relating to post roads. The tax did not interfere, as the result was indirect, but the injunction did, because it was direct in its effect: *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. Rep. 961, 31 L. ed. 790.

A tax on the right to engage in interstate commerce, as by a commercial traveler, was held void as an attempt to regulate a subject under federal control, but that is quite different in principle from a tax on all transfers of a certain kind of property, which, like all other property, may at times enter into interstate transactions, but is not peculiar thereto: *Robbins v. Shelby County*, 120 U. S. 489, 7 Sup. Ct. Rep. 592, 30 L. ed. 694. The tax before us is not on the transfer of stock in foreign corporations, but on the transfer of stock in all corporations. "A uniform tax imposed by a state on all sales made in it, whether they be made by a citizen of it or a citizen of some other state, and whether the goods sold are the produce of the state enacting the law or of some other state, is valid," because "there is no attempt to discriminate injuriously against the products of other states or the rights of their citizens, and the case is not, therefore, an attempt to fetter commerce among the states, or to deprive the citizens of other states of any privilege or immunity possessed by the citizens of" the state in question: *Woodruff v. Parham*, 8 Wall. 123, 19 L. ed. 382; *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. Rep. 1091, 35 L. ed. 594; *Emert v. Missouri*, 156 U. S. 296, 15 Sup. Ct. Rep. 367, 39 L. ed. 430; *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 24 Sup. Ct. Rep. 365, 48 L. ed. 538.

So a tax on all meat-packing houses in a state, or on the agents thereof, is valid, although some do an interstate as well as a domestic business: *Armour Packing Co. v. Lacey*, 200 U. S. 226, 50 L. ed. 451; *Kehrer v. Stewart*, 197 U. S. 60, 25 Sup. Ct. Rep. 403, 49 L. ed. 663. A tax on the gross commissions of brokers derived, wholly in one instance and partly in another, from sales made in behalf of many nonresident principals who shipped goods from without the state for sale, was held to affect interstate commerce only so "incidentally and remotely as not to amount to a regulation"⁴⁵⁷ thereof: *Ficklen v. Shelby County*, 145 U. S. 1, 12 Sup. Ct. Rep. 810, 36 L. ed. 601. Where the business of the brokers was not general, with the right to engage in all kinds, but was in terms limited to specific, nonresident principals, the effect was held to be direct and the tax void: *Stockard v. Morgan*, 185 U. S. 27, 22 Sup. Ct. Rep. 576, 46 L. ed. 785. The cases distinguish, carefully and critically, between direct and remote results and with reason, for the constitution is not sensitive to clouds on the horizon, but to clouds overhead. In the nature of things every slight and incidental consequence of state action does not constitute state regulation, for this would lead to sad confusion and leave the subject in perpetual doubt. Attention should be paid to the interests of the state as well as those of the nation, and a construction just to both should be adopted. The legislative power of the state should not be shackled, and the commerce clause of the constitution should not be frittered away by extreme views in either direction. Immaterial, indirect and remote effects should be ignored and substantial results alone considered. As Mr. Justice Peckham recently said: "The effect upon the commerce spoken of must be direct and proximate: *New York etc. R. R. Co. v. Pennsylvania*, 158 U. S. 431, 15 Sup. Ct. Rep. 896, 39 L. ed. 1043. An agreement may in a variety of ways affect interstate commerce, just as state legislation may, and yet, like it, be entirely valid, because the interference produced by the agreement or by the legislation is not direct": *Hopkins v. United States*, 171 U. S. 578, 19 L. ed. 40, 43 L. ed. 290; citing *Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819; *United States v. E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. Rep. 249, 39 L. ed. 325; *Pittsburg etc. Coal Co. v. Louisiana*, 156 U. S. 590, 15 Sup. Ct. Rep. 459, 39 L. ed. 544; *Transportation Co. v. Parkersburg*, 107 U. S. 691, 2 Sup. Ct. Rep. 732, 27 L. ed.

584; *Ficklen v. Shelby County*, 145 U. S. 1, 12 Sup. Ct. Rep. 810, 35 L. ed. 601.

The principles governing interstate commerce are in process of development, and, as is usually true in evolving the law out of many complicated cases, the treatment by the courts has not always been uniform or consistent. We think, however, that the weight of authority regards state legislation, which treats all persons, all property and all transfers of the same class in the same way under the same circumstances, ⁴⁵⁸ and which does not directly or materially touch interstate commerce, as not amounting to state regulation. While restraint by the state is regulation by the state, it must be direct or substantial to have that effect, and the statute under consideration falls under neither head. The question is not whether the statute is wise, but whether it is valid, and we think it is valid.

The order appealed from should be affirmed.

Cullen, C. J., O'Brien, Haight, Werner, Willard Bartlett, and Hiscock, JJ., concur.

Order affirmed.

From the Judgment of the Court of Appeals of New York a writ of error was prosecuted to the supreme court of the United States resulting in a judgment of affirmance by that court, accompanied by an opinion as follows:

"This is a writ of error to revise an order dismissing a writ of habeas corpus and remanding the relator to the custody of the defendant in error. The order was made by a single justice and affirmed successively by the appellate division of the supreme court (110 App. Div. 821, 97 N. Y. Supp. 535), and by the court of appeals (184 N. Y. 431, ante, p. 628, 77 N. E. 970). The facts are these: The relator, Hatch, a resident of Connecticut, sold in New York to one Maury also a resident of Connecticut, but doing business in New York, one hundred shares of the stock of the Southern Railway Company, a Virginia corporation, and one hundred shares of the stock of the Chicago, Milwaukee, and St. Paul Railroad Company, a Wisconsin corporation, and on the same day and in the same place received payment and delivered the certificates, assigned in blank. He made no memorandum of the sale and affixed to no document any stamp, and did not otherwise pay the tax on transfers of stock imposed by the New York Laws of 1905, chapter 241. He was arrested on complaint, and thereupon petitioned for this writ, alleging that the law was void under the fourteenth amendment of the constitution of the United States.

"The statute in question levies a tax of two cents on each hundred dollars of face value of stock, for every sale or agreement to sell the same, etc., to be paid by affixing and canceling stamps for the requisite amount to the books of the company, the stock certificate, or a memorandum required in certain cases. Failure to pay the tax is made a misdemeanor punishable by fine, imprisonment, or both. There is also a civil penalty attached. The petition for the writ sets up only the fourteenth amendment, as we have mentioned, but both sides have argued the case under the commerce clause of the constitution (article 1, section 8) as well, and we shall say a few words on that aspect of the question.

"It is true that a very similar stamp act of the United States, the act of June 13, 1898, chapter 448, section 25, Schedule A, 30 Statutes at Large, 448, 458, United States Compiled Statutes, 1901, page 2300, was upheld in *Thomas v. United States*, 192 U. S. 363, 24 Sup. Ct. Rep. 305, 48 L. ed. 481. But it is argued that different considerations apply to the states, and the tax is said to be bad under the fourteenth amendment for several reasons. In the first place it is said to be an arbitrary discrimination. This objection to a tax must be approached with the greatest caution. The general expressions of the amendment must not be allowed to upset familiar and long-established methods and processes by a formal elaboration of rules which its words do not import: See *Michigan C. R. Co. v. Powers*, 201 U. S. 245, 26 Sup. Ct. Rep. 459, 50 L. ed. 744. Stamp acts necessarily are confined to certain classes of transactions, and to classes which, considered economically or from the legal or other possible points of view, are not very different from other classes that escape. You cannot have a stamp act without something that can be stamped conveniently. And it is easy to contend that justice and equality cannot be measured by the convenience of the taxing power. Yet the economists do not condemn stamp acts, and neither does the constitution.

"The objection did not take this very broad form, to be sure. But it was said that there was no basis for the separation of sales of stock from sales of other kinds of personal property; for instance, especially, bonds of the same or other companies. But bonds in most cases pass by delivery, and a stamp tax hardly could be enforced: See, further, *Nicol v. Ames*, 173 U. S. 509, 19 Sup. Ct. Rep. 522, 43 L. ed. 786. In *Otis v. Parker*, 187 U. S. 606, 23 Sup. Ct. Rep. 168, 47 L. ed. 323, practical grounds were recognized as sufficient to warrant a prohibition, which did not apply to sales of other property, of sales of stock on margin, although this same argument was pressed with great force. A fortiori do they warrant a tax on sales which is not intended to discriminate against or to discourage them, but simply to collect a revenue for the benefit of the whole community in a convenient way.

"It is urged further that a tax on sales is really a tax on property, and that therefore the act, as applied to the shares of a foreign corporation owned by nonresidents, is a taking of property without

due process of law: *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 Sup. Ct. Rep. 36, 50 L. ed. 150. This argument presses the expressions in *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678, 687, *Fairbank v. United States*, 181 U. S. 283, 21 Sup. Ct. Rep. 648, 45 L. ed. 862, and intervening cases, to new applications, and further than they properly can be made to go. Whether we are to distinguish or to identify taxes on sales and taxes on goods depends on the scope of the constitutional provision concerned: Compare *Foppiano v. Speed*, 199 U. S. 501, 26 Sup. Ct. Rep. 138, 50 L. ed. 288. A tax on foreign bills of lading may be held equivalent to a tax on exports as against article 1, section 9; a license tax on importers of foreign goods may be held an unauthorized interference with commerce; and yet it would be consistent to sustain a tax on sales within the state as against the fourteenth amendment, so far as that alone is concerned. Whatever the right of parties engaged in commerce among the states, a sale depends in part on the law of the state where it takes place for its validity and, in the courts of that state, at least, for the mode of proof. No one would contest the power to enact a statute of frauds for such transactions. Therefore, the state may make parties pay for the help of its laws, as against this objection. A statute requiring a memorandum in writing is quite as clearly a regulation of the business as a tax. It is unnecessary to consider other answers to this point.

“Yet another ground on which the owners of stock are said to be deprived of their property without due process of law is the adoption of the face value of the shares as the basis of the tax. One of the stocks was worth thirty dollars and seventy-five cents a share of the face value of one hundred dollars, the other one hundred and seventy-two dollars. The inequality of the tax, so far as actual values are concerned, is manifest. But here again equality in this sense has to yield to practical considerations and usage. There must be a fixed and indisputable mode of ascertaining a stamp tax. In another sense, moreover, there is equality. When the taxes on two sales are equal, the same number of shares is sold in each case; that is to say, the same privilege is used to the same extent. Valuation is not the only thing to be considered. As was pointed out by the court of appeals, the familiar stamp tax of two cents on checks, irrespective of amount, the poll tax of a fixed sum, irrespective of income or earning capacity, and many others, illustrate the necessity and practice of sometimes substituting count for weight: See *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 10 Sup. Ct. Rep. 533, 33 L. ed. 892; *Merchants' etc. Nat. Bank v. Pennsylvania*, 167 U. S. 461, 17 Sup. Ct. Rep. 829, 42 L. ed. 236. Without going further into a discussion which, perhaps, could have been spared in view of the decision in *Thomas v. United States*, 192 U. S. 363, 24 Sup. Ct. Rep. 305, 48 L. ed. 481, and the constitutional restrictions upon Congress, we are of opinion that the New York statute is valid, so far as the fourteenth amendment is concerned.

“The other ground of attack is that the act is an interference with commerce among the several states. Cases were imagined which, it was said, would fall within the statute, and yet would be cases of such commerce; and it was argued that if the act embraced any such cases it was void as to them, and, if void as to them, void altogether, on a principle often stated: *United States v. Ju Toy*, 198 U. S. 253, 49 L. ed. 1040, 25 Sup. Ct. Rep. 644. That the act is void as to transactions in commerce between the states, if it applies to them, is thought to be shown by the decisions concerning ordinances requiring a license fee from drummers, so called, and the like: *Robbins v. Taxing District*, 120 U. S. 489, 7 Sup. Ct. Rep. 592, 30 L. ed. 694; *Stockard v. Morgan*, 185 U. S. 27, 22 Sup. Ct. Rep. 576, 46 L. ed. 785; *Rearick v. Pennsylvania*, 203 U. S. 000, 27 Sup. Ct. Rep. 159, 51 L. ed. 000.

“But there is a point beyond which this court does not consider arguments of this sort for the purpose of invalidating the tax laws of a state on constitutional grounds. This limit has been fixed in many cases. It is that unless the party setting up the unconstitutionality of the state law belongs to the class for whose sake the constitutional protection is given, or the class primarily protected, this court does not listen to his objections, and will not go into imaginary cases, notwithstanding the seeming logic of the position that it must do so, because if, for any reason, or as against any class embraced, the law is unconstitutional, it is void as to all: *Albany County v. Stanley*, 105 U. S. 305, 26 L. ed. 1044; *Clark v. Kansas City*, 176 U. S. 114, 20 Sup. Ct. Rep. 284, 44 L. ed. 392; *Lampasas v. Bell*, 180 U. S. 276, 21 Sup. Ct. Rep. 368, 45 L. ed. 527; *Cronin v. Adams*, 192 U. S. 108, 24 Sup. Ct. Rep. 219, 48 L. ed. 365. If the law is valid when confined to the class of the party before the court, it may be more or less of a speculation to inquire what exceptions the state court may read into general words, or how far it may sustain an act that partially fails. With regard to taxes, especially, perhaps it might be assumed that the legislature meant them to be valid to whatever extent they could be sustained, or some other peculiar principle might be applied: See, e. g., *People's Nat. Bank v. Marye*, 191 U. S. 272, 24 Sup. Ct. Rep. 68, 48 L. ed. 180.

“Whatever the reason, the decisions are clear, and it was because of them that it was inquired so carefully in the drummer cases whether the party concerned was himself engaged in commerce between the states: *Stockard v. Morgan*, 185 U. S. 27, 22 Sup. Ct. Rep. 576, 46 L. ed. 785; *Caldwell v. North Carolina*, 187 U. S. 622, 23 Sup. Ct. Rep. 229, 47 L. ed. 336; *Rearick v. Pennsylvania*, 203 U. S. 000, 27 Sup. Ct. Rep. 159, 51 L. ed. 000. Therefore, we begin with the same inquiry in this case, and it is plain that we can get no further. There is not a shadow of a ground for calling the transaction described such commerce. The communications between the parties were not between different states, as in *Western Union Tel. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067, and the bargain

did not contemplate or induce the transport of property from one state to another, as in the drummer cases: *Rearick v. Pennsylvania*, 203 U. S. 000, 27 Sup. Ct. Rep. 000, 51 L. ed. 000. The bargain was not affected in any way, legally or practically, by the fact that the parties happened to have come from another state before they made it. It does not appear that the petitioner came into New York to sell his stock, as it was put on his behalf. It appears only that he sold after coming into the state. But we are far from implying that it would have made any difference if he had come to New York with the supposed intent before any bargain was made.

"It is said that the property sold was not within the state. The immediate object of sale was the certificate of stock present in New York. That document was more than evidence, it was a constituent of title. No doubt, in a more remote sense, the object was the membership or share which the certificate conferred or made attainable. More remotely still it was an interest in the property of the corporation, which might be in other states than either the corporation or the certificate of stock. But we perceive no relevancy in the analysis. The facts that the property sold is outside of the state, and the seller and buyer foreigners, are not enough to make a sale commerce with foreign nations or among the several states, and that is all that there is here. On the general question there should be compared with the drummer cases the decisions on the other side of the line: *Nathan v. Louisiana*, 8 How. 73, 12 L. ed. 993; *Woodruff v. Parham*, 8 Wall. 123, 19 L. ed. 382; *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. Rep. 1091, 29 L. ed. 257; *Emert v. Missouri*, 156 U. S. 296, 15 Sup. Ct. Rep. 367, 39 L. ed. 430. A tax is not an unconstitutional regulation in every case where an absolute prohibition of sales would be one: *American Steel etc. Co. v. Speed*, 192 U. S. 500, 24 Sup. Ct. Rep. 365, 48 L. ed. 538. We think it unnecessary to explain at greater length the reasons for our opinion that the petitioner has suffered no unconstitutional wrong.

"Order affirmed."

A State has the Power to Tax the corporate stock of a domestic corporation owned by aliens at a higher rate than that owned by resident owners: *State v. Travelers' Ins. Co.*, 70 Conn. 590, 66 Am. St. Rep. 138. And, generally speaking, the classification of property within a state for the purpose of taxation is a matter to be determined by the state acting by its legislative department, subject to the limitations imposed thereon by the state constitution. The courts will not undertake to revise its judgment, or to denounce or annul a system of taxation, or any part thereof, on the ground that the classification therein is arbitrary or not founded upon just reason: See the monographic note to *St. Louis etc. Ry. Co. v. Paul*, 62 Am. St. Rep. 175.

CASES
IN THE
SUPREME COURT
OF
NORTH DAKOTA.

MANNING v. CITY OF DEVILS LAKE.

[13 N. Dak. 47, 99 N. W. 51.]

MUNICIPAL CORPORATIONS—Taxation.—The Validity of a Contract of a municipal corporation which can be fulfilled only by a resort to taxation depends upon the power to levy and collect a tax for that purpose. (p. 655.)

MUNICIPAL CORPORATIONS—Construction of Bridge.—A City cannot Impose a Tax to raise funds for the construction of a bridge which is not located on a legal street or highway. (p. 655.)

MUNICIPAL CORPORATIONS—Taxation.—The Incidental and Indirect Benefits which accrue to the inhabitants of a city from the promotion of its commercial interests will not sustain the power of taxation. (pp. 658, 661.)

MUNICIPAL CORPORATIONS—Taxation for Bridge Outside of City.—The construction and maintenance of a bridge outside the limits of a city to provide the people of an outlying district a convenient mode of reaching town and thereby increase the trade of the business men of the city, rather than to provide for the convenience of the inhabitants of the city itself, will not justify the exercise of the power of taxation. (p. 660.)

B. D. Townsend, for the appellants.

John C. Anderson, for the respondent.

48 YOUNG, C. J. The defendants appeal from an order of the district court of Ramsey county continuing a temporary injunction, made upon an order to show cause. The action in aid of which the restraining order was issued is brought for the purpose of permanently enjoining the defendants from issuing and negotiating certain bonds which it proposes to issue for the purpose of constructing and maintaining a certain road or bridge across an arm of Devils Lake. The plain-

tiff alleges in her complaint that she is a resident, property owner and taxpayer in the city of Devils Lake; that said city is a municipal corporation organized under the laws of this state; that at a city election called for that purpose, a majority of the electors voted to issue bonds of said city, in the sum of six thousand five hundred dollars, for the purpose of paying the cost of construction and maintenance of a certain bridge, known as the "Pelican Point Bridge," ⁴⁹ and for paying outstanding warrants of the city of Devils Lake, issued in aid of such purpose; that the defendant Ole Skratass, the auditor of said city, has advertised for bids for said bonds; that said Pelican Point Bridge is located several miles outside of the corporate limits of said city; that the acts of the defendant and its officers in attempting to issue and dispose of said bonds for the purpose aforesaid are ultra vires and wholly void. The complaint further alleges that the officers of said city have issued a large number of city warrants, to wit, in the sum of at least six thousand dollars, to aid in the construction of said bridge, and that the same are unpaid, and are about to issue other warrants and expend the moneys of the corporation for said purpose, and prays that defendants be restrained and enjoined from disposing of and issuing said bonds, and from diverting any funds of the corporation to said purpose, and from paying the outstanding warrants. Upon the foregoing complaint and upon plaintiff's affidavit a temporary restraining order was issued, together with an order to show cause why defendants should not be restrained from negotiating said bonds and paying said warrants during the pendency of the action. At the hearing of the order to show cause the defendants filed a number of affidavits setting forth the importance of the object of the proposed expenditure to the business interests of the city of Devils Lake. The court made an order that the temporary restraining order theretofore issued be continued until the final determination of the action. From this order the defendants appeal.

We are of opinion that the trial court did not err in refusing to vacate the restraining order. The question involved is one entirely of corporate power. The facts are not in dispute. From the statement of facts prefixed to appellant's brief, it appears that the so-called Pelican Point Bridge is situated in Lake township, between four and five miles southwest of, and outside of the corporate limits of, the city of Devils Lake, and consists of an embankment of earth and stone, connecting

the north and south shores of Devils Lake at its narrowest point. In the center, where the water is deepest, there is a pontoon bridge or barge, about one hundred feet in length, connecting the embankments. The affidavits show that the construction of the so-called bridge was commenced in the spring of 1900 by the business men of the city of Devils Lake, acting through a citizens' committee, and that a large sum of ⁵⁰ money was raised by private subscription and expended upon its construction. The land on the north side of the lake belongs to the state military reservation, and by chapter 134, page 173, of the Laws of 1901, the legislature granted the right to locate a highway thereon, and a highway was located by the township of Lake, in which said military reservation is situated, connecting the embankments with the public highways leading to the city of Devils Lake. The land on the south side is included in the Ft. Totten Indian reservation. The affidavits state that the city of Devils Lake acquired a right of way over the tract of land abutting on the south side from the allottee Indian owning the same, with the consent of the United States government. The road, as constructed by the citizens' committee, aside from the pontoon bridge in the center, extended about three feet above the surface of the water. Since 1901 the waters of Devils Lake have risen about thirty-eight inches, necessitating the raising of the embankments. Some twelve thousand dollars have been expended. The expenditures now proposed are necessary to put the road in permanent and safe condition. The affidavits filed by the defendants show that there is a large territory south of the city of Devils Lake, and a large number of people tributary, who will do their trading at that city if the bridge is constructed and maintained; that "the amount of increased trade and business brought to the city of Devils Lake during the time said highway was passable in the summer of 1901 . . . aggregated an average of approximately two hundred and fifty dollars a day; that said increased business was general in character, and a direct benefit to all engaged in business in said city of Devils Lake at said time." The affidavits also show that there are more than one thousand allottee Indians residing on the Ft. Totten Indian reservation, on the south side of the lake, who are largely engaged in agricultural pursuits, and who will do their trading at the city of Devils Lake, providing the highway in question is maintained; that there are a large number of persons in "the

Cheyenne River country" who are "naturally tributary to the city of Devils Lake," and who would "market their wood and purchase their supplies at Devils Lake if the bridge were maintained"; that there are a large number of instructors in the industrial school on the Indian reservation; that said school consumes a vast amount of all kinds of merchandise and supplies, a large portion of which would be purchased at said city if said highway is opened for travel; that there is ⁵¹ approximately one hundred thousand acres of unoccupied and unallotted land on the Indian reservation, which it is proposed to open to settlers, and that this, when occupied and cultivated, will increase the commercial importance of the city of Devils Lake if said highway is maintained; that the completion and maintenance of said highway communicating with the land south of Devils Lake "will greatly increase the amount of marketing and trading done at said city of Devils Lake, and otherwise greatly improve and extend its commercial relations." It is also stated that "the construction, completion and maintenance of said highway known as 'Pelican Point Bridge' is a commercial necessity to said city, and that it will greatly extend the commercial importance and trade relations of the said city; that it will greatly increase the amount of grain marketed in said city, and very materially increase and extend the territory tributary to the said city of Devils Lake, and will be a direct benefit, to a very appreciable extent, to every merchant, property owner, taxpayer and resident of said city."

There are two sufficient reasons why the proposed expenditure is illegal. It must be conceded that the validity of the bonds and warrants in question cannot be sustained unless the city has power to provide for their payment by taxation. It has been properly said that "the issue of bonds by a city, whatever provision may be made for their redemption, involves the possible, and not improbable, consequence of the necessity to provide for their payment by the city. The right to incur the obligation implies the right to raise money by taxation for payment of the bonds, or, what is equivalent, the right to levy a tax for the purposes for which the fund is to be raised by means of the bonds so authorized": *Lowell v. City of Boston*, 111 Mass. 454, 15 Am. Rep. 39. The validity of a contract of a municipal corporation which can only be fulfilled by resort to taxation depends on the power to levy a tax for that purpose: *Savings & Loan Assn. v. Topeka*, 20

Wall. 655, 22 L. ed. 455; *Sharpless v. Mayor*, 21 Pa. St. 147, 59 Am. Dec. 759; *Hanson v. Vernon*, 27 Iowa, 28, 1 Am. Rep. 215; *Allen v. Inhabitants of Jay*, 60 Me. 124, 11 Am. Rep. 185; *Whiting v. Sheboygan etc. R. Co.*, 25 Wis. 167, 3 Am. Rep. 30. It is proposed to expend funds derived from a sale of these bonds upon a road or bridge which is not a legal highway. Such an expenditure will not authorize the imposition of a tax. "It has been decided that an assessment for making and opening a road, where no road has in fact ⁵² been laid out, and where consequently the land is the subject of private ownership, and no highway would exist when the money was expended, would be illegal and void": 1 *Cooley on Taxation*, 3d ed., 216; *Philbrook v. Inhabitants of Kennebec County*, 17 Me. 196; *People v. Saginaw Supervisors*, 26 Mich. 22; *Pacific Bridge Co. v. Kirkham*, 54 Cal. 558; *Snyder v. Foster*, 77 Iowa, 638, 42 N. W. 506. See, also, *Coates v. Campbell*, 37 Minn. 498, 35 N. W. 366. Bridges constitute a part of the public highway: *Rev. Codes*, sec. 1091. Section 1053 of the *Revised Codes*, which is a part of chapter 17 of the *Political Code of 1899*, commits the power to open highways outside of the limits of incorporated cities, villages or towns, "all proceedings relative thereto," and "all matters connected therewith," to the board of county commissioners or board of township supervisors. Section 1114 of the *Revised Codes of 1899* charges township supervisors with the care and supervision of roads and bridges within their respective townships. It is not claimed that the county commissioners of Ramsey county, or the supervisors of Lake township, in which the "bridge" is situated, have taken any action whatever either to locate it or recognize it as a highway. It has not acquired a legal character as a public highway by use, under section 1050 of the *Revised Codes of 1899*, and there is no pretense that it was laid out and established as a highway under chapter 17 of the *Political Code of 1899*. On the contrary, it was constructed, as we have seen, by private individuals and by private subscription. The duty of maintaining and keeping in repair a public highway, regularly established (that is, a legal highway) may be enforced, and the public interests thereby protected: See 2 *Cooley on Taxation*, 3d ed., 1293, and cases cited. The construction of this road imposed no such obligation upon the individuals who constructed it, or upon the county or township in which it is situated. In short, there exists no duty to maintain and keep it in repair which the

public can enforce: *Travis v. Skinner*, 72 Mich. 152, 40 N. W. 234; *Anthony v. Inhabitants of Adams*, 42 Mass. 284; *City of Goshen v. Myers*, 119 Ind. 196, 21 N. E. 657; *Board of Commrs. v. Washington Township*, 121 Ind. 379, 23 N. E. 257; *Houfe v. Town of Fulton*, 34 Wis. 608, 17 Am. Rep. 463; *State v. Wood County Supervisors*, 41 Wis. 28. If, therefore, no other objection existed than that just considered, it alone would be sufficient to render the proposed expenditure illegal.

But aside from the fact that it is proposed to expend funds derived by local taxation upon a bridge which is not located upon a ⁵³ legal highway, the proposed expenditure is illegal for another reason. It is not for a corporate use or purpose, but is, on the contrary, for private benefit. The doctrine of the cases on this point is stated in 2 Dillon on Municipal Corporations, fourth edition, section 736 (587), as follows: "The taxing power of the state consists in its authority to levy and collect taxes and assessments, which are in the nature of special taxes. Taxes (including in the term assessments) are burdens or charges imposed by the legislature, or under its authority, upon persons and property, to raise money for public, as distinguished from private, purposes, or to accomplish some end or object public in its nature. There can be no legitimate taxation to raise money, unless it be destined for the uses and benefit of the government, or some of its municipalities or divisions invested with the power of auxiliary or local administration. A public use or purpose is of the essence of the tax." Again, it is said in 2 Beach on Public Corporations, section 1440, that "municipal taxation must be for local purposes only, and for a public use, and the rule of strict construction should always be applied." The development of the commerce or trade of a city is not a corporate purpose. Instances are numerous where cities have attempted to promote their commercial importance by aiding manufacturing and industrial enterprises through the aid of local taxation, and in every instance the attempted exercise of power, when called in question, has been condemned as unlawful. To bring any particular object within the description of a corporate purpose, "it must appear to be money necessary to the execution of some corporate power, the enjoyment of some corporate right, or the performance of some corporate duty, as established by law or by long usage": *Spaulding v. City of Lowell*, 40 Mass. 71. "Municipal corporations possess only

a limited right to bind themselves and the inhabitants and property within their respective limits by civil contracts. Their contracts will be valid when made in relation to objects concerning which they have a duty to perform, an interest to protect, and a right to defend; but here is the extent at once of their right and their power. They cannot engage in enterprises foreign to the purpose for which they were incorporated, nor assume responsibilities which involve undertakings not within the compass of their corporate powers": *Vincent v. Inhabitants of Nantucket*, 66 Mass. 103. Neither will they be bound by the express vote of the majority to the performance of contracts or other legal duties not coming within the scope of the ⁵⁴ objects and purposes for which they are incorporated: *Anthony v. Inhabitants of Adams*, 1 Met. (Mass.) 284. In *Ottawa v. Cary*, 108 U. S. 110, 2 Sup. Ct. Rep. 361, 27 L. ed. 669, it was said that the power to govern a city does not imply power to expend the public money to make the water in the rivers available for manufacturing purposes. "The charter confers all the powers usually granted to a city for the purpose of local government, but that has never been supposed, of itself, to authorize taxes for everything which, in the opinion of the city authorities, would promote the general prosperity and welfare of the municipality. Undoubtedly, development of the water power of the streams that traverse the city would add to the commerce and growth of the citizens. But certainly power to govern the city does not imply power to expend the public money to make the water in the rivers available for manufacturing purposes." In 1 *Cooley on Taxation*, third edition, 206, it is said that: "However important it may be to the community that individual citizens should prosper in their industrial enterprises, it is not the business of government to aid them with its means. Enlightened states, while giving all necessary protection to their citizens, will leave every man to depend for his success and prosperity in business on his own exertions, in the belief that by doing so his own industry will be more certainly enlisted, and his prosperity and happiness more probably secured. It may therefore be safely asserted that taxation for the purpose of raising money from the public, to be given or even loaned to private persons, in order that they may use it in their individual business enterprises, is not recognized as an employment of the power for a public use. In contemplation of law, it would be taking the com-

mon property of the whole community and handing it over to private parties for their private gain, and consequently unlawful. Any incidental benefits to the public that might flow from it could not support it as legitimate taxation": See, also, cases cited at note 1.

It may be safely stated that no case can be found sustaining an expenditure by a city, as for a corporate use and purpose, when the principal object of the expenditure is to promote the trade and business interests of the city, and the benefit to the inhabitants is merely indirect and incidental. The cases condemning such efforts are almost numberless. In 1872 the business and manufacturing district of Boston was destroyed by fire. The legislature ⁵⁵ of Massachusetts, called in special session for that purpose, passed an act authorizing the city of Boston to issue bonds to the amount of twenty million dollars to render aid in the way of loans in rebuilding the burned district. In a well-reasoned opinion, the soundness of which has never been questioned, but always approved, the supreme court of that state held that the proposed expenditure was not for a public use or purpose, and would not sustain the power of taxation, and that the act was unconstitutional and void. We quote at length from the very lucid opinion in that case: "The power to levy taxes is founded on the right, duty and responsibility to maintain and administer all the governmental functions of the state, and to provide for the public welfare. To justify any exercise of the power requires that the expenditure which it is intended to meet shall be for some public service, or some object which concerns the public welfare. The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private, and not a public, object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental. The incidental advantage to the public or to the state which results from the promotion of private interests and the prosperity of private enterprises or business does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary. It is the essential character of the direct object of the expenditure which must determine its validity, as justifying a tax, and not the magnitude of the interests to be affected, nor the degree to which the general advantage of the com-

munity, and thus the public welfare, may be ultimately benefited by their promotion. . . . The power of the government, thus constituted, to affect the individual in his private rights of property, whether by exacting contributions to the general means, or by sequestration of specific property, is confined, by obvious implication as well as by express terms, to purposes and objects alone which the government was established to promote, to wit, public uses and the public service. This power, when exercised in one form, is taxation; in the other, is designated as the right of eminent domain. The two are diverse in respect of the occasion and mode of exercise, but identical in their source, to wit, the necessities of ⁵⁶ organized society, and in the end by which alone the exercise of either can be justified, to wit, some public service or use. It is due to their identity in these respects that the two powers, otherwise so unlike, are associated together in the same article. So far as it concerns the question what constitutes public use or service that will justify the exercise of these sovereign powers over private rights of property, which is the main question now to be solved, this identity renders it unnecessary to distinguish between the two forms of exercise, as the same tests must apply to and control in each. An appropriation of money raised by taxation, or of property taken by right of eminent domain, by way of gift to an individual for his own private uses exclusively, would clearly be an excess of legislative power. The individual, by reason of his capacity, enterprise or situation, might be enabled to employ the money or property thus conferred upon him in such a manner as to furnish employment to great numbers of the community, to give a needed impulse to business of various kinds, and thus promote the general prosperity and welfare. In this view, it might be shown to be for the public good to take from the unenterprising and thriftless their unemployed capital, and intrust it to others who will use it to better advantage for the interests of the community. But it needs no argument to show that such an arbitrary exercise of power would be a violation of the constitutional rights of those from whom the money or property was taken, and an unjustifiable usurpation": See, also, *Whiting v. Sheboygan etc. R. Co.*, 25 Wis. 167, 3 Am. Rep. 30; 1 *Dillon on Municipal Corporations*, 4th ed., sec. 159, and cases cited; also *State v. Township of Osawkee*, 14 Kan. 419, 19 Am. Rep. 99; *Central Branch U. P. R. Co. v. Smith*, 23 Kan. 745; *Clark v. City of Des Moines*,

19 Iowa, 199, 87 Am. Dec. 423; and particularly *Town of Jacksonport v. Watson*, 33 Ark. 704.

The facts of this case bring it within the principle of the cases to which we have just referred. The proposed expenditure is not for a bridge upon the streets of the city, nor at or near its boundaries, for the convenience of its inhabitants. On the contrary, the "bridge" in question is almost five miles from the city limits, and is neither a necessity, nor even a convenience, to the inhabitants of the city for traveling purposes. Its utility and avowed purpose is to provide the inhabitants of an outlying and remote district lying south of the lake with a convenient mode of reaching ⁵⁷ the city of Devils Lake to do their trading, and thereby increase the trade of the merchants and business men of the city. The direct purpose of the expenditure is for the benefit of those who will travel the road, and the business men who will profit by their trade. The benefit which will accrue to the inhabitants of the city is merely incidental and indirect. As has already been pointed out, such benefits do not constitute a public purpose for which a tax may be imposed. The expenditure is essentially for a private purpose. For this reason, and independent of all other consideration, the bonds in question are unauthorized and void.

In reaching this conclusion, we do not unqualifiedly assent to the contention of plaintiff's counsel that the boundaries of a city mark the limits of the lawful exercise of its corporate power, and that there can be no expenditure for a corporate purpose, the object of which is located outside of its boundaries. For obvious reasons, the exercise of its political and governmental powers is restricted by its boundaries. But in the exercise of other corporate functions, which affect the health, safety and convenience of its inhabitants, and may be said to be of a private nature, the reason for the limitation which rests upon the exercise of its governmental and political power does not exist. For this reason it has been generally held that a city can expend corporate funds for parks, drains, sewers, waterworks, breakwaters, pesthouses and cemeteries. It has also been held that they may construct bridges at or immediately outside of their boundaries, when necessary to serve the convenience of their inhabitants. Such was the holding in the *Brooklyn Bridge Case* (*People v. Kelly*, 76 N. Y. 475), and for the same reasons the right has been sustained in numerous other cases. The power of a city cor-

poration to exercise functions of a private nature outside of its limits is recognized to some extent by the statute in enumerating the powers of city councils: See Rev. Codes 1899, sec. 2148, subds. 7, 60, sec. 2503. But as already stated, the "bridge" here in question cannot be said to be a convenience to the inhabitants of the city of Devils Lake. The proposed expenditure cannot, therefore, be sustained as for a corporate purpose.

The order appealed from will be affirmed.

All concur.

A City has Authority to Make Contracts and Construct such public works as sewers beyond its corporate limits for the discharge of drainage and sewage: Colwater v. Tucker, 36 Mich. 474, 24 Am. Rep. 601; McBean v. Fresno, 112 Cal. 159, 53 Am. St. Rep. 191; Langley v. Augusta, 118 Ga. 590, 98 Am. St. Rep. 133.

Taxation cannot be Imposed for the purpose of establishing, aiding, or maintaining private business enterprises whose sole object is the emolument of the proprietors, no matter how beneficial to the community the enterprise may be: See the note to Zigler v. Menges, 16 Am. St. Rep. 370.

BARRY v. TRAUX.

[13 N. Dak. 131, 99 N. W. 769.]

CONSTITUTIONAL LAW.—The "Right of Trial by Jury" secured by the constitution of North Dakota embraces all the substantial elements of the right of trial by jury as understood by the framers of the constitution and the people who adopted it. (p. 665.)

CONSTITUTIONAL LAW.—A Constitution will be Held to have been prepared and adopted in reference to existing statutory laws upon the provisions of which in detail it must depend to be set in practical operation. (p. 667.)

CONSTITUTIONAL LAW.—Courts are Bound to Presume that the people adopting a constitution are familiar with the previous and existing laws upon the subjects to which its provisions relate, and upon which they express their judgment and opinion in its adoption. (p. 667.)

CONSTITUTIONAL LAW.—It is a Cardinal Rule of construction that a constitution must be so construed as to give effect to the intention of the people who adopted it, and, while it will be construed with reference to the doctrines of the common law, its intent will never be overruled by them. (p. 668.)

CONSTITUTIONAL LAW.—Change of Venue.—The "Right of Trial by Jury" secured by the constitution of North Dakota is the right of trial by jury with which the people who adopted it were familiar and which had obtained a fixed meaning in the criminal jurisprudence of the territory prior to and at the time of the adoption

of the constitution; and that right gave the prosecution, as well as the defendant, the right to change the place of trial when necessary to secure a fair and impartial trial. (pp. 669, 670.)

CONSTITUTIONAL LAW—Change of Venue—Prosecution.—

At the common law the right of trial by a jury in the county of the offense was a general one, not unconditional, but always subject to the exception that the indictment might be removed and the trial take place in another county, either upon the application of the prosecution or the defendant, when necessary to secure a fair and impartial trial, and without substantial difference between felonies and misdemeanors, except as to the degree of proof necessary to procure the change. (p. 677.)

CONSTITUTIONAL LAW—Change of Venue by Prosecution.—

The statute of North Dakota which provides for a change of the place of a criminal trial to another county upon the application of the state's attorney, when a fair and impartial trial cannot be had in the county of the offense, does not violate the right of trial by jury as secured by the constitution. (p. 678.)

Joseph Cleary and Morrill & Engerud, for the plaintiff.

George M. Price and E. R. Sinkler, for the defendant.

135 YOUNG, C. J. The plaintiff, a resident of Cavalier county, in the seventh judicial district, is charged with the murder of one Andrew Mallem, which is alleged to have been committed in that county on January 3, 1901. He was brought to trial in July, 1901, upon an information filed by the state's attorney of that county. The jury returned a verdict of guilty, and affixed life imprisonment as a penalty. Upon appeal to this court the verdict was set aside and a new trial ordered: State v. Barry, 11 N. Dak. 428, 92 N. W. 809. At the second trial, which took place in November, 1903, the jury failed to agree upon a verdict. Preliminary to the third trial, the state moved for a change of place of trial to another county, upon the ground that a fair and impartial jury could not be secured, or a fair and impartial trial had, in Cavalier county. The motion was granted, against the plaintiff's objection, and on March 7, 1904, the presiding judge made an order transferring the case to Walsh county, which is an adjoining county in the same judicial district. The validity of this order is presented to this court for determination upon a writ of certiorari sued out by the accused, the plaintiff in the present proceeding.

The position of counsel for plaintiff is that the district court was without lawful authority to make the order in question, and that it is therefore void. The order was made under the authority of section 8122 of the Revised Codes of 1899, which authorizes a change of place of trial in criminal cases

upon the application of the state's attorney, and it is not claimed that the application by the state's attorney did not fully comply with the requirements of the statute. The sole contention is that section 8122, *supra*, is unconstitutional. Counsel for plaintiff contend that section 7 of the state constitution, which is a part of the Declaration of Rights, guarantees to every person in this state an unqualified right to a trial by a jury of the county where the offense was committed, and that neither the legislature nor the courts have power to deprive him of that right. Section 7 ¹³⁶ of the constitution reads as follows: "The right of trial by jury shall be secured to all, and remain inviolate; but a jury in civil cases, in courts not of record, may consist of less than twelve men, as may be prescribed by law." The statutory provisions relating to change of venue in criminal cases are contained in article 5 of chapter 9 of the Code of Criminal Procedure, embracing sections 8110 to 8122, inclusive, of the Revised Codes of 1899. The first section grants to a defendant the right to a change of place of trial when a fair and impartial trial cannot be had in the county or judicial district in which the action is pending, and specifies, as one of the grounds for a change, the impossibility of obtaining a jury that has not formed an opinion as to the guilt or innocence of the defendant such as would disqualify them as jurors. The several sections following this relate chiefly to matters of procedure. Section 8122, upon which this order is based, reads as follows: "The state's attorney, on behalf of the state, may also apply in a similar manner for a removal of the action, and the court being satisfied that it will promote the ends of justice, may order such removal upon the same terms and to the same extent as are provided in this article, and the proceedings on such removal shall be in all respects as above provided."

It is entirely clear that the constitutionality of the statute authorizing a change of the place of trial upon the application of the state turns upon the meaning to be ascribed to the phrase "right of trial by jury." What is the scope and extent of this right, which the Declaration of Rights secures to all and declares shall remain inviolate? Is it an unconditional right to a trial by a jury drawn from the county where the offense was committed, and prohibiting a change of place of trial to another county when a fair and impartial trial cannot be had in the county where the venue was

originally laid? If it is true, as counsel for plaintiff contend, that "the right of trial by jury" thus guaranteed is an unqualified right to a trial by a jury of the county where the offense was committed, and that no person can, without his consent, be tried in any other county, it is apparent that no act of the legislature can deprive him of that right. Section 8122 of the Revised Codes of 1899, which confers the right to change the place of trial upon the state, would in that event be unconstitutional and void, and would furnish no legal justification for the order in question. If, on the other hand, the right to a trial by a jury of the county of the offense is conditioned upon the possibility ¹³⁷ of a fair and impartial trial in that county, it will be conceded that section 8122, supra, is constitutional and valid. The question involved is an important and delicate one; important, because it calls for a judicial declaration as to the scope of the most important of constitutional rights, the right of trial by jury; delicate, because it involves the consideration of an alleged infringement of that right by a co-ordinate branch of the government. Proper deference for legislative authority has given rise to the settled rule that all acts of the legislature will be presumed to be valid and constitutional, and courts will declare them void only when it is clear that they violate the fundamental law. In case of doubt, the presumption of validity will prevail and the law be sustained. When, however, the conflict is clear, the duty is cast upon the court to declare the conflict, and thus sustain the integrity of the constitution.

We are convinced that the legislation in question is constitutional and valid, and this conclusion does not rest upon the mere presumption of validity which attends all legislative acts. On the contrary, we think it is demonstrably clear that the "right of trial by jury" which is secured by the Declaration of Rights is in no respect impaired by the act of the legislature authorizing a change of place of trial to another county, upon the state's application, when a fair and impartial trial cannot be had in the original county. It will be noted that the constitution does not enumerate the details or incidents of the right of trial by jury. This omission, however, gives no authority to the legislature or to the courts to destroy by legislation or by judicial construction any of the substantial elements of the right of jury trial which were intended to be secured. The constitution refers to "the right of trial by jury" as a right well known and commonly un-

derstood at the time of its adoption, and it is the right so understood which is secured by it. Our duty in this case is therefore to ascertain whether it was the understanding of the framers of the constitution, and the people who adopted it, that the right of trial by jury included, as one of its substantial elements, an absolute right to a trial by a jury of the county where the offense was committed. If such was their intent it must be given effect, the same as though it had been expressly written into the constitution. We are unable, however, to find any ground whatever to sustain the existence of any such intent. On the contrary, there is, in our opinion, convincing evidence that the right of trial by jury, as that right was known at the time of the adoption of ¹³⁸ the constitution, did not include an absolute right to a trial by a jury of the county where the offense was committed, but that the right was conditioned upon the possibility of a fair and impartial trial being had in that county. In other words, the right of trial by jury, as it now exists, with the right on the part of the state to secure a change of venue to another county when necessary for a fair and impartial trial, is the same as existed when the constitution was adopted. The present statutes regulating changes of venue in criminal cases, including section 8122, *supra*, were first enacted by the people of this jurisdiction in 1875, and they have been a part of the statutory law of this jurisdiction continuously since that date: See Code of Criminal Procedure, secs. 285-291; Laws 1875, pp. 122, 123; also the same numbered sections of the Code of Criminal Procedure, Rev. Codes 1877; also, Comp. Laws 1887, secs. 7312-7318. The constitution was adopted in 1889. It will thus be seen that, for a period of fourteen years prior to its adoption, the people who adopted it had lived under a system of criminal laws created by themselves, which authorized the prosecution, as well as the defendant, to secure a change of place of trial to another county when necessary to a fair and impartial trial. The right, as it exists under the statute under consideration, is therefore the same as that which existed when the constitution was adopted, and for fourteen years prior thereto. The supreme court of Iowa held, upon a similar state of facts, that a like provision in the constitution of that state did not prohibit legislation authorizing a change of place of trial by the state. In that case it was contended that the trial jury must come from the county where the offense was committed. In denying this, the court

said: "The first constitution in this state was adopted in 1846, and it contained the following provision: 'The right of trial by jury shall remain inviolate, but the general assembly may authorize trial by jury of a less number than twelve men in inferior courts.' This constitution was superseded by the one now in force, which was adopted in 1857, and it contains, in substance, the same provision. A statute precisely the same as section 4160 of the code was in force when the first constitution was adopted, and such a statute has been in force at all times since 1843. This being so, the right of trial by jury is the same now as it was when the first constitution was adopted, and therefore the statute in question is not unconstitutional, for the reason that the constitutional rights of the defendant have not been in any respect impaired": State v. ¹³⁹ Pugsley, 75 Iowa, 742, 38 N. W. 498. This conclusion necessarily follows from an application of the well-settled rule of construction which requires that "a constitution shall be held to be prepared and adopted in reference to existing statutory laws, upon the provisions of which in detail it must depend to be set in practical operation" (People v. Potter, 47 N. Y. 375; People v. Draper, 15 N. Y. 532; Cass v. Dillon, 2 Ohio St. 607; People v. Mayor, 25 Wend. 9), and the further rule that courts are bound to presume that the people adopting a constitution are familiar with the previous and existing laws upon the subjects to which its provisions relate, and upon which they express their judgment and opinion in its adoption: Mayor v. State, 15 Md. 376, 74 Am. Dec. 572; State v. Mace, 5 Md. 337; Bandel v. Isaac, 13 Md. 202; Manly v. State, 7 Md. 135; Hamilton v. St. Louis County Court, 15 Mo. 35; People v. Gies, 25 Mich. 83; Servis v. Beatty, 32 Miss. 52; Pope v. Phifer, 50 Tenn. 682; People v. Harding, 53 Mich. 48, 51 Am. Rep. 95, 18 N. W. 555, 19 N. W. 155; Creve Cœur Lake Ice Co. v. Tamm, 138 Mo. 385, 39 S. W. 791. The fact that the constitution secures "the right of trial by jury" by simply declaring it, without adding words expressly limiting the locality of a trial jury, is significant, too, of an intent to merely perpetuate the right as it then existed and was known to the people who gave to the constitution their approbation. Further evidence of this intent is also found in the fact that the statutes relating to a change of place of trial, theretofore in force, were perpetuated upon the recommendation of the two code commissions which were composed of men learned

in the law and familiar with the previous legislation of the state. One of the members of the first commission, and its secretary, were members of the constitutional convention. As a contemporaneous construction, this is entitled to great weight: Cooley's Constitutional Limitations, 7th ed., 102. See, also, *Mayor v. State*, 15 Md. 376, 74 Am. Dec. 572, and *People v. Mayor*, 25 Wend. 9; also *People v. Supervisors*, 100 Ill. 495.

Counsel for plaintiff contend that the right to a trial by a jury of the county where the offense was committed was one of the essential elements of the common-law right of trial by jury, and that the right secured by the constitution must be held to be that recognized by the usage of the common law of England. It is undoubtedly true that the common law may be, and is, properly resorted to as an aid in construction, and, in the absence of other evidence of intent, it might be presumed that it was the intent of the framers of ¹⁴⁰ the constitution to perpetuate the right of trial by jury as it existed at common law. But it is a cardinal rule of construction that a constitution must be so construed as to give effect to the intention of the people who adopted it, and, while it will be construed with reference to the doctrines of the common law, its intent never will be overruled by them: Black on Constitutional Law, secs. 38, 42; Cooley's Constitutional Limitations, 7th ed., 94; Flavell's Case, 8 Watts & S. 197. In short, the question is always one of intent, and, where the intent is clear, it, and not the doctrines of the common law, will prevail. A similar contention was advanced in the case of *The Huntress*, Fed. Cas. No. 6,914, 2 Ware, 89, 4 West. Law J. 38, 24 Am. Jur. 486, involving the meaning of the words "admiralty" and "maritime," as those words are used in the third article of the constitution of the United States, which extends the judicial powers to "all cases of admiralty and maritime jurisdiction." It was held in that case that the words were used in the sense which they had in this country at the time of the adoption of the constitution, and that where technical terms of law or jurisprudence are used in the constitution, which are common to our own law and to the law of England, if there is a difference of signification in the two countries, the meaning which they have in our own country is to be preferred. We fully approve the principle of interpretation laid down in that case in the following language: "The assumption is, and it is

made without a tittle of proof, unless general argument is to be taken as proof, that the framers of the constitution, silently, and without the slightest notice, referred, for the sense of these words, not to the meaning which they had in our jurisprudence, but to that which they bore in the jurisprudence and laws of England. If the fact be so, we will venture to affirm that it is a fact unique in the history of the world. It may safely be said that no man and no other body of men engaged in framing an organic law for the government of a great nation ever, silently and without notice of any such intention, referred, for the sense and meaning of any of their words, to the signification which they had in laws and jurisprudence of a foreign nation, especially if these words had a well-known meaning in their own country. We may here be met by an argument that the constitution does, in fact, refer to the common law for the definition of words, by the use of technical terms of that law, as 'habeas corpus,' 'trial by jury,' etc., without proceeding to define them. But these words were just as familiar in our law as in that of England. ¹⁴¹ And if, by supposition, there had been any difference in the sense in which they were used in the English statutes and common law and that in which they were generally used and understood in this country, can there be a doubt which sense is adopted by the constitution? The common law, and, of course, the sense in which the technical words of that law are used, was never in force in this country any further than as it was adopted by common consent or by the colonial legislatures. Beyond this, it was as much a foreign law as that of France or Holland; and, for the definition of any technical terms of general law or jurisprudence, we may with just as much propriety refer to the laws of any other foreign country as to those of England, except so far as the law of England has been adopted and incorporated into our own laws and jurisprudence. And where the same words have a different import in the two countries, that which prevails in our own is most certainly to be preferred." It is entirely clear, therefore, that the right of trial by jury which is secured by the constitution is the right of trial by jury with which the people who adopted it were familiar, and that was the right which had obtained a fixed meaning in the criminal jurisprudence of the territory, as defined by the statutes which existed prior to and at the time of the adoption of the constitution. That right, as we have seen, gave to the prosecu-

tion, as well as the defendant, the right to change the place of the trial when necessary to secure a fair and impartial trial. The present law is in no respect different, and is therefore not vulnerable to the constitutional objection urged against it.

In reaching the conclusion just announced, we have assumed the correctness of the contention that at common law the prosecution had no right to change the venue, but that, on the contrary, it was the defendant's unqualified right to demand a jury panel from the county where the offense was committed. We do not think, however, that this contention accords with the fact. We are of opinion that neither the common law as it existed in England at the time of the Revolution, nor as adopted in this country, gave the defendant an absolute right to a trial in the county of the offense. This is, at least, the opinion of a large number of American courts, whose views are entitled to most respectful consideration, and, as we shall hereafter see, it is sustained by English cases and text-writers. In *New York*, from an early day, it was the custom to award a change of place of trial to the prosecution. In *People v. Vermilyea* (1827), ¹⁴² 7 Cow. 108, it was said that: "The course in criminal prosecutions, where a clear case is made out, is to order a suggestion upon the record that a fair and impartial trial cannot be had in the county where the offense is laid. A venire is then awarded to the sheriff of another county, and the cause is tried there, the indictment remaining unaltered as to the venue." In *People v. Webb* (1841), 1 Hill, 179, the venue was changed in a criminal case, upon application of the public prosecutor, upon the ground that a fair and impartial trial could not be had in the county where the indictment was found. The court said: "The revised statutes impliedly authorize us to make such a change for special cause on an indictment coming into this court on certiorari. This is also an authority which we have at common law"—citing 1 Chitty on Criminal Law, 201; *King v. Nottingham*, 4 East, 208; *People v. Vermilyea*, 7 Cow. 108. In *People v. Baker* (1856), 3 Abb. Pr. 42, a murder case, it was urged that the writ of certiorari could not lawfully issue upon the application of the prosecution to remove an indictment to another county. This was denied, and the court stated that, "There can be no doubt that it has always been competent for counsel for the crown in England, and, since our Revolution, for the counsel for the people of

the state (unless abrogated by statute), to remove criminal cases by certiorari," and, after an exhaustive review of the authorities, held that a change may be ordered upon the application of the prosecution as well as the defendant, when made upon the ground that a fair and impartial trial cannot be had in the original county. In *Price v. State* (1849), 8 Gill, 295, which was a murder case removed to another county, upon the application of the attorney general, for the purpose of securing a fair and impartial trial, it was contended that this was a violation of the common-law right of trial by jury guaranteed by the Maryland constitution. This was denied. The court said: "That the court of king's bench has rightfully exercised this power of removal as an acknowledged, if not essential, part of its ordinary common-law jurisdiction, both in respect to criminal and civil cases, does not seem to have been doubted in any cases in which its exercise is reported to us, of which several may be found referred to in 1 Chitty on Criminal Laws, 201. It is there said that: 'At common law the court has power of directing the trial to take place in the next adjoining county when justice requires it.' The same considerations must govern, and the same result be obtained, in regard ¹⁴³ to the state and the party. There is no canon of interpretation which can be applied to the one which will not with equal force apply to the other." In *Negro Jerry v. Townshend* (1852), 2 Md. 274, it was said that: "All laws for the removal of causes from one vicinage to another were passed for the purpose of promoting the ends of justice by getting rid of the influence of some local prejudice which might be supposed to operate detrimentally to the interests or rights of one or the other of the parties to the suit. This is a common-law right belonging to our courts, and, as such, can be exercised by them in all cases, when not modified or controlled by our constitutional or statutory enactments"—citing *Price v. State*, 8 Gill, 295. The cases last cited were approved in *Cooke v. Cooke*, 41 Md. 362. The supreme court of Pennsylvania, in *Commonwealth v. Balph*, 111 Pa. St. 365, 3 Atl. 220, after pointing out that its jurisdiction was similar to that of the king's bench, and reviewing the English and American authorities upon this question, stated that: "After a case has been so brought into king's bench, it may be tried at bar, or at nisi prius by a jury from the county from which the record was brought, or, if it is suggested upon the

record and proved by an affidavit that an impartial trial cannot be had in such county, the record may be remanded to another county for trial. The latter is an important provision, as it amounts practically to a change of venue, and may take place in cases when no such change is given by statute"—and reached the conclusion that it "possessed the inherent power of issuing writs of certiorari to remove criminal cases, to try such cases at bar in any district in which it might be sitting, or send it for trial to nisi prius, or, upon sufficient cause shown, to send it to a county other than the one in which the indictment was found": See, also, *Commonwealth v. Delamater*, 145 Pa. St. 210, 22 Atl. 1098, and *Kendrick v. State*, 3 Tenn. (Cooke) 474, and cases cited. The same view is held in Michigan. The constitution of that state provides that: "The right of trial by jury shall remain." In *Swart v. Kimball*, 43 Mich. 443, 5 N. W. 635, a statute which authorized the indictment and trial of trespassers upon state lands, in any county in the Upper Peninsula, was held unconstitutional, for the reason that it violated the right of trial by a jury of the vicinage as known at the common law—a right which was held in that case, as it is, indeed, in all cases, to be one of the substantial and beneficial elements of a jury trial. The case did not involve the question as to whether the right is unqualified, ¹⁴⁴ or the right of the state to secure a change when necessary for a fair and impartial trial. Nevertheless, Mr. Justice Cooley, who wrote the opinion, indicated his views on that subject in the following language: "It has been doubted in some states whether it was competent even to permit a change of venue, on the application of the state, to escape local passion, prejudice and interest: *Kirk v. State*, 1 Cold. 344; *Osborn v. State*, 24 Ark. 629; *Wheeler v. State*, 24 Wis. 52. But this may be pressing the principle too far: *State v. Robinson*, 14 Minn. 447 (Gil. 333); *Gut v. Minnesota*, 9 Wall. 35, 19 L. ed. 573." The significance of the statement, "this may be pressing the principle too far," will be better understood when we consider that the constitution of Tennessee guarantees a trial by "an impartial jury of the county in which the crime shall have been committed"; that of Arkansas and Wisconsin "an impartial jury of the county or district"; and that it was under these express constitutional limitations as to locality that the courts were constrained to hold, in the cases referred to by Judge Cooley, that the right to a trial by a jury of the county or

district was an absolute one. In the later case of *People v. Peterson*, 93 Mich. 27, 52 N. W. 1039, where the question was directly involved, that court held a statute authorizing a change of place of trial upon the state's application was constitutional, and, after quoting the above language of Judge Cooley, said: "This statute is but declaratory of the common-law power vested in the circuit court of this state. It is said by Bishop, in his work on Criminal Procedure, that the change of venue is usually ordered on application of the prisoner, first giving notice to the prosecuting officer, and then supporting the application by affidavits; but it may equally be ordered, in the absence of any provision of written law to the contrary, when applied for by the representative of the government: 1 Bishop's Criminal Procedure, sec. 113. In support of this doctrine is cited *People v. Webb*, 1 Hill, 179; *People v. Baker*, 3 Park. Cr. 181. In *People v. Webb*, 1 Hill, 179, it was held that a change of venue might be awarded by the court on application of the state, on motion of the public prosecutor, if it appear that a fair and impartial trial could not be had in the county where the indictment was found. We think it is well settled that, where there is no constitutional provision fixing the vicinage within which the trial must be had, the rule of the common law must prevail, unless changed by statute, and that under their common-law powers the ¹⁴⁵ circuit courts have the right, upon cause shown, to change the venue upon the application of the people." This case was followed and approved in *People v. Fuhrmann*, 103 Mich. 593, 61 N. W. 865.

Numerous cases might be cited which, under the supposed coercion of constitutional provisions providing for a trial by a jury "of the county," or "of the county and district," or "of the vicinage," hold that the legislature cannot authorize a change by the state, even when necessary to secure a fair and impartial trial. But, even under such constitutional restrictions, the cases are not uniform. The constitution of Minnesota guarantees "a speedy and public trial by an impartial jury of the county or district where the crime shall have been committed." It was held in *State v. Miller*, 15 Minn. 344 (Gil. 277), that a statute authorizing a change by the state from a county in one judicial district to an adjoining county in an adjoining district was not unconstitutional. The court said, "that both constitution and law are but the affirmance of the common-law right of the defendant to an im-

partial jury of the county where the act was committed, subject to the right of the court to change the place of trial whenever such impartial jury cannot be had there." *Commonwealth v. Davidson*, 91 Ky. 162, 15 S. W. 53, is to the same effect. The correctness of the declarations as to the common-law right in the cases to which we have referred is, we think, fully sustained by the English cases and text-writers. In England the king's bench had general supervisory jurisdiction, in criminal cases, coextensive with the kingdom, and a change of the place of trial from the county of the offense in criminal cases was effected by aid of a writ of certiorari issued by that court. In 4 Blackstone, 321, the second of the four grounds upon which that writ was frequently issued is stated as follows: 2. "Where it is surmised that a partial or insufficient trial will probably be had in the court below, the indictment is removed in order to have the prisoner or defendant tried at the bar of the court of king's bench, or before the justice of nisi prius." And in the same connection that learned author states that "a certiorari may be granted at the instance of either the prosecutor or the defendant, the former as a matter of right, the latter as a matter of discretion": See, also, 2 Hawkins' Pleas of Crown, c. 27, sec. 27. Were authority necessary to sustain the foregoing text, it will be found in the following cases: *Rex v. Holden*, 5 Barn. & Adol. 347, 2 Nev. & M. 167; *Rex v. Thomas*, 4 Maule & S. 442; *Rex v. Russel*, 4 Barn. & Adol. 576; *Rex v. Ellis*, 6 Barn. ¹⁴⁶ & C. 145; *Regina v. Palmer*, 5 El. & B. 1024; *Rex v. Penprose*, 4 Barn. & Adol. 252; *Regina v. Fay*, 6 I. R. C. L. 436; *Rex v. Hunt*, 3 Barn. & Ald. 444, 2 Chit. 130; *Rex v. Eaton* (1787), 2 Term Rep. 81, 1 R. R. 436; *In re Lord Lustowit's Fishery*, 9 I. R. C. L. 46; *Regina v. Barrett*, 4 I. R. C. L. 285, 18 Week. Rep. 671; *Regina v. Phelan*, 14 Cox C. C. 579. It will appear from an examination of these cases that the writ was granted as of course when applied for by the crown or the attorney general, and that no distinction was made between misdemeanors and felonies, except that in case of a felony the showing by a defendant that a fair and impartial trial could not be had must be more conclusive than in case of a mere misdemeanor. So firmly was the crown's right to the writ established at common law, that acts of parliament which took away the right to the writ in general language were held not to apply to the crown because it was not expressly so stated: *Rex v. Bodenham*, 9 Ad. & E. 504; *Rex v. Bodenham*, 1 Cowp.

78; *Rex v. ———*, 2 Chit. 135; *Rex v. Davies* (1794), 7 Term Rep. 626, 5 Eng. R. Cas. 543. It is true that most of the reported cases on this subject are where the application was by the defendant. The reason for this is found in the fact that the crown's right was an admitted one, whereas that of the defendant rested upon an exercise of the court's discretion; and the latter was therefore most frequently the subject of judicial inquiry. The crown's right was seldom, if ever, challenged, and no case has been cited or found by us where it was denied. It was exercised upon the application of the prosecution in *Regina v. Barrett*, 4 I. R. C. L. 285, 18 Week Rep. 671, where: "On a trial for felony the jury was not able to agree upon a verdict, and the prisoner was discharged. The crown then moved to have a second trial in some other county, on the ground that a fair trial could not be had in the county where the offense was committed. It was held that the court of queen's bench had the same jurisdiction to change the place of trial in felony as in misdemeanor, and that the place of trial should be changed, as the court was of opinion that a fair trial could not be had in the county where the offense was committed." So, also, in *Regina v. Phelan*, 14 Cox C. C. 579: "In an indictment for murder the trial had twice been ready for hearing; once in the local venue where the alleged crime was committed, and once in the venue fixed by the winter assizes act. On both these occasions the trial was postponed on the ground that an impartial trial could not be had, it appearing on affidavit that large numbers of the jurors who would try the case were members of an association ¹⁴⁷ called 'The Land League,' which association had subscribed to the defense of the prisoners, the crime being of an agrarian nature. The venue was now changed from the local one to a district where it appeared probable that a fair and impartial trial could be had, the crown being put under terms to expedite the hearing of the case, and to pay the costs to the accused persons necessarily incurred by the change of venue." So, too, the place of trial was changed upon the crown's application in a case reported in 2 Chitty, 235. In *Regina v. Palmer*, 5 El. & B. 1024, the defendant was tried for murder, convicted and executed in another county than that of the offense. It is true that in that case the indictments—for there were several of them—were removed to king's bench upon a writ issued upon the defendant's application, but the record shows that the motion which fixed the place of

trial was made by the attorney general. Lord Campbell, C. J., said: "No doubt, after the indictment has been removed, there may be a trial at bar, though at present I see no ground for that; or there may be a trial in any county of England in which the court may think it right that such a trial should take place." And the other justices separately expressed their assent to this view. Blackstone, cited to sustain the unqualified character of the right of trial by a jury of the vicinage, does not support that view, but rather the reverse. True, in book 4, page 351, he says: "When, therefore, a prisoner on his arraignment has pleaded not guilty, and for his trial hath put himself upon the country, which country the jury are, the sheriff of the county must return a panel of jurors *liberos et legales homines de vicineto*—that is, freeholders, without just exception—and of the vicinity or neighborhood, which is interpreted to be the county where the fact is committed." And, again, he states that a grand jury "cannot regularly inquire of a fact done out of that county for which they are sworn." But these are statements of general, and not absolute, rules. Indeed, in this connection, on page 304, he cites a large number of offenses, including murder, which, under various and early acts of parliament, might be inquired of and tried in any county of the kingdom, and concludes, "But, in general, all offenses must be inquired into, as well as tried, in the county where the fact is committed." Reference has already been made to his enumeration of the impossibility of a fair and impartial trial in the county of the offense as one of the four grounds for the issuance of the writ of *certiorari*, and that the right to the writ, when applied for by the crown, was absolute. ¹⁴⁸ Further, confirmation is found in his eulogy upon the jury system: 3 Blackstone's Commentaries, p. 385. After stating that "the locality of trial required by the common law" was a result of the ancient locality of jurisdiction, namely, in the manor and the hundred, and gradually in the country, which formerly made it necessary that the jurors should be tenants of the lord or members of the hundred where the offense was committed, he said: "The restriction as to the hundredors hath gradually worn away and at length entirely vanished. That of counties still remains for many beneficial purposes. But, as the king's courts have a jurisdiction coextensive with the kingdom, there surely can be no impropriety in sometimes departing from the general rule when the great ends of justice warrant and require an

exception." Our conclusion, that at common law the right of trial by a jury of the county of the offense was a general one, not unconditional, but always subject to the exception that the indictment might be removed and the trial take place in another county, either upon the application of the prosecution or the defendant, when necessary to secure a fair and impartial trial, and without substantial difference between felonies and misdemeanors, except as to the degree of proof necessary to procure the change, is also supported by the text of other distinguished English authors whose common-law learning vouches for the accuracy of their statements: See 1 Chitty on Criminal Law, 378, 495; 2 Hale's Pleas of the Crown, 162, 210; 1 Roscoe's Criminal Evidence, 8th ed., 290, 372, and cases cited.

The supreme court of California held in *People v. Powell*, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75, that a constitutional provision identical in language with our own—and it is upon this case that counsel for plaintiff chiefly rely—prohibited the legislature from authorizing a change of place of trial to another county upon the state's application. We cannot agree to the correctness of this decision. Its fallacy lies in erroneously assuming that at common law the defendant had an unqualified right to a trial by a jury of the county of the offense. The people of California, when they adopted their first constitution, did not enter into statehood from a territorial government, like the people of this state. In the absence of any other certain means of ascertaining the nature of the right of trial by jury intended to be secured by their constitution, the court turned to the common law, and, assuming that the common-law right was an unqualified one, necessarily reached the conclusion that the legislature could not take it away. The error lies in the assumption. ¹⁴⁹ The crowning purpose of the jury system, through its various stages of development, has been to provide a fair and impartial trial. Under the interpretation of the California court, the right secured is not the common-law right of trial by jury. It is more. It secures to the defendant a fair and impartial trial in the county of the offense, if such a trial can be had; and if not, it grants him immunity from trial and punishment for his offense. The common law, which may be said to be the ripened product of the wisdom and experience of successive generations, is not properly chargeable with the origin of any such doctrine. The crown, through the king's bench,

always had the power to accord a fair and impartial trial. If it could not be had in the county where the offense was committed, it was secured by transferring the indictment for trial to another county. Our constitution was adopted after, and not in the light of, the California case, and is not therefore controlled by it. As we have seen, the right of trial by jury had acquired a fixed meaning among the people who adopted our constitution when they adopted it, and it is the right thus understood which was secured, and it is, in fact, merely the right as it existed at the common law.

It follows from what we have said that the district court did not act without lawful authority in making the order in question. The writ will therefore be quashed.

All concur.

Cochrane, J., did not sit in the above case or take any part in the decision, Judge Charles A. Pollock, of the third judicial district, sitting in his place by request.

Constitutional Provisions that the Right of Trial by Jury shall remain inviolate, have reference to the right of trial by jury as it existed at the common law or at the time of the adoption of the constitution: Kirkland v. State, 72 Ark. 171, 105 Am. St. Rep. 25; Hathorne v. Panama Park Co., 44 Fla. 194, 103 Am. St. Rep. 138; Eckrich v. St. Louis Transit Co., 176 Mo. 621, 98 Am. St. Rep. 517; Christensen v. Hollingsworth, 6 Idaho, 87, 96 Am. St. Rep. 256; State v. Doherty, 16 Wash. 382, 58 Am. St. Rep. 39.

The Court may Grant a Change of Venue in a criminal trial on the application of the state, according to the better rule, as well as upon the application of the defendant: People v. Fuhrmann, 103 Mich. 593, 61 N. W. 865; People v. Baker, 3 Abb. Pr. 42; and statutes providing for such a change are generally regarded as constitutional: Commonwealth v. Davidson, 91 Ky. 162, 15 S. W. 53; State v. Miller, 15 Minn. 344. See, too, Mischer v. State, 41 Tex. Cr. Rep. 212, 96 Am. St. Rep. 780.

WREGE v. JONES.

[13 N. Dak. 267, 100 N. W. 705.]

SLANDER—Setoff of One Slander Against Another.—A statute permitting a defendant to plead as a counterclaim “a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff’s claim” does not authorize one slander to be set up as a counterclaim against another, although both were uttered at the same time and place as a part of the same conversation. Each slander constitutes a separate “transaction.” (p. 680.)

SLANDER—Mitigation and Justification.—Under the North Dakota statutes, the defendant in an action for slander or libel may answer by way of justification and mitigation—either or both—or may plead mitigating circumstances in connection with a general denial. (p. 682.)

SLANDER—Presumption of Malice—Evidence.—The fact that the law raises a presumption of malice from the publication of words actionable per se does not render incompetent evidence upon the question of actual malice. (p. 684.)

SLANDER—Presumption of Malice.—The malice which by legal fiction is presumed to exist from the publication of words actionable per se is legal malice as distinguished from actual malice or malice in fact. (p. 684.)

SLANDER.—The Absence of Actual Malice will not defeat an action for slander and prevent the injured person from recovering his actual damages. (p. 684.)

SLANDER—Exemplary Damages—Evidence of Motive.—If actual malice is charged in a complaint for slander, and punitive damages are claimed for the injury, the presence of actual malice becomes a vital question; therefore the defendant may testify directly to his intent or motive, and also as to the facts and circumstances which are pleaded and were known to him when he uttered the slander. (p. 686.)

McCumber, Forbes & Jones, for the appellant.

D. A. Dwyer and Charles E. Wolfe, for the respondent.

270 **YOUNG, C. J.** This is an action for slander. The plaintiff recovered a verdict in the sum of five hundred dollars. The defendant has appealed from the order denying his motion for new trial, and also from the judgment.

The complaint alleges that on October 3, 1902, the defendant, in the village of Hankinson, in Richland county, in the presence of divers persons, four of whom are named, falsely and maliciously spoke and published of and concerning the plaintiff the following false, malicious and defamatory words: “‘You stole my wheat’ (meaning thereby that this plaintiff stole wheat owned by defendant). ‘Mr. Albert Wrege stole

my wheat. I will have you both arrested' (meaning thereby that the defendant would have this plaintiff and his brother arrested for the alleged offense)." The answer interposed by the defendant consisted of (1) a general denial; (2) mitigating circumstances; and (3) a counterclaim. The trial court held upon demurrer that the cause of action set up as a counterclaim did not arise out of the transaction which is the foundation of plaintiff's claim, and was not, therefore, allowable. The case was tried upon the remaining issues, with the result above stated.

The first error assigned is the ruling upon the demurrer. The answer alleged, by way of counterclaim, "that on said October 3, 1902, and at the same time and at the same place, and as a part of the same conversation and transaction mentioned and referred to in the complaint, and in the presence of the same persons who are named and mentioned therein, the said plaintiff falsely and maliciously spoke the following false, slanderous and defamatory words of, about and concerning the plaintiff, to wit: 'Jones, you are a damned robber.'" Damages were prayed for in the sum of three thousand dollars. Counsel for defendant urge that "the cause of action set up in the complaint and the cause of action contained in the counterclaim arose out of one and the same transaction," and that for this reason the counterclaim is within section 5274, subdivision 1, of the Revised Codes of 1899, which authorizes one to plead as a counterclaim "a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action." ²⁷¹ We cannot agree that the transaction out of which defendant's cause of action arose is the "transaction set forth in the complaint as the foundation of the plaintiff's claim," and are therefore of opinion that the demurrer was properly sustained. The statute just referred to is common to a number of states: Thus far the courts have not arrived at a definition of the term "transaction," as used therein, which is wholly satisfactory. It is quite generally agreed, however, that it is broader in meaning than the word "contract," and includes torts; otherwise it would not have been employed. Probably the definition given in Pomeroy on Code Remedies, section 774, is the most accurate and comprehensive, i. e., "that combination of acts and events, circumstances and defaults, which, viewed in one aspect, results in the plaintiff's right of action,

and, viewed in another aspect, results in the defendant's right of action." The fact that two transactions originate at the same time and place, and between the same parties, is not the test. The question in such cases is, "Did each cause of action accrue or arise out of the same transaction—the same thing done?" *Anderson v. Hill*, 53 Barb. 239. It is clear in this case that they did not. The act set forth in the complaint as the foundation of plaintiff's claim, and which gave rise to his cause of action, was the speaking by defendant of the defamatory words charged in the complaint. The act which gave rise to the defendant's cause of action was the speaking by plaintiff of the defamatory words charged in the counterclaim. Each act was complete in itself—a separate tort—and constituted a transaction, within the meaning of the above section. It cannot be said that the utterance of the slanderous words by the defendant resulted in a cause of action in his favor for the plaintiff's tort. The latter arose from a wholly distinct act, namely, plaintiff's utterance of the slanderous words. There was no single transaction, which, "viewed in one aspect," gave plaintiff's right of action, and, in another aspect, defendant's right of action. The transactions were separate. Our conclusion that one slander cannot be set up as a counterclaim against another slander is in harmony with the views of the courts of New York under the same statute (*Sheehan v. Pierce*, 70 Hun, 22, 23 N. Y. Supp. 1119; *Fellerman v. Dolan*, 7 Abb. Pr. 395), and, by parity of reasoning, is supported by the following cases: *Schnaderbeck v. Worth*, 8 Abb. Pr. 37; *Barhyte v. Hughes*, 33 Barb. 320; *Macdougall v. Maguire*, 35 Cal. 274, 95 Am. Dec. 98; *Anderson v. Hill*, 53 Barb. 238; *Lake Shore etc. Ry. 272 Co. v. Van Auken*, 1 Ind. App. 492, 27 N. E. 119; *Terre Haute etc. Co. v. Pierce*, 95 Ind. 496; *Keller v. B. F. Goodrich Co.*, 117 Ind. 556, 10 Am. St. Rep. 88, 19 N. E. 196; *Shelly v. Vanarsdoll*, 23 Ind. 543; *Lovejoy v. Robinson*, 8 Ind. 399; *Ward v. Blackwood*, 48 Ark. 396, 3 S. W. 624.

We are agreed, however, that the motion for new trial should have been granted. A large number of errors were specified as grounds of the motion, some relating to the admission of testimony and others to the instructions. We find it necessary to consider only the assignments directed to the rejection of testimony offered by the defendant under his plea of mitigating circumstances. The defendant alleged, in substance, that he was the owner of the wheat referred to

in the alleged slanderous charge; that he had employed the plaintiff to harvest and thresh it, and to deliver it to the elevator in the defendant's name; that the plaintiff sold about three hundred bushels of it, and appropriated the proceeds to his own use—and averred that what the defendant said was in reference to this wheat; that he did accuse the plaintiff of taking said wheat, “and then and there said to the plaintiff, in substance, that said plaintiff had taken and sold said wheat; . . . that, except as herein stated, the defendant neither said nor spoke anything to or about said plaintiff; that all that was at that time said or spoken by this defendant was true and was said or spoken without malice or intent to in any way wrong or injure the plaintiff.” Upon objection of plaintiff's counsel, the trial court excluded the evidence offered by the defendant (1) in support of his allegation of ownership of the wheat which was referred to in the conversation in which plaintiff claims the slander was published; and (2) in support of his allegation “that what was said or spoken was without malice, or intent to in any way wrong or injure the plaintiff.” This was prejudicial error. The plaintiff alleged in his complaint that the defendant had maliciously accused him of stealing his wheat; that is, of committing the crime of larceny. The defendant, although denying that he had spoken the slanderous words, alleged that whatever he said was without malice or intent to injure or wrong the plaintiff, and that it was said and spoken in reference to certain wheat which was in plaintiff's possession, but owned by the defendant, and which the plaintiff had in fact sold and appropriated. The answer does not state that the purpose of these allegations was to mitigate damages, or that they were offered as a plea in mitigation. In this respect the **273** answer is open to criticism: *Bennett v. Mathews*, 64 Barb. 410. Perhaps in other respects it cannot be approved as a model of pleading: See *Hatfield v. Lasher*, 17 Hun, 23; *Will-over v. Hill*, 72 N. Y. 36; *Dolevin v. Wilder*, 34 How. Pr. 488. But no attack was made upon its sufficiency, and the record shows that it was treated both by court and counsel as a plea in mitigation. Under our statute, a defendant in an action for slander or libel may answer by way of justification and mitigation—either or both—or may plead mitigating circumstances in connection with a general denial, as was done in this case. Section 5289 of the Revised Codes of 1899, which was adopted in this jurisdiction from the Code of Civil Pro-

cedure of New York, reads as follows: "In the actions mentioned in the last section [libel and slander], the defendant may in his answer allege both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of damages; and whether he proves the justification or not, he may give in evidence the mitigating circumstances." The following authorities may be cited in support of the construction which we have given to this section: *Bush v. Prosser*, 11 N. Y. 347; *Bennett v. Mathews*, 64 Barb. 410; *Van Benschoten v. Yaple*, 13 How. Pr. 97; *Heaton v. Wright*, 10 How. Pr. 79; *Dolevin v. Wilder*, 34 How. Pr. 488; *Warner v. Lockerby*, 31 Minn. 421, 18 N. W. 145, 821; *Coe v. Griggs*, 76 Mo. 619; *Bliss on Code Pleading*, sec. 360 et seq.; 13 *Ency. of Pl. & Pr.* 90, and cases cited. The contention of plaintiff's counsel—and it was adopted by the trial court—is that where the words of a slander or libel are unambiguous, accusing the plaintiff of the commission of a crime, and therefore actionable per se, as they were in this case, and are not justified or excused, "malice is conclusively presumed." And in this connection it is urged that "the issue raised by the general denial having been met and overcome by the plaintiff—i. e., proof being adduced of the speaking of the words charging him with being guilty of the crime of larceny—the law immediately raised three conclusive presumptions: 1. That the words were false; 2. That they were spoken maliciously; 3. That damages resulted to the plaintiff therefrom. There being no issue raised by the pleadings as to either justification or legal excuse, all the evidence offered by the defendant was incompetent, so far as the question of malice was concerned." The foregoing may be accepted as a correct general statement of the presumptions which follow proof of the publication of words actionable ²⁷⁴ per se which are not justified or excused. But the conclusion that, because in such cases it is said that malice is conclusively presumed, evidence upon the question of actual malice (that is, as to the motive or intent with which the publication was made) is incompetent, when offered under a sufficient answer, is entirely erroneous. The malice which by legal fiction is thus presumed to exist is known as "legal malice," as distinguished from actual or express malice, or malice in fact: *King v. Root*, 4 Wend. 114, 21 Am. Dec. 102; *King v. Patterson*, 40 N. J. L. 417, 60 Am. Rep. 622, 9 Atl. 705. In many cases there may be no malice at all, and no intent to injure, or, at most, thoughtlessness or negligence. It

is well settled that in such cases the absence of actual malice will not defeat the action, and the party injured may recover his actual damages. In other words, the absence of malice is never a complete defense. But where actual malice is charged in the complaint, and more than compensatory damages are claimed for the injury—and that is this case—the actual motive or intent with which the publication was made becomes an important, and indeed a vital fact, from which to determine the amount of damages to be awarded. The sole purpose of pleading and proving circumstances in mitigation is to place the jury in a position to determine whether the publication was with or without malice in fact, and if with malice, its degree and character. This distinction is well stated in *Bennett v. Smith*, 23 Hun, 50: “In libel and slander the damages may embrace two items, namely, compensatory and punitive. The law implies damage from the injury done. If the defendant lacks a legal excuse for his libel of the plaintiff, the law presumes malice, and the defendant ought to respond to the full extent of the actual injury done the plaintiff; that is, compensatory damages should be given. But if, in addition to this malice which the law presumes, and which may be merely constructive and passive in fact, the jury should find that the defendant was actuated by active and vindictive malice, then they may give, in addition to the actual damages, punitive damages. These are not given as the actual due of the plaintiff, but awarded him that the defendant may be punished, and a wholesome example afforded. It is true that in practice the jury do not distinguish between the damages that are compensatory and those that are punitive. No standard exists whereby to measure in money the equivalent for injured character, and hence the unjustified defendant is always in danger of being ²⁷⁵ mulcted in punitive damages. To avoid this, he is permitted to plead and prove matters in mitigation of damages. The strictly compensatory damages ought not to be mitigated, else the defendant might cast the consequences of his wrong upon the plaintiff. But the strictly punitive damages may be mitigated. These depend upon the malice of the defendant, and malice depends upon the motive with which the libel was published. If the motive was good, the malice for which the defendant must respond may be existent by operation of law merely, and not by force of evil passions moving the defendant to wish and to do the plaintiff a wrong. The law, it must be borne in mind, presumes the

existence, not the character, of the defendant's malice. That character, therefore, becomes a material fact in the case, and hence the defendant's motive or intent equally material." In the case just referred to, the defendant was charged with writing and publishing a libelous article. With a view to showing that he wrote the article with good motives, and in a belief of its truth, the defendant was asked this question by his counsel: "Why did you write it?" The trial court sustained an objection, and excluded the evidence. This was held to be error. The court said: "The question, 'Why did you write it?' called for the defendant's intent or motive. The defendant had the right to answer the question": Citing in support of its conclusion, *Seymour v. Wilson*, 14 N. Y. 567; *Dutchess County etc. Co. v. Hachfield*, 73 N. Y. 226; *Kerrains v. People*, 60 N. Y. 221, 19 Am. Rep. 158; *Cortland County v. Herkimer County*, 44 N. Y. 22; *Fiedler v. Darrin*, 50 N. Y. 437; *McKown v. Hunter*, 30 N. Y. 625. To which we may add *Marks v. Baker*, 28 Minn. 162, 9 N. W. 678; *Smith v. Higgins*, 16 Gray, 251; *Berkey v. Judd*, 22 Minn. 287. Indeed, it is well settled that, when intent is material to a fact in issue, a party may testify to it directly: *Pope v. Hart*, 35 Barb. 630; *Thurston v. Cornell*, 38 N. Y. 281, and cases above cited. So, also, for the purpose of enabling the jury to determine the character of the motive with which a defamatory publication is made, the defendant is permitted to allege and prove facts and circumstances known to and relied upon by him tending to show the absence of actual malice. Such facts are admitted to show that he did not act wantonly or rashly, and that he had probable cause for what he did or said and to rebut the inference of actual malice which might otherwise arise if the circumstances were not explained. For illustrative cases, see *Mayo v. Sample*, 18 Iowa, 306; *Wetherbee* ²⁷⁶ v. *Marsh*, 20 N. H. 561, 51 Am. Dec. 244; *Shattue v. McArthur* (C. C.), 29 Fed. 136; *Kidd v. Ward*, 91 Iowa, 371, 59 N. W. 279; *Hewitt v. Pioneer Press Co.*, 23 Minn. 178, 23 Am. Rep. 680; *Willover v. Hill*, 72 N. Y. 36; *Weed v. Bibbins*, 32 Barb. 315; *Davis v. Griffith*, 4 Gill & J. 342; *Botelar v. Bell*, 1 Md. 173. The evidence offered by the defendant under his plea in mitigation, and excluded by the trial court, included, among others, the following questions put to him by his counsel: "Did you say what you said at the time out of any malice upon your part toward the plaintiff?" "What, Mr. Jones, led you to say what you did say to the plaintiff concerning the

taking of the wheat?" In addition, all evidence offered by the defendant to show the facts and circumstances which were within his knowledge when he spoke the slanderous words, relating to his ownership of the wheat, and its possession and appropriation by the plaintiff, was excluded. This was error of a highly prejudicial character. As we have already seen, the defendant had a right to testify directly to his intent and motive; and he also had a right to inform the jury as to the facts and circumstances which were pleaded, and were known to him when he uttered the slander. This evidence was of the highest importance. "In such cases it is often important that the jury should have some information of the transaction to which the words refer, in order to understand correctly their true import and meaning, and the design with which they were spoken. The defendant may, through ignorance or excitement, misapprehend the plaintiff's conduct, or use inappropriate language and epithets in the expression of his indignation or resentment; and yet that conduct may have been wholly unwarranted, or extremely injurious or provoking. The aggravation of a fraud or a trespass into a felony, whether from ignorance or exasperation, surely stands upon a different footing, in regard to the quantum of damages, from a sheer fabrication. Thus, if a party should obtain the money of another by a fraudulent contrivance or dishonest breach of trust, or his property by open violence under a false claim of title, and the party injured in speaking of the transaction should designate it, in the former case as a theft, or in the latter as a robbery, a recovery of heavy damages in an action of slander would not be so much for actual defamation as for inaccurate phraseology. And if a plaintiff without moral guilt, but to disport himself with the fears or feelings of the defendant, has misled or provoked him to the use of defamatory words, this ²⁷⁷ should be made known to the jury; otherwise the plaintiff, to a greater or less extent, would recover damages for his own misbehavior": *Bourland v. Eidson*, 8 Gratt. 27. In this case punitive damages were claimed by the plaintiff. The jury was instructed that punitive damages might be awarded, and they were awarded in the verdict returned. Actual malice thus became a material and vital issue, and the defendant should have been permitted to offer evidence upon it under his plea in mitigation of damages.

The remaining assignments need not be referred to. Those already considered are fatal. The district court is directed to

vacate the order and judgment appealed from, and to enter an order granting a new trial.

All concur.

In an Action for Damages for assault and battery the defendant cannot set up by way of counterclaim a libel published by the plaintiff of and concerning the defendant: *Macdougall v. Maguire*, 35 Cal. 274, 95 Am. Dec. 98. And generally one independent tort cannot be made a defense against another tort, either by way of setoff or counterclaim: *Keller v. B. F. Goodrich Co.*, 117 Ind. 556, 10 Am. St. Rep. 88.

STATE v. CURRIE.

[13 N. Dak. 655, 102 N. W. 875.]

BURGLARY—Consent of Owner of Building.—Where a detective informs the owner of a building that it is about to be burglarized by a designated person, and that he himself is to feign assistance in the crime to secure evidence of it and of other crimes, the passive acquiescence of the owner in the commission of the offense, without participation or encouragement on his part, is not such a consent thereto as can be urged by the burglar as a defense. (p. 690.)

BURGLARY.—The Feigned Assistance of a Detective in a burglary is no defense to his associate, if the latter does every act essential to the crime; but what is done by the detective cannot be charged to the burglar, for the two are not acting together for a common purpose. (pp. 691, 692.)

CRIMINAL LAW—Failure of Accused to Testify.—An instruction that the jury should not consider the failure of the defendant to become a witness in his own behalf in arriving at a verdict is not erroneous. (p. 693.)

De Puy & De Puy, for the appellant.

657 MORGAN, C. J. The defendant was convicted of the crime of burglary in the third degree, and sentenced to five years in the penitentiary. His principal contention on the appeal is that the court erred in refusing to give certain requested instructions bearing on the relation of the owner of the building, and of a certain detective, to the commission of the alleged crime. His claim is that the owner of the building consented to the burglary, and that defendant was instigated to commit the burglary under the undue influence of the detective in causing him to become intoxicated.

The facts are uncontradicted in respect to what transpired before the burglary, and are as follows: About January, 1904,

several crimes, including burglaries, larcenies and arson were committed in Minto, Walsh county, North Dakota, without any success by the local authorities in arresting the perpetrators and bringing them to trial. Thereupon the county authorities sought the aid of one Walker, a detective from St. Paul. The detective had an interview with the state's attorney upon his arrival in the county, and secured from him the names of the persons suspected of complicity in the past crimes, among them being the name of the defendant. The detective thereupon acted as cook in a restaurant in Minto. This restaurant was kept in connection with a place kept by one Gile, where intoxicating liquors were unlawfully sold. The restaurant feature of the establishment was a pretense, as a matter of fact, and was resorted to for the purpose of giving to the detective the appearance of having employment at the place. After some days the defendant and Walker became acquainted, and soon became constant companions. They ate together, slept together, drank to excess together, and became confidential with each other and intimate in their relations. The detective loaned the defendant small sums of money at one time, and in conversation about money matters the detective told the defendant that he had sixty-five dollars coming from Canada. The defendant then stated to Walker that he knew where "we could get some money," and, upon being asked where, answered, "in some of these stores around here." The defendant and ⁶⁵⁸ Walker finally, and after much consideration of the time and place of burglary, concluded to break into a store. The detective says in respect to the final conclusion: "We arranged a deal to break this store open." The first suggestion of a burglary, as between the defendant and Walker, came from the defendant. Several stores were suggested by the defendant as ones that might be burglarized, and among them Zulesdorff's, the one that was broken into. Before the store to be burglarized was agreed upon, Walker secured a letter of introduction to the mayor of Minto from the state's attorney. Walker presented the letter to the mayor, and told him of the contemplated burglary, and further stated: "I told him what I was there for, and told him about the stores, this building to be broken open, and told him that I didn't want myself in some place where I might get shot, . . . and told the doctor, if he knew any storekeeper in town there that would keep a secret, he had better go and notify him, and afterward I would see

him." Dr. Evans, the mayor, suggested that Zulesdorff's store be selected, and saw Zulesdorff in pursuance of this request, and Zulesdorff sent Walker word that he wished to see him. Walker saw Zulesdorff thereafter, and testifies as to what transpired between them as follows: "And he said that he had seen Dr. Evans, and he said that things would be all right; and I told him that after it was broken into he was to keep still about it, and told him what I wanted to know on the outside; and I said, 'By doing that I can get in a little work, and can find out the rest of these people'; so that was about all that was said between I and Frank Zulesdorff." Later, he testified as follows upon his further cross-examination: "Q. And Zulesdorff told you it would be all right? A. Yes, sir. Q. And that he would permit you to use his store in your plans, and would keep the matter a secret for a sufficient length of time to enable you to complete the job? A. Yes, sir." Zulesdorff did nothing further in reference to the burglary, except that he marked two five dollar bills that he left in the money drawer with other money on the Saturday night preceding the burglary, which was committed on Sunday night. The doors and safe and money drawers were locked, and left in the same manner as usual. He marked the bills so that he could identify them in case they were stolen. On these facts it is claimed that Zulesdorff consented to the breaking, and that the defendant cannot, in consequence of such consent, be rightfully convicted of the crime of burglary.

659 After a conversation between Zulesdorff and Dr. Evans and Walker, it was definitely decided by defendant and Walker that the Zulesdorff store was the one to be burglarized. Walker says that he never made any suggestions to the defendant as to the burglary; that he simply acquiesced and agreed to defendant's plans. In answer to a question as to "why you didn't go on with your plans, then, everything being all right," he testifies: "Yes, sir, right enough if I had wanted to work the plan myself, but I didn't want to do that. I wanted him to do it himself, if he wanted to do it." Walker and defendant agreed to break into the store Saturday night, and went to the store for that purpose, but something happened after they got to the store, causing the breaking to be abandoned on defendant's request. He then said, however, "We will try it to-morrow night." On Sunday night they again went to the store, and broke into it by joint force. The defendant removed the marked bills and other money from

the money drawer, and a fur-lined coat was also taken from the store by defendant, and they left the building together. After leaving the building the money, sixteen dollars and sixty cents, was equally divided between them. The overcoat was hidden in a livery barn by the defendant, and subsequently found by an officer and returned to the owner. In a few days the defendant was arrested at the instance of one Gile, and his trial and conviction followed.

Upon these facts, two questions are presented for consideration which were raised at the trial by requests to instruct the jury, and they were also urged on a motion for a new trial: 1. Did the owner of the property consent to the breaking into of his building by the defendant? 2. Did the fact of the detective Walker's participation in the burglary entitle the defendant to a reversal of the judgment of conviction?

Upon the first question, the facts as narrated show that Zulesdorff did nothing by any act to aid in the burglary of his building. He remained passive after being informed of the intended burglary. The plan of a burglary had been arranged before he was advised of the plan of the detective to join the defendant in the proposed burglary as a feigned participant. Zulesdorff gave the detective no instructions. He did not advise him as to the manner of proceeding, nor do anything to assist in the burglary. The store was closed and locked in the usual manner. When he consented to remain away, at the request of the detective, for the ⁶⁶⁰ purpose of securing evidence, it was not certain that his store was the one to be burglarized, nor when it was to occur. The Zulesdorff store was selected as the one to be burglarized after the detective's interview with him. Under these conditions it cannot be said that he consented to the burglary. Before the owner's consent will be a defense to a burglary, the owner must participate, or in some way aid or solicit or encourage the burglary. Mere knowledge that a person's property is to be burglarized, followed by nonaction on his part to thwart it, is not deemed a consent to it. His consent must be manifested by some act of assistance. Mere passiveness for the purpose of securing evidence of the burglary is not such consent as can be urged by the burglar as a defense. The detective was not the agent of Zulesdorff in the matter at all, nor did he have charge of the building in any sense, hence the detective's acts cannot be said to be those of the owner. In *People v. Hanselman*, 76 Cal. 460, 9 Am. St. Rep. 238, 18 Pac.

425, the court said: "And under the authorities we do not think that there is such consent where there is mere passive submission on the part of the owner of the goods taken, and no indication that he wishes them taken, and no knowledge by the taker that he wishes them taken, and no mutual understanding between the two, and no active measures of inducement employed for the purpose of leading into temptation, and no preconcert whatever between the thief and the owner." In *State v. Sneff*, 22 Neb. 481, 35 N. W. 219, the court said: "The fact that those in charge of a building hear of an intended burglary to be committed by breaking into the building, do not prevent it, but put in a force in the building to capture the burglar, and he is so captured, does not affect the guilt of the burglar." In a similar case to this, in *State v. Jansen*, 22 Kan. 498, in speaking of the conduct of the owner of the building, the court said: "His willingness to assist in and facilitate the detection and arrest of a criminal was no consent to the commission of the crime." In *McAdams v. State*, 8 Lea (Tenn.), 456, the court said: "A man may direct his servant or a third person to appear to encourage the design of a thief and lead him on until the offense is complete, so long as he does not induce the original intent, but merely provides for its discovery after it has been formed": See, also, *Thompson v. State*, 18 Ind. 386, 81 Am. Dec. 364; *Clark on Criminal Law*, 11; *Varner v. State*, 72 Ga. 745; *State v. Stickney*, 53 Kan. 308, 42 Am. St. Rep. 284, 36 Pac. 714; *State* ⁶⁶¹ *v. Adams*, 115 N. C. 775, 20 S. E. 722; 6 Cyc. 182, and cases cited.

Upon the second question, the state's evidence shows that the detective did not instigate the commission of the offense. The suggestion of committing the crime, and the active planning of it, is shown to have come from the defendant. The detective fell in and agreed with the defendant's plan. It is true the detective deceived the defendant as to the purpose of his complicity in the crime. He assisted by his acts, but with a hidden purpose. Without commending this practice, or commenting upon it as dangerous and generally of doubtful propriety, we will say that, if the defendant is shown to have committed the crime in its completeness, the feigned complicity of a detective in the crime should not be a shield to the defendant. The authorities almost unanimously hold that a detective may aid in the commission of the offense in conjunction with a criminal, and that the fact will not exonerate

the guilty party. Mere deception by the detective will not shield the defendant, if the offense be committed by him free from the influence or instigation of the detective. The detective must not prompt or urge or lead in the commission of the offense. The defendant must act freely of his own motion, and if he so acts, the fact that the detective was not an accomplice in fact will not accrue to his benefit. The defendant is not to be charged with what was done by the detective, as the two are not acting together for a common purpose. As was said by the court in *State v. Jansen*, 22 Kan. 498: "The act of a detective may, perhaps, not be imputable to the defendant, as there is a want of a community of motive. But where each of the overt acts going to make up the crime charged is personally done by the defendant, and with criminal intent, his guilt is complete, no matter what motives may prompt or what acts be done by the party who is with and apparently assisting him." The cases cited above are all to the effect that the assistance of a detective in a burglary is no defense to a person who himself does every act essential to constitute the burglary.

The defendant did not testify at the trial, hence the facts as to what transpired between him and Walker at and before the burglary are all to be gathered from Walker's testimony. From this testimony, carefully scrutinized, there is no support, even by inference from the facts stated, for the contention that Walker instigated the crime; hence the proposed requests on the question of the instigation ⁶⁶² of the crime by him were properly refused as not applicable to the case under any theory or hypothesis to be drawn therefrom. The court gave the jury correct instructions on the question of consent. They were told that mere knowledge by the owner that the building was to be burglarized, without taking steps to prevent the same, would not be a consent to the commission of the offense. They were also instructed that, if the building was burglarized by the "procurement and consent" of the owner, the defendant would not be guilty. The jury were properly instructed on the effect of the intoxication of the defendant. Under such instructions the jury should have acquitted the defendant if the facts warranted a finding of intoxication as defined in the instructions. The evidence, in our judgment, would not warrant a finding that he was intoxicated at all when the crime was committed.

Complaint is made on the ruling of the court in admitting admissions in the nature of a confession made by the defendant in the presence of the state's attorney and others soon after the offense was committed. The ground of complaint is that such confession was made under the inducement of a promise made by the detective. The detective told the defendant while in jail after his arrest that "in order to help himself out" he had better tell who the parties were that were implicated in the crimes that had previously been committed in Minto. There was nothing said by him at this time as to the commission of the offense for which he was tried, and what was there said by defendant was not admitted in evidence. In the conversation or presence of the state's attorney, the defendant admitted having assisted in burglarizing the Zulesdorff store. At this time defendant knew that Walker was a detective. But there was no promise made, and there is no ground for any claim that the admission was not voluntarily made, and without any suggestion even of any benefit to be gained by him by such admission. The admission was admissible: *Willet v. People*, 27 Hun, 469.

The court read to the jury the section of the code relating to persons on trial for offenses not becoming witnesses for themselves, and the effect thereof, and that the jury should not consider that fact in making up their verdict. We have recently held that giving such instruction is not error: *State v. Wisnewski*, 13 N. Dak. 649, 102 N. W. 883.

⁶⁶³ Exceptions were saved to the introduction and to the exclusion of certain evidence. We have carefully considered these exceptions, and find them without merit. One of these exceptions relates to excluded evidence of the defendant's condition as to sobriety when he was arrested two days after the burglary. Another relates to the ownership of the livery barn where the overcoat was hidden, and that the owner was defendant's father. Other assignments of error in refusing requests have been carefully considered, and found not prejudicial error, but properly refused. The evidence amply sustains the verdict, and the trial was without prejudicial error.

The judgment is affirmed.

All concur.

One Who Breaks into a Building with the intention of committing larceny, and does every act necessary to a burglarious breaking, can-

not escape responsibility from the fact that there was a detective with and apparently assisting him in the commission of the crime: *State v. Stickney*, 53 Kan. 308, 42 Am. St. Rep. 284. See, further, *Connor v. People*, 18 Colo. 373, 36 Am. St. Rep. 295.

The Consent of the Owner of Property to the larceny or burglary thereof, as a defense to the thief or burglar, is discussed in the monographic notes to *People v. Miller*, 88 Am. St. Rep. 597-600; *State v. Hull*, 72 Am. St. Rep. 700-705; and in the subsequent cases of *Lowe v. State*, 44 Fla. 449, 103 Am. St. Rep. 171; *State v. Abley*, 109 Iowa, 61, 77 Am. St. Rep. 520.

CASES
IN THE
SUPREME COURT
OF
OHIO.

McNEAL v. PIERCE.

[73 Ohio St. 7, 75 N. E. 938.]

LIMITATION OF ACTIONS—New Promise or Acknowledgment, Will as.—The making of a will containing a legacy of a specified amount, with a statement that the same is in consideration of services rendered by the legatee in the care of testator's mother and child, is not an acknowledgment of a legal obligation, and does not remove the bar of the statute of limitations. (p. 696.)

A LEGACY Lapses on the Death of the Legatee Though It Purports to be Given in Consideration of the care by the legatee of the testator's mother and child, and it is not competent to show by extrinsic evidence that the intention of the legatee was to give the legacy in payment of the debt. (p. 698.)

Action by the executor of Emily Pierce against the administrator of William P. Hazen to recover the amount of a legacy. The complaint averred that in 1858 the testator was indebted to Emily Pierce for services theretofore rendered at his request in the care of his invalid mother and of his infant son in the sum of five thousand dollars; that Hazen, in 1896, made a will by the tenth clause of which he gave and bequeathed to the plaintiff's testate five thousand dollars, declaring in such clause that the same was in consideration of her care of his invalid mother for many years, and also in the care of his infant child after the death of its mother. The tenth clause was also set out and relied upon as an acknowledgment in writing for the purpose of removing the bar of the statute of limitations. A demurrer interposed to the

complaint was sustained by the court of common pleas, but its judgment was reversed by the circuit court.

J. F. McNeal and L. B. McNeal, for the plaintiff in error.

N. H. Bostwick and Crissinger & Guthery, for the defendants in error.

¹² SUMMERS, J. Two questions are presented: 1. Whether the will removed the bar of the statute of limitations; and 2. Whether the legacy lapsed.

The claim for services is barred unless the will is an acknowledgment. The natural and ordinary ¹³ meaning of the words "in consideration of" in the connection used is not compensation, but a mark or token of affection or appreciation. The testator does not acknowledge that there ever was any liability, debt or claim. He acknowledges merely the fact that his niece did care for his invalid mother and for his infant son, and feeling grateful therefor, in recognition or consideration of the fact, he gives her five thousand dollars. The services may have been paid for or rendered gratuitously. He acknowledges a debt of gratitude, not a legal obligation, and he does not direct the payment of a debt, but confers a bounty. In *Duncan v. Franklin Township*, 43 N. J. Eq. 143, 10 Atl. 546, where the item of the will under consideration read as follows: "I give and bequeath to Henry Benson Duncan, for his services in assisting me at different times, the sum of two thousand dollars," it is said in the opinion: "The expression 'for his services in assisting me at different times,' does not, standing alone, import an indebtedness from her to the legatee for which payment may be exacted by process of law. For aught that appears to the contrary, the services may have been rendered gratuitously and the legacy may have been given in grateful recognition of that."

The second question is whether the facts set out in the petition state a cause of action for the recovery of the legacy.

It is conceded that the general rule is that a legacy lapses when the legatee dies before the testator, and that section 5971 of the Revised Statutes, enacted to prevent mischief from the operation of the rule, does not apply; but it is contended that a legacy does not lapse when it is given to pay a debt; citing *Ward v. Bush*, 59 N. J. Eq. 144, 45 Atl. 534.

¹⁴ The cases that hold that a legacy given in payment of a debt does not lapse do so for the reason that such is the

manifest intention of the testator. That is the ground of the decision in *Williamson v. Naylor*, 3 *Younge & C.* 208. There it is held that certain creditors, whose claims were barred but who were named in the will which provided that a certain part of the estate should be divided among them, should not be considered as legatees, but rather as creditors, and consequently that the representatives of such as died in the testator's lifetime were entitled to the benefit of the will. In the note to that case it appears that Lord Lyndhurst, C. B., in disposing of the matter when it was before him said: "I cannot consider this as a mere voluntary bounty on the part of the testator, but we must consider that the testator meant this money to be applied in satisfaction, or part satisfaction, of an obligation in reduction of his debts, which though they could not be enforced against him at law, were nevertheless subsisting debts. . . . In this case the testator has manifested an anxious desire to fulfill his just obligations; and it was plainly his intention not to make a gift to the persons named in the schedule but to waive the legal bar to the recovery of his debts." In *Philips v. Philips*, 3 *Hare*, 281, where the testator gave the residue of his estate to trustees, upon trust, to divide the same among certain creditors, it is held that: "The shares attributed to the debts of creditors who died in the lifetime of the testator do not lapse by their death." Again: "That the testator must be considered as proceeding upon a mixed principle of bounty and obligation; that the will must be read as, to some extent, directing payment of debts." The vice-chancellor says: "In coming to the ¹⁵ conclusion that the representatives of the creditors who died in the testator's lifetime are entitled to claim, I consider that I follow the case of *Williamson v. Naylor*, 3 *Younge & C.* 208, that I am giving effect to the trusts of the will, and that I am doing that which the conscience of the testator led him to do, in discharging pro tanto his obligations to his creditors, notwithstanding the bar of the statute. If that were his intention, which, on the face of the will, and on the authority of *Williamson v. Naylor*, 3 *Younge & C.* 208, I will assume, I cannot suppose that the testator contemplated the depriving of the benefit given by the will those creditors who might happen to die between the date of his will and his death." Again: "Another observation strongly in favor of *Williamson v. Naylor*, 3 *Younge & C.* 208, is this: if the claimants had been treated as legatees, and not as creditors, the rights of the

creditors to the benefit of the trust might have lapsed by his death in the lifetime of the testator. This could not have been in accordance with the intention of the testator."

In *Turner v. Martin*, 7 De Gex, M. & G. 429, the lord chancellor says: "The object of the testator was to do that which was honest and just, namely, to pay those creditors in full who had proved against the joint estate of his father and himself; that object could not have been attained if his intended bounty was to be limited to those creditors only who might happen to survive him, he having lived twenty-nine years after the debts were proved."

In the present case the claim is barred. The testator does not acknowledge it. In law it is no debt, and it cannot be said that the intention of the testator was to discharge an obligation and not to confer a bounty. The intention of the testator must be given effect according to what appears upon the face of the ¹⁶ will. There is no ambiguity, and evidence to prove an intention different than that implied in the terms of the will would be incompetent: *Comfort v. Mather*, 2 Watts & S. 450.

The judgment of the circuit court is reversed and that of the common pleas is affirmed.

Davis, C. J., Shauck, and Crew, JJ., concur.

Acknowledgments or New Promises to suspend the running or remove the bar of the statute of limitations are discussed in the monographic note to *Warren v. Cleveland*, 102 Am. St. Rep. 751-777.

The Lapse of Legacies by the Death of Legatees prior to the death of their testator is discussed in the monographic note to *Cureton v. Massey*, 94 Am. Dec. 156-160. By the rules of the common law, a legacy or devise lapses and becomes void if the legatee or devisee fails to survive the testator: *In re Wells*, 113 N. Y. 396, 10 Am. St. Rep. 457.

HUNTER v. NIAGARA FIRE INSURANCE COMPANY.

[73 Ohio St. 110, 76 N. W. 563.]

TRANSITORY ACTIONS—Jurisdiction of Actions for Insurance.—The court of any state in which an action may be brought and process served on an insurer may exercise jurisdiction of an action to recover on an insurance policy, though made and delivered in another state where the property insured thereby was situated. (p. 700.)

LIMITATION OF ACTION, the Cause for Which Accrued in Another State.—By the statute of Ohio a cause of action accruing in another state and barred by its laws is also barred by the laws of Ohio. (p. 700.)

LIMITATION OF ACTIONS, Injunction, Effect of in Stopping the Running of.—An injunction which prevents the commencement or prosecution of an action does not suspend the operation of the statute of limitations, nor does it estop from pleading the statute one who was not instrumental in obtaining the injunction. (p. 701.)

Action to recover on a policy of insurance. The defendant was a New York corporation. The policy was issued in Florida and covered property situate in that state. The property was destroyed by the peril insured against May 21, 1891, and the present action was begun March 30, 1898. The complaint alleged the issuing of an injunction by a court of Florida in June, 1891, against the defendant insurance company and also against the policy-holders and others, restraining them from adjusting, collecting or attempting to collect the amount of the loss; that in March, 1893, plaintiff learned that the injunction had been dissolved, but that the cause was appealed to the supreme court of Florida, and was pending there for several years.

The answer pleaded the statute of limitations of Florida, under which the action was barred in five years, and such statute was offered and received in evidence at the trial. In the court of common pleas judgment was given for the plaintiff, but it was reversed on appeal to the circuit court.

M. L. Smyser and C. P. Winbigler, for the plaintiff in error.

J. W. Mooney, for the defendant in error.

112 SHAUCK, J. The transitory character of an action to recover on a policy of fire insurance is not denied by the judgment of the circuit court. That character requires the conclusion that jurisdiction of the action may be exercised by

a court of any state where service upon the insurer may be effected. The question presented by the record does not relate to the jurisdiction of the Ohio court, but to the time limited for invoking the exercise of that jurisdiction.

This contract of insurance was applied for, signed and delivered in the state of Florida, and it covered property situated in that state. The property was destroyed by fire on the twenty-first day of May, 1891. The cause of action then arose in that state. The action was commenced in a court of Ohio. March 30, 1898. On behalf of the plaintiff it is urged that if this cause of action had arisen in this state it would ¹¹³ not be barred by our statute, and that the limitation of an action, being a part of the remedy, must, under the general rule upon that subject, be determined by the law of the forum. The force of this view seems to be entirely averted by the terms of our own statute, which, for the government of such a case, adopts the limitation of the state in which the cause of action arose, at least to the extent that the action cannot be brought here when barred there. Section 4990 of our statutes is: "If, by the laws of the state or country where the cause of action arose, the action is barred, it is also barred in this state." On the trial of the present case the statute of limitations of the state of Florida was introduced by stipulation. An examination of that statute makes it quite apparent that the question is determined by the third section which limits to five years the commencement of "an action upon a contract, obligation or liability founded upon an instrument of writing not under seal." It follows that when the circuit court concluded that the action was barred it gave full effect to the law of the forum.

But it is urged that the operation of the injunction granted by the Florida court either prevented the operation of the statute or estopped the defendant to plead it. This proposition must fail even if we assume in its aid that the plaintiff was bound by the injunction and that it continued in force for the time necessary to give it the effect claimed. Neither the statute of Ohio nor that of Florida provides for such an exception to the operation of the statutes by which actions are limited. In a number of the states the statute expressly saves causes from its operation during the time of the operation of an injunction which prevents the bringing of an action ¹¹⁴ thereon. There is no such saving unless the statute so provides. In Wood on Limitations, section 243, the law is so

stated, and the statement is justified by a collection and classification of the decisions according to the presence or absence of such saving provisions.

Counsel for the plaintiff urge the view that because of the pendency of the injunction suit the company is estopped to plead the statute, and *Treasurer of Brown Co. v. Martin*, 50 Ohio St. 197, 33 N. E. 1112, is cited in its support. The second proposition of the syllabus in that case states the point decided with reference to the pleading of the statute of limitations, and it holds that the estoppel operates against him who has wrongfully procured the injunction. That the doctrine of the case is not applicable here is apparent since, in the present case, the party pleading the statute was in no sense an actor in procuring the injunction.

Judgment affirmed.

Davis, C. J., Price, Crew, Summers and Spear, JJ., concur.

If the Statute of Limitations is regarded as going to the remedy merely without affecting the right, then the statute of the forum must ordinarily govern. Hence, an action, though not barred where it arose, may be barred by the law where it is sought to be enforced; and, on the other hand, though barred by the law of the state where it arose, may not be barred by the law of the forum: See the monographic notes to *Menzell v. Hinton*, 95 Am. St. Rep. 660, 661; *Eingartner v. Illinois Steel Co.*, 59 Am. St. Rep. 878. Consult, also, the recent case of *Negaubauer v. Great Northern Ry. Co.*, 92 Minn. 184, 104 Am. St. Rep. 674.

If One is Prevented from Exercising a Legal Remedy by some paramount authority, the time during which he is thus forced to be inactive is not counted against him in determining whether the statute of limitations has barred his right: *St. Paul etc. Ry. Co. v. Olson*, 87 Minn. 117, 94 Am. St. Rep. 693.

PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY v. NAYLOR.

[73 Ohio St. 115, 76 N. E. 505.]

STATUTES, Construction of.—Where the words of a statute are plain, explicit and unequivocal, the court is not warranted in departing from their obvious meaning. (p. 703.)

DEATH OF ALIEN—Action for the Benefit of His Alien Family.—A statute declaring that there shall be a right of action in favor of the husband or wife of a decedent in all cases against persons wrongfully causing his death within the state is not rendered inapplicable by his alienage or that of his wife and next of kin, who are also aliens and nonresidents. (p. 707.)

Action in the court of common pleas by Naylor, as administrator of the estate of Basilio Marino, deceased, to recover for his negligent killing. The defense was that the defendant was a citizen and resident of Ohio, and that Marino was a native, and at the time of his death, a citizen of Italy, and that his wife and children, for whose benefit the action was prosecuted, were not resident aliens. This defense was demurred to, and the demurrer sustained by the court of common pleas, but on appeal its action was reversed by the circuit court.

Dunbar & Sweeney and Arrell, McVey, Rowland & Harrington, for the plaintiff in error.

Goldzier, Rodgers & Froelich, A. C. Lewis, D. M. Gruber and Fred C. Rector, for the defendant in error.

¹¹⁹ DAVIS, C. J. The question raised in this case is whether or not, notwithstanding the clear and unqualified language of Revised Statutes, sections 6134 and 6135, an action can be prosecuted for the benefit of the next of kin of the person whose death has been wrongfully caused, when the next of kin are nonresident aliens.

It is admitted that the literal terms of these sections would not exclude from the benefits of the statute next of kin who are nonresident aliens; for in section 6134 it is provided that "in every such case" of wrongful death a liability to an action for damages attaches, while in section 6135 no exception which would exclude a nonresident alien can be found. But it is contended: 1. That the statutes of any country, in the absence of express words to ¹²⁰ the contrary, are to be interpreted as applying to the citizens of that country only; 2. That the statutes of no country can be presumed to operate beyond the territorial limits of the country so as to confer rights or impose liabilities upon aliens; 3. That to include nonresident aliens is obviously opposed to the spirit and policy of the statute; and 4. That our statute is adapted from the English statute which is commonly known as Lord Campbell's act, and that the English courts so interpret that act as to exclude nonresident aliens. In support of these propositions the counsel for the plaintiff in error cite the following authorities: Story's Conflict of Laws, secs. 7, 20; Endlich on Interpretation of Statutes, sec. 176; *Deni v. Pennsylvania Co.*, 181 Pa. St. 525, 59 Am. St. Rep. 676, 37 Atl. 558; *Brannigan v. Union Gold Min. Co.*, 93 Fed. 164; *Me-*

Millan v. Spider Lake Sawmill etc. Co., 115 Wis. 332, 95 Am. St. Rep. 947, 91 N. W. 979, 60 L. R. A. 589; Cleveland etc. Ry. Co. v. Osgood (Ind. App.), 70 N. E. 839; and Adam v. Brit. & For. S. S. Co., L. R. 2 Q. B. 430.

In regard to the first proposition contended for by the plaintiff in error, it is important to note that many years ago this court held that "where the words of a statute are plain, explicit and unequivocal, a court is not warranted in departing from their obvious meaning." This principle of construction was adhered to in that case, notwithstanding the fact that the court was convinced by extraneous circumstances that the legislature intended to enact something very different from that which they did enact: Woodbury v. Berry, 18 Ohio St. 456. That case has been cited and approved many times in this court and in the courts of last resort in other states, as well as in Thornley v. United States, 113 U. S. 310, 5 Sup. Ct. Rep. 491, 28 L. ed. 999. It must therefore be regarded as laying down ¹²¹ a cardinal rule of interpretation, at least for this jurisdiction.

Moreover, it seems to us to be a misinterpretation of Mr. Endlich to cite his book as an authority for the proposition contended for here. He refers to the dicta of the judges in the celebrated copyright case of Jefferys v. Boosey, 4 H. L. 815, and says: "It has been said, indeed, that when personal rights are conferred, and persons filling any character of which foreigners are capable are mentioned, foreigners would be comprehended in the statute." That is one view, the dictum of Maule, J., in Jefferys v. Boosey, 4 H. L. 815, and of Lord Westbury in Routledge v. Low, 3 H. L. 100. Then he proceeds: "On the other hand, it has been laid down that in general, statutes must be understood as applying to those only who owe obedience to the legislature which enacts them, and whose interests it is the duty of that legislature to protect; . . . that as regards aliens resident abroad, the legislature has no concern to protect their interests, any more than it has a legitimate power to control their rights." This is the second view deducible from dicta in Jefferys v. Boosey, 4 H. L. 815. Mr. Endlich then continues: "In this view [that is, the latter of the two views] it would be presumed, in interpreting a statute, that the legislature did not intend to legislate either as to their rights or liabilities; and to warrant a different conclusion, the words of the statute ought to be express, or the context of it very clear." We think that the rule

of statutory construction prevailing here, adverted to above, would require a presumption just the contrary of that contained in the second view mentioned by Mr. Endlich; and, indeed, the authority of that view was overturned by the decision in *Davidsson v. Hill*, ¹²² [1901] L. R. 2 K. B. Div. 606, and the reasoning by which it is supported has been fully and completely answered by Kennedy, J., and Phillimore, J., in that case.

The second proposition which is advanced in behalf of the plaintiff in error has already been discussed in part; but it may be added that no extraterritorial effect is sought to be given to this statute. Marino was killed in the state of Ohio by the plaintiff in error. The killing is alleged to be wrongful under the laws of Ohio. A man who is a citizen and resident of Ohio is duly appointed in Ohio as administrator of the estate of the deceased, and brings suit in Ohio to recover as damages a judgment for the benefit of the widow and children of the deceased, as provided by the laws of Ohio. Is this giving effect to the laws of Ohio in Italy? It is hardly incidentally or remotely so. These foreigners come into the courts of this state, by their legal representative, according to the forms prescribed by the law of this state, and they ask for compensation for a wrong which has been done to them. The answer to them is that they were absent from the state of Ohio when the trespass occurred. If they had been citizens of Ohio their absence in Italy would have made no difference. Nor would the fact that they are aliens be decisive against their right to recover; for, although aliens, if they had been residents of Ohio at the time of the trespass they might recover. The actual presence in the state of the next of kin of the deceased at the time of the injury is not required by the statute to create a right of action. The injury may be complete, although the next of kin may be at the time in another country. The plaintiffs have not sought to enforce the laws of Ohio in another jurisdiction, ¹²³ but they have come into the courts of Ohio to enforce the laws of Ohio in their own behalf. The objection made to this is that the statute of Ohio does not apply in favor of nonresident aliens. If there had been three men instead of one killed at the same time, and the widow of one was a citizen of Ohio, the widow of another a resident alien, and the widow of the third a nonresident alien, it is admitted that the first and second could recover, and it is contended that the third could not; yet the

language of the statute is the same as to the rights of all of these parties. It seems to us, therefore, that it is not a question of territorial jurisdiction; but that when a nonresident alien comes into the courts of the state for redress under the laws of the state, as he may do, it is merely a question of construction of the statute to determine whether he is excluded from its benefits.

We have no disposition to controvert the proposition that a statute of one state cannot impose obligations or liabilities on citizens of another state or country, not residing in the state enacting the statute; but we take it to be a self-evident proposition that a state, if there are no constitutional limitations on the general legislative power, may confer rights, privileges or immunities upon nonresident aliens which they may accept, if not prohibited by the government to which they owe allegiance. Thus, in our own state all disabilities of aliens as to inheritance are removed by statute: Rev. Stats. sec. 4173. Numerous examples of the exercise of such legislative power may be found noted in 2 Cyc. 100, 101. *State v. Smith*, 70 Cal. 153, 12 Pac. 121, affords a very striking illustration; and see *Mulhall v. Fallon*, 176 Mass. 266, 79 Am. St. Rep. 309, 57 N. E. 386, 54 L. R. A. 34. And this being so, we have not yet been ¹²⁴ able to perceive any good reason for raising a presumption that the legislature intended to exclude nonresident aliens from the privilege of the statute when its language is, "in every such case."

Again, we have not found any persuasive force in the suggestion made in *Deni v. Pennsylvania R. R. Co.*, 181 Pa. St. 525, 59 Am. St. Rep. 676, 37 Atl. 558, that the interpretation which includes nonresident aliens is contrary to the "spirit and policy" of the statute. The policy of the statute is plainly stated, and it is that "whenever," not in certain cases, "the death of a person shall be caused by wrongful act, etc., then in every such case the corporation which or the person who, etc., shall be liable to an action for damages, etc.": Sec. 6134. "Every such action shall be for the exclusive benefit of the wife," etc., and the amount received by the personal representative shall be apportioned among the beneficiaries, etc.: Sec. 6135. Obviously, the purpose of the statute, judging from its language, is to give relief in damages to the next of kin in all cases of wrongful death, notwithstanding that no right of action would have survived at common law. Consequently it

is not apparent to us that it is inconsistent with the "spirit and policy" of the statute to allow this remedy for such a wrong to a nonresident alien; for if nonresident aliens be excluded from the privilege of the statute, then the remedy is not to all, but only to some of the cases of that description. This statute unequivocally declares the law of this state to be that there shall be a right of action in favor of the next of kin of the deceased in all cases of wrongful death occurring in Ohio. Should such an explicit declaration be set aside by the mere suggestion that the general assembly was legislating for its own jurisdiction and for the citizens and residents of **125** Ohio only? We think that the presumption is rather that the general assembly meant what it has said in unambiguous language; and that a nonresident foreigner coming into this jurisdiction and asking redress for an injury done to him in this state and contrary to the law of this state, although he was absent from the state at the time, is entitled to be heard in the same manner as a resident foreigner or a citizen.

In this connection, and inasmuch as the supreme court of Pennsylvania in *Deni v. Pennsylvania R. R. Co.*, 181 Pa. St. 525, 59 Am. St. Rep. 676, 37 Atl. 558, seems to place much emphasis on the policy of that state as to exemption laws, it is pertinent to cite *Sproul v. McCoy*, 26 Ohio St. 577, in which this court held that the exemptions from sale or execution allowed to "every person who has a family" by the act of April 16, 1873 (70 Ohio Laws 132; see Rev. Stats., sec. 5430), may be claimed by any debtor against whom an action is prosecuted in the courts of this state, whether such debtor be or be not a resident of this state. The rule of interpretation which was adopted in *Woodbury v. Berry*, 18 Ohio St. 456, was there applied to the exemption statute, and it does not seem to have led the court to a wrong conclusion; for in that respect the statute of Ohio remains without change to this day.

Finally, it is urgently argued for the plaintiff in error that this is an English statute, and that we should adopt the English construction of the statute; citing *Adam v. Brit. & For. S. S. Co.*, [1898] L. R. 2 Q. B. 430. The act of 9 & 10 Victoria, chapter 93, commonly known as Lord Campbell's act, had been in effect more than fifty years when this question was raised and decided in that case. At the time that the act was adopted in Ohio there had been no adjudication, and, **126** so far as we know, no suggestion of this question. We

are not bound, therefore, by this decision in the queen's bench division. We find, however, a later decision in the same court, *Davidsson v. Hill*, [1901] L. R. 2 K. B. 606, in which, after careful and full consideration in opinions by Kennedy, J., and Phillimore, J., the ruling was directly opposed to the ruling in *Adam v. Brit. & For. S. S. Co.*, [1898] L. R. 2 Q. B. 430, and in accord with the views which we have expressed above.

A notable change in the attitude of the court is found in the *Indiana* case which is cited for plaintiff in error, *Cleveland etc. Ry. Co. v. Osgood*, decided in the appellate court, second division, April 21, 1904, 70 N. E. 839. When the same case was again before the same court, February 16, 1905, 73 N. E. 285, it was held that an administrator appointed in the state may sue to recover for the death of a resident, although the ultimate distribution of the proceeds of the action will go to a nonresident alien, where the laws of the country in which such alien resides authorize a similar recovery in favor of alien next of kin.

There are other cases, in addition to those cited in the briefs for the defendant in error, which are in accord with the views which we have expressed: *Romano v. Capital City Brick etc. Co.*, 125 Iowa, 591, 106 Am. St. Rep. 323, 101 N. W. 437, 63 L. R. A. 132; *Tanas v. Municipal Gas Co.*, 84 N. Y. Supp. 1053; *Alfson v. Bush Co. Lim.*, 182 N. Y. 393, 75 N. E. 230, *Bonthron v. Phoenix Light etc. Co. (Ariz.)*, 71 Pac. 941; *Renlund v. Commodore Min. Co.*, 89 Minn. 41, 99 Am. St. Rep. 534, 93 N. W. 1057; *Pocahontas Collieries Co. v. Bukas' Admr.*, 104 Va. 278, 51 S. E. 449.

¹²⁷ It seems to us that the right of the defendant in error to maintain this action in behalf of the wife and children of his decedent, notwithstanding that the wife and children are nonresident aliens, is supported by the sounder reasoning and by the greater weight of authority; and therefore the judgment of the circuit court is affirmed.

Price, Crew and Summers, JJ., concur.

The Benefits of a Statute Giving a Right of Action for wrongful death may, according to the better opinion, be claimed in behalf of nonresident alien relatives of a person negligently killed in the state: Alfson v. Bush Co., 182 N. Y. 393, 108 Am. St. Rep. 815, and cases cited in the cross-reference note thereto.

NONAMAKER v. AMOS.

[73 Ohio St. 163, 76 N. E. 949.]

FRAUDS, STATUTE OF—Title to Land, When not Involved.—

An agreement changing the amount of oil to be paid by the lessee under a lease giving him the right to operate on a tract of land for gas and oil does not involve the title to land nor any estate or interest therein. (p. 711.)

PERSONAL PROPERTY, Petroleum Oil, When is.—Petroleum oil when it reaches a well and is produced on the surface becomes personal property and belongs to the owner of the well. (p. 711.)

FRAUDS, STATUTE OF—Agreement, When Susceptible of Performance Within a Year.—An agreement that the lessees under an oil lease may operate for gas and oil on condition that they will pay to the lessor one-sixth of the oil produced and saved may be susceptible of performance within a year, and, therefore, is not within the statute of frauds. (p. 713.)

FRAUDS, STATUTE OF, Changing the Terms of an Oil Lease by Parol.—If a written lease has been entered into giving the lessees the right to operate certain premises for oil and gas on condition that they pay the lessor one-sixth of all the oil produced and saved, and the lessees announce their intention to abandon the lease, as by its terms they have a right to do, and thereupon an oral agreement is entered into between them and the lessor that if they will further drill and operate the lands for oil the royalty shall be one-eighth instead of one-sixth, such agreement is not within the statute of frauds, and is therefore enforceable. (p. 715.)

Suit for the specific performance of an agreement to deliver to plaintiff one-sixth of the oil produced from certain premises included in a lease executed by the plaintiff October 11, 1902. The defendants pleaded and relied upon an oral agreement entered into subsequently to the execution of the lease, whereby the amount of royalty to be paid by the lessees was changed and under which they claimed that the plaintiff had become entitled to only one-eighth of the oil produced on the leased premises, which amount, they alleged, they were and at all times had been willing to deliver to him.

The court of common pleas decided in favor of the plaintiff. On appeal by the defendants to the circuit court it found in their favor on all the issues of fact, but nevertheless was of the opinion that the agreement on which they relied was within the statute of frauds, and therefore gave judgment for the plaintiff.

James O. Troup, for the plaintiffs in error.

James & Kelly, for the defendant in error.

167 PRICE, J. There is no merit in the cross-petition in error filed in this proceeding by Amos, the defendant in error. It seems that he was not satisfied with the findings of fact made by the lower court, but he did not file a motion for new trial as a foundation for a review of such findings.

Nor was the defendant in error entitled to any relief in damages against The Buckeye Pipe Line Company on account of any facts appearing in the record, and it was not liable to account to him for any oil which was the subject of controversy between the lessor and lessee. The Pipe Line Company took the oil as a common carrier, or bailee, for both parties, and when they could not agree on a division of it, and therefore not upon a division order upon the company, it was unable to decide between them on the only question of difference, and the lessor resorted to the proper court for its solution. This view will become quite clear from our further consideration of the case.

The lease of October 11, 1902, granted to the plaintiffs in error and their heirs and assigns, "all the oil and gas in and under said tract of land, and also said tract of land for the purpose and with the exclusive right of operating thereon for said gas or oil, with the right of way, the right to lay pipes **168** over and to use water from said premises; and also the right to remove at any time all property placed thereon by the lessee." The grant is for a term of twenty years from date, and as much longer as oil or gas is found in paying quantities thereon, yielding and paying to the lessor "the one-sixth of the oil produced and saved from the premises, delivered free of expense into the tanks or pipe line to the lessor's credit."

There is another important clause in the lease: "It is agreed further, that the second party (lessees) shall have the right at any time to surrender the lease to the first party for cancellation, after which all payments and liabilities to accrue under and by virtue of its terms shall cease and determine and the lease shall become absolutely null and void."

The lessees proceeded to operate under this lease and drilled and equipped one oil-well, which the circuit court found "did not produce oil sufficient to pay for operating the same at one-sixth royalty as prescribed in the lease." That court further found that the defendants, now plaintiffs in error, informed the plaintiff Amos that they would abandon said premises and surrender said lease unless he would agree to

reduce the royalty stipulated therein from one-sixth to one-eighth, and they proposed that if he would make that reduction, they would proceed to further drill and operate the lease for oil. Thereupon the lessor and lessees entered into a parol contract, to the effect that if the lessees would continue to further drill and operate said lands for oil, the royalty should be one-eighth instead of one-sixth as provided in the lease, and further, that if at the end of thirty days from the completion of any well the average production of said lands should amount to ¹⁶⁹ five barrels per day for each well, the royalty to the lessor should be one-sixth; and if the production at the end of thirty days from the completion of any well should amount to an average of ten barrels per day from each well, the royalty to the lessor should be one-fourth of the oil produced.

In consideration of this parol contract, the lessees drilled, equipped and operated five additional wells on said lands at an expense to themselves of not less than six thousand dollars. But at no time since the completion of either or any of said wells has the production exceeded an average of two barrels per day for each well. When it came to sign a division order according to the terms of the parol contract, Amos, the lessor, refused, and demanded one-sixth royalty as stipulated in the written lease, and brought action to enforce specific performance of its terms. While the circuit court found all the above facts to be established, it held that the verbal agreement so made is within the statute of frauds and therefore void. Is its conclusion of law sound?

That statute is found in section 4199 of the Revised Statutes, and its provisions relative to the present controversy may be quoted as follows: "No action shall be brought whereby to charge the defendant . . . upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning of them; nor upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized."

¹⁷⁰ It is claimed for the lessor who commenced the action under review that (1) the parol contract relied on relates to an interest in or concerning land; and (2) that the contract was not to be performed within the space of one year from

the making thereof. We cannot assent to either proposition. The title to the land is not involved, nor is any interest or estate therein. The question arises on a lease supplemented by a parol contract with reference to the consideration. There is no controversy over the extent of the grant, and the parol contract does not undertake to lessen or enlarge the estate granted. Touching the division of the oil when brought to the surface, the written lease stipulates that the lessees shall yield and pay "to the lessor the one-sixth part of the oil produced and saved from the premises, delivered free of expense into the tanks or pipe-line to the lessor's credit."

This share is the lessor's compensation for the lease and the rights granted therein. The five-sixths go to the lessees by virtue of the same instrument, because the grant to them was the oil contained in the premises. Therefore the parol contract related to personal property and not real estate, or an interest in or concerning the same. In *Kelley v. Ohio Oil Co.*, 57 Ohio St. 317, 63 Am. St. Rep. 721, 49 N. E. 399, 39 L. R. A. 765, this court held that petroleum oil is a mineral, and while it is in the earth, it forms part of the realty; and when it reaches a well and is produced on the surface, it becomes personal property and belongs to the owner of the well. In the opinion by Burket, J., on page 328, it is said: "Petroleum oil is a mineral, and while in the earth it is part of the realty, and should it move from place to place by percolation or otherwise, it forms part of the tract of land in which it tarries for ¹⁷¹ the time being, and if it moves to the next adjoining tract, it becomes a part and parcel of that tract; and it forms part of some tract, until it reaches a well and is raised to the surface, and then for the first time it becomes the subject of distinct ownership separate from the realty, and becomes personal property, the personal property of the person into whose well it came. . . . It is the property of and belongs to the person who reaches it by means of a well and severs it from the realty and converts it into personalty." The same doctrine is again laid down in *Northwestern Ohio Natural Gas Co. v. Ullery*, 68 Ohio St. 259, 67 N. E. 494.

The lessees, by the written instrument, agreed to drill and operate for oil, and of what they would thus produce from the wells and thereby severed from the realty, they were to yield and pay to the lessor one-sixth. Hence, when the parties entered into the parol contract as found by the lower court, they were not contracting for an interest in or concern-

ing real estate, but for a division of personal property in proportions different from those named in the written lease. The royalty is an incident to the written instrument as a means of compensation to the lessor for the grant and privileges therein conveyed.

Akin to the foregoing is the case of *Long v. White*, 42 Ohio St. 59. It is there held that the statute of frauds cannot defeat the recovery of the purchase money on a verbal contract for the sale of a dwelling-house then annexed to real estate, but to be severed from the freehold and delivered on rollers, after the same has been so severed, and which was delivered in accordance with the contract. In that case the defense was that the dwelling-house, when the verbal contract for its purchase was made, was standing upon the premises, erected upon permanent walls, ¹⁷² a solid and strong foundation, permanently affixed to the premises and constituted a part of the same. The defense was held bad and the seller recovered.

In *Negley v. Jeffers*, 28 Ohio St. 90, it is held that when a deed to real estate has been executed, or title in any other way passed, subsequent agreements between vendor and vendee, as to the pecuniary liabilities growing out of the transaction, which do not take away or confer any interest in the land, but only determine the time when the purchase money becomes due, are not affected by the statute of frauds. It is further held that a subsequent contract between the parties, by the terms of which the vendee, for a valuable consideration received, agreed to waive his right to insist on the performance of conditions precedent which were in writing and take the property subject to encumbrances, and pay the balance due, is not a contract within the statute of frauds, and may be proved by parol: See, also, *Blakeney v. Goode*, 30 Ohio St. 350.

In *Shaw v. Walbridge*, 33 Ohio St. 1, this court decided that where a grantor in a deed absolute on its face claimed that it was a mortgage, in a proceeding to establish that claim, it was competent for the grantee to show that although originally a mortgage, the equity of redemption had been released by a parol agreement. Beyond doubt the party released an interest in real estate. We think these authorities ample on the first proposition.

The second contention is that the parol contract was not to be performed within one year, and for that reason it is within the statute of frauds. We think this position is also unten-

able. The only time fixed for performance is when oil is "produced and saved," and on its face is susceptible of being performed ¹⁷³ within a year, within the legal signification of that term. One well had been drilled and was in operation when the verbal agreement was made. The premises consisted of sixty acres, and the remaining wells, five in number, could be, and perhaps were, drilled and put in operation within the year, and they may all become worthless and nonproductive within the year after each had been operated. The rule is well stated by Browne in his work on the Statute of Frauds, sections 274-276. In section 274 it is said: "Suppose that the parties make no stipulation as to time; but the performance of the agreement depends either expressly or by reasonable implication upon the happening of a certain contingency which may occur within the year. In such case it is settled upon authority, and is reasonable in principle, that the statute should not apply. The agreement may be performed entirely within the year, consistently with the understanding and the rights of parties."

The author in the following section cites illustrations of his meaning. And in section 576 he adds: "Cases where the promise is to continue to do something until an implied contingency occur; as, for instance, to pay during the promisee's life; to pay during the life of another; to work for another during his life; to board the promisee during his life; to educate a child; to support a child; to pay during coverture—are not within the statute, because the contracting parties contemplate that the one whose life is involved may die within the year. Agreements to continue to do something for an indefinite period, which may be terminated at any time by either party; or which may be terminated by such change in the circumstances of the parties ¹⁷⁴ as will make it unreasonable or unnecessary that they be further bound, the contingency of such change of circumstances being implied in the nature of the contract—are not within the statute." It is well to remember here that one of the stipulations in the lease is, that the lessees might abandon and surrender the lease at any time and remove their property, terminating all further liabilities. But we will not further pursue the discussion in the textbooks. This court has spoken sufficiently plain on the subject in several cases. In *Randall v. Turner*, 17 Ohio St. 262, it is held that a verbal agreement for the sale of lands which has been fully performed on the part of the vendor is not ren-

dered void by the statute of frauds. In the opinion by Day, C. J., on page 270, it is said: "The most that can be claimed is, that it [the contract] was not likely to be performed in a year; but it was clearly susceptible of performance within that time. The road [railroad] might have been abandoned within a year, and thus a reasonable time to wait for its completion would have expired. There was surely nothing in the contract that fixed the time of performance beyond a year. It is well settled by the authorities upon this point that the contract is not within the statute of frauds. Moreover, the suit being for the purchase money of the land, and the contract having been fully performed on the part of the vendor, the statute does not apply."

Jones v. Pouch, 41 Ohio St. 146, is a case where there was a verbal contract to construct a section of a road within a year and twenty days from the date of the contract. The work could have been completed within the year, and it was held that this was ¹⁷⁵ not an "agreement not to be performed within the space of one year from the making thereof"; and an action thereon was not prohibited by the statute of frauds.

A very decisive case is found in Towsley v. Moore, 30 Ohio St. 184, 27 Am. Rep. 134. Miss Towsley was a minor about eleven years old, and, with the advice and consent of her mother, agreed to work for Moore in his household and kitchen until she arrived at the age of eighteen, for which service Moore was to board, clothe and furnish her with schooling, and at the expiration of her term of service pay her what such service was reasonably worth. She rendered the service agreed upon. In her action to recover, among other defensive matter, Moore set up the statute of frauds—that the contract could not be and was not performed within a year from its date. This was admitted by the reply, but it averred that she did fully complete and perform the same, and that her services were worth the amount sued for.

It was held on the above facts that "although an action cannot be maintained upon a verbal contract not to be performed within one year, yet when such contract has been fully performed by one party, the other having obtained its benefits, he cannot refuse to pay the reasonable value thereof." That is a very instructive case on the one year clause of the statute of frauds, and the principles of various decided cases are well summed up in the opinion on page 194.

In the light of the authorities, only a few of which we have noted, how stands the case at bar? Relying on the integrity of the verbal agreement with their lessor, the plaintiffs in error drilled, equipped and put in operation five additional wells at an expense of not less than six thousand dollars, and tendered ¹⁷⁶ him the eighth royalty agreed upon as the inducement to make the large expenditure. They have fully performed the contract on their part, of which performance lessor has received the benefits, and can he now repudiate the contract as invalid and defeat the rights of the lessees?

He has brought his action in a court of equity for specific performance of the terms of the original written lease, and the lessees plead the change in the royalty merely. Courts of equity do not always grant specific performance of contracts, and they will not do so where it would work manifest injustice to adverse parties. On the facts found in this case, there is not a semblance of equity in the lessor's claim, and the circuit court should have denied his prayer for relief.

The judgment of the circuit court is reversed, and rendering the proper judgment on the facts found, we find for the plaintiffs in error, and dismiss the petition filed in the court of common pleas by defendant in error.

Davis, C. J., Shauck, Crew and Spear, JJ., concur.

Petroleum Oil forms part of the realty until it reaches a well and is raised to the surface, when it becomes the personal property of him into whose well it has come and who raises it to the surface: *Kelley v. Ohio Oil Co.*, 57 Ohio St. 317, 63 Am. St. Rep. 721; *Williamson v. Jones*, 43 W. Va. 562, 64 Am. St. Rep. 891.

The Statute of Frauds refers to contracts which by the terms are not susceptible of performance within one year, and not to contracts which may be performed within that time: *Dickey v. Dickinson*, 105 Ky. 748, 88 Am. St. Rep. 337; *Sax v. Detroit etc. Ry. Co.*, 125 Mich. 252, 89 Am. St. Rep. 572; *Chase v. Hinckley*, 126 Wis. 75, 110 Am. St. Rep. 896.

CITY OF COLUMBUS v. PENROD.

[73 Ohio St. 209, 76 N. W. 826.]

MUNICIPAL CORPORATIONS.—Knowledge or Notice by a Policeman of the obstruction of a sidewalk is not imputed to the city. (p. 717.)

MUNICIPAL CORPORATIONS.—Liability of for Granting Permission to Use Part of Street for Placing Building Materials.—A municipality granting permission to use part of a street as a place for depositing material for the constructing of a house on an abutting lot does not thereby license any act in the street which, but for the permission, would be illegal and a nuisance, nor impose the duty on the city of seeing that the place is guarded, nor render it answerable to a person injured in consequence of the omission to guard such place with bars or lights, unless it had express or implied notice of such omission and was therefore guilty of negligence. (p. 722.)

Action to recover of the defendant municipality for injuries suffered by the plaintiff from falling off a mortar-board projecting from the street over the curbing of one of its sidewalks. The plaintiff relied on the fact that the defendant had granted permission to use part of the street as a place for depositing building material for the construction of a house on an abutting lot, and that a mortar-board had been placed in the street three and a half days prior to the accident by the employés of a brick mason having the contract to construct one of the chimneys. The jury, in addition to a general verdict in favor of the plaintiff, returned six special findings in which the defendant moved for judgment, notwithstanding the general verdict, but its motion was denied. These findings were as follows:

“No. 1: Upon what obstruction did the plaintiff stumble? Answer: Mortar-board.

“No. 2: Who placed on the sidewalk the thing or obstruction on which, or over which the plaintiff stumbled? Answer: J. Jackson, for Contractor Kuntz.

“No. 3: How many days prior to the accident had this thing or obstruction over which plaintiff stumbled been placed on the sidewalk? Answer: Three and one-half days.

“No. 4: Did the defendant, the city of Columbus, have any actual notice of the obstruction on the sidewalk, over which the plaintiff stumbled? Answer: Dun notified policeman on duty in that district.

“No. 5: If the defendant, the city of Columbus, had actual notice of the existence of the said obstruction on the

sidewalk before the accident, to whom, or through whom had this actual notice been given? Answer: The officer on the district.

"No. 6: If the defendant, the city of Columbus, had, prior to the accident, received actual notice of the thing or obstruction on the sidewalk, over which plaintiff fell or stumbled, how many days prior to the accident had this notice been given or received? Answer: From one to two weeks."

James M. Butler, David T. Keating, George S. Marshall and Edgar L. Weinland, for the plaintiff in error.

E. M. Baldridge and F. V. Owen, for the defendant in error.

213 SUMMERS, J. The contention on the part of the city may be summarized as: That the special finding is in effect that the city had no knowledge or notice other than that of the policeman, and there being no evidence of any facts tending to prove constructive notice that the mortar-board was in a position to endanger the use of the sidewalk, the city was entitled to a judgment in its favor on the special findings.

The circuit court, so it is said by counsel for defendant in error, ruled that notice was not necessary because it was the duty of the city, having given the permit, to see that proper precautions were taken to prevent accidents, and on the trial in the court of common pleas an ordinance of the city authorizing the granting of permits for such use of the streets and prescribing the mode of use and the manner of safeguarding the same was admitted in evidence for the purpose of showing wherein the city had neglected its duty.

That the knowledge of the policeman or notice to him does not make the city liable is ruled in *Cleveland v. Payne*, 72 Ohio St. 347, 74 N. E. 177, so that the principal question for consideration is whether in an action to recover damages for personal injuries received from an unguarded or unlighted obstruction in a street it is necessary to prove that the city had knowledge or notice, when the city had given permission **214** to occupy a part of the street at the place with material for the construction of a building upon the adjacent property; or, differently stated, whether it is the duty of the city when it gives such permission to see that a nuisance is not created.

In *Clark v. Fry*, 8 Ohio St. 358, 72 Am. Dec. 590, it is ruled:

"1. The right of transit in the use of the public highways is subject to such incidental, temporary or partial obstructions as manifest necessity requires; and among these are the temporary impediments necessarily occasioned in the building and repair of houses on lots fronting upon the streets of a city, and in the construction of sewers, cellar drains, etc. These are not invasions, but qualifications, of the right of transit on the public highway; and the limitation on them is, that they must not be unnecessarily and unreasonably interposed or prolonged.

"2. Such temporary obstructions upon the highway, when guarded with due care to prevent danger to the public, and not unnecessarily extended or continued, are not nuisances, and do not require a license from the municipal authority to legalize them, although suitable regulations by the city authorities, requiring such obstructions to be properly guarded, and to prevent them from being made in an improper manner, or continued unreasonably, are usual and highly proper."

If the regulation of such obstructions is highly proper, it would seem unreasonable to hold that a regulation, requiring a permit to be obtained, may be enforced only at the risk of becoming liable in damages for such injuries as may result from its abuse; and strange that such regulation is usual.

²¹⁵ An examination of the cases will show that it is only when the city is the actor or in cases of license by the city to do an intrinsically dangerous thing in the street, and not in cases properly of mere regulation that the city is liable without notice, or is charged with notice by the fact that it gave the permit to do the thing in the street. An ordinance regulating the use of the street for such purposes emanates from the police power of the city, and the granting of the permit under it or neglect to enforce its provisions cannot make it civilly liable to an individual in consequence.

Referring to the cases cited by counsel for defendant in error, we observe that *Gable v. Toledo*, 16 C. C. R. 515, is a case of permission to make a dangerous excavation in the street.

Circleville v. Neuding, 41 Ohio St. 465, and *Railroad Co. v. Morey*, 47 Ohio St. 207, 24 N. E. 269, are cases of dangerous excavations in the street, and are not in point, for the reason that the question there decided is that a party causing a dangerous excavation in a street cannot escape liability on the ground that the work was done by an independent contractor.

The judgment of the circuit court in *Hewitt v. Cleveland*, 21 C. C. R. 505, is reversed, and that of the court of common pleas affirmed by this court in *Cleveland v. Hewitt*, 67 Ohio St. 534, 67 N. E. 1095. *McPherson v. District of Columbia*, 7 Mackey, 564, and *Mayor etc. v. Donnelly*, 71 Ga. 258, are cases of excavations in the street.

In *Wilson v. Watertown*, 5 Sup. Ct. Rep. 579, a railroad company had been authorized by statute to construct its road across a street with the city's assent and the company was required to restore the street to its former state. The plaintiff ²¹⁶ sued the city to recover for injuries received from obstructions on the sidewalk placed there by the railroad company, and was nonsuited on the ground that the statute made it the duty of the company to restore the street, and that this relieved the city of its duty to keep the street safe. The question as to notice was not made, but it is assumed that notice was necessary. On page 581 it is said: "A municipal corporation may not be liable for an injury caused by a nuisance in a street created without its authority or sanction, or of the existence of which it had no notice. But the nonsuit in this case was not put upon that ground, nor does that question arise here for the reason that there was at least some evidence from which the jury might have been warranted in finding that the defendants had notice of the nuisance which caused the injury to the plaintiff."

The case of *District of Columbia v. Woodbury*, 136 U. S. 450, 10 Sup. Ct. Rep. 990, 34 L. ed. 472, arose out of an excavation in the sidewalk. The opinion is by Mr. Justice Harlan. The instructions to the jury on the trial were given by Cox, J., and Mr. Justice Harlan approves of the following principles which he states were covered by the charge:

"3. People must build houses, and, in order to do that it is necessary to excavate for cellars and areas, if needed, and to dig trenches to connect with the water mains, gas-pipes and sewers. Nobody has a right to do this without a permit from the authorities, and if any person undertakes to do it without a permit, he would be responsible for any injury resulting; but the district would not be, unless it had the notice already spoken of. If a permit is granted, as is usually the case, the fact is ²¹⁷ notice to the authorities that the work is in progress, and then they are charged with the duty of seeing that it is properly conducted.

"4. These works are necessarily dangerous to life and limb, and it is the duty of a person doing the work to protect it against accident to travelers on the street, and the duty of a private person is very much the same as that of the district itself when it is prosecuting an improvement. If a private individual fails to protect the excavation or hole, or whatever it may be, it is the duty of the district authorities to see that it is protected, and they are held responsible that he shall do it, for they were notified that he was going on with the work when he obtained his permit. If the individual himself supplies the protection against danger, then the duty will have been discharged on his part, and that of the district also will have been discharged just the same as in the case of the works being constructed by itself. If, then, by any unforeseen accident or the act of somebody that could not be anticipated, the protection has been removed and new danger supervenes, of course the law about notice applies."

It is to be noticed that the principles of law there laid down relate to excavations, "works necessarily dangerous."

The principles of law given to the jury in *King v. Cleveland*, 132 U. S. 295, 10 Sup. Ct. Rep. 90, 33 L. ed. 334, a case of obstructions placed in a street for building purposes, are also approved by Mr. Justice Harlan. The charge to the jury in that case was given by Welker, J., and is reported in *King v. Cleveland*, 5 Ohio Fed. Dec. 444, 28 Fed. 835, and he expressly instructs the jury that the ²¹⁸ city, notwithstanding it had given permission to occupy a portion of the street with building materials, would not be liable for injuries resulting from a failure to properly barricade or light the obstructions, in the absence of notice, and furthermore, that the city having provided in the permit that sufficient lights should be placed to give warning of the obstructions, had the right to act upon the assumption that such lights were there. He said: "Without any permit to do so, owners of lots abutting directly on streets in a city like Cleveland have a right to the use of a reasonable or necessary part of the street on which to deposit building materials in the erection of their buildings, and the city could not prevent them from such reasonable use; but they must comply with reasonable requirements made by the city to provide for the safety of persons using the streets."

"Having allowed Mr. Rosenfeld and the contractor, by permits granted in the usual way, to use one-half of the street on which to deposit necessary building materials, with the

provision therein as to proper signals, as stated, and such building materials being in the street at the time the plaintiff alleges he received the injury of which he complains, the question arises, What was the duty of the city in seeing that proper guards and proper lights were placed at or near the materials so deposited?

“The principal negligence complained of by the plaintiff is that, being in the night-time, no lights were placed at or near the materials sufficient to warn him of danger as he passed along the street. Having provided in the permits to Rosenfeld and Kosterling, the contractor, that in the night-time sufficient lights should be placed by them at or near ²¹⁹ materials placed and remaining in the street to warn persons passing along of dangerous obstructions, the city had a right to suppose such lights were so placed in the night-time. While it was the general duty of the city to keep its streets in safe condition for the use of persons passing over the same, and liable for injuries caused by its neglect or omission to keep them in repair and reasonably safe, yet in such a case, the basis of the action being negligence, it is not liable for an injury resulting from such negligence unless it had notice or knowledge of the defect that caused the injury before it was sustained; or, in the absence of express or direct notice, such notice or knowledge may be inferred from facts and circumstances showing that such want of proper lights to denote dangerous obstructions existed for a sufficient period of time, and in such a public and notorious manner, as that the officers representing the city, or those employed by the city for the purpose of removing obstructions in the city, in the exercise of ordinary care and diligence, ought to have known of such want of proper guards in the night-time.

“The city is not an insurer of the absolute safety of persons passing along its streets in the night-time. It is only required to exercise ordinary care for such safety; and in judging of what would be ordinary care, you are to take into account the great number of streets, and their mileage, contained in the city. If the city, or the officers or employers representing it, had such notice or knowledge, direct or implied, as I have stated, then it was its duty to see that proper lights in the night-time were placed at or near the obstructions, such as would be sufficient to warn persons of reasonable and ordinary prudence ²²⁰ of the presence of such obstructions; and fail-

ing to do so, it would be liable for injuries resulting from such failure."

These cases, read in the light of the facts, an excavation in the sidewalk, necessarily dangerous, in the one case, and in the other an obstruction in the street, not necessarily dangerous, consisting of building materials, are not in conflict, and the present case being one of an obstruction in the street, not necessarily dangerous, we are not required to determine whether *Clark v. Fry*, 8 Ohio St. 358, 72 Am. Dec. 590, in so far as it applies to excavations or obstructions necessarily dangerous is too broad, or whether in a case of permit to the owner of adjacent property to make an excavation in the street for some lawful purpose incident to the use of his property, it would be the duty of the city to see that a nuisance is not created.

To hold that the city may not grant such a permit without assuming the duty of seeing that the obstruction is properly guarded with barriers and lights would require the city to exact from the property owner the expense of doing so, which, in many cases, would be a hardship on the property owner and an unreasonable regulation; so that, being of the opinion that a permit by a city to use part of the street for the placing of building materials for use in the construction of a building on the adjacent property is a mere regulation of a right of the property owner to make such use of the street, and not a license to do an act in the street which but for such license would be illegal or a nuisance, the city, by giving such permit, is not charged with the duty of seeing that the place is guarded, and will not be liable in damages to a person injured in consequence of the omission to guard such place with barriers or lights unless it ²²¹ had notice, express or implied, of such omission and after such notice was guilty of negligence.

The judgments of the circuit court and of the court of common pleas are reversed, and judgment is entered for the plaintiff in error upon the special findings.

Davis, C. J., Shauck, Price, Crew and Spear, JJ., concur.

The Liability of Municipal Corporations for defects and obstructions in its streets and highways is discussed at length in the monographic note to *Dudley v. Flemingsburg*, 103 Am. St. Rep. 257-295.

McBRIDE v. VANCE.

[73 Ohio St. 258, 76 N. E. 938.]

ESTATES OF DECEDENTS.—The Necessity for Administration of an estate of a decedent arises out of the common-law doctrine that his personal property descends to his executor or administrator. (p. 725.)

ESTATES OF DECEDENTS, Title to Personal Property.—On the death of the owner of personal property, his title thereto does not vest in his heirs or legatees, but remains in abeyance until his executor or administrator is appointed. Hence, the sole heir of the holder of a promissory note cannot as such maintain any action thereon. (p. 726.)

Action by Eleanor Vance, claiming as sole heir of T. J. Robinson, to recover of C. E. McBride, as administrator of J. B. Daily, deceased, on a promissory note executed by the latter to Robinson. The judgment in the court of common pleas in favor of the plaintiff was affirmed on appeal to the circuit court.

Cummings, McBride & Wolfe, for the plaintiff in error.

H. E. Bell and George Brinkerhoff, for the defendant in error.

261 SUMMERS, J. Considerable space in the briefs of counsel is given to a consideration of the questions whether the credit of the date 1887, in the absence of any evidence tending to prove when or by whom it was made, saved the action on the note from the bar of the fifteen year statute of limitation, and whether the indorsement of that credit on the note operated as an allowance of it as a claim against the estate of J. B. Daily by his administrator.

It is not necessary to determine either question; the first, because it is not raised either by demurrer or answer, and the second, because there is no evidence that Schaden was administrator of the estate **262** of Daily, or that he made this payment upon the note, and for the further reason that the case is disposed of on other grounds.

Nor is it necessary to consider whether the statutes of limitation pleaded by the answer are a bar, because it does not appear that the note ever was presented as a claim against the estate of Daily to the administrator de bonis non by anyone to whom the administrator legally might have paid it.

In Williams on Executors, seventh American edition, 775, it is said: "It may be stated that, both at law and equity, the whole personal estate of the deceased vests in the executor or administrator." And that: "The interest which an executor or administrator has in the goods of the deceased is very different from the absolute, proper, and ordinary interest which every one has in his own proper goods; for an executor or administrator has his estate as such in *auter droit* merely, viz., as the minister or dispenser of the goods of the dead."

In Woerner's American Law of Administration, second edition, section 199, it is said that the necessity of administration arises out of the common-law doctrine that the personal property of the decedent descends to the executor or administrator, and that this doctrine is recognized substantially in all the states except Louisiana; and further: "The direct consequence of this principle of the law is, that without due course of administration the claims of creditors cannot be lawfully satisfied and neither heirs nor legatees can obtain a legal title to their legacies or distributive shares; and that neither devisees nor heirs can hold the real estate to which they succeed free from the claims of creditors of the deceased, against whom limitation does not, in some states, run after the ²⁶³ debtor's death, until there be lawful administration of his estate. Another consequence is, that the payment of debts to the deceased can be coerced by no one but the lawfully appointed executor or administrator, even in equity, because there is no privity between the debtors and any person other than the legal representative. He stands as the representative of those interested in the devolution of the personalty of the deceased, including creditors of the estate as well as legatees and distributees."

The statutes and decisions in this state both accord with the above statement of the law.

Section 5994 of the Revised Statutes provides that upon the decease of any inhabitant of this state letters testamentary or letters of administration on the estate, shall be granted by the probate court of the county in which the deceased was an inhabitant or resident at the time of his death; and when any person shall die intestate in any other state or country leaving any estate to be administered within this state, administration thereof shall be granted by the probate court of any county in which there is an estate to be administered. Section 6007 provides for the appointment of a special administrator

to collect and preserve the effects of the deceased when from any cause there shall be a delay in granting letters testamentary or of administration. Section 6014 provides that administration shall not be originally granted as of right after the expiration of twenty years from the death of the testator or intestate, but provides that the probate judge shall have power as well after as before the expiration of said period of twenty years to grant letters of original administration on good cause shown. And section 5997 provides that if the executor is residuary ²⁶⁴ legatee, the probate court may, in a measure, dispense with the general administration upon his giving bond to pay all the debts and legacies of the testator.

In *Clark v. Boyd*, 2 Ohio, 56, the facts are, that Boyd gave a promissory note to one Pierce. After the death of P., the note was found among his papers, indorsed by him to Clark. The executor, supposing it to be the property of C., did not inventory it as a part of the estate of P., but delivered it to C. The court ruled, in substance, that the assignment without delivery, when no contract of sale was proved, was a mere nullity, that the title vested by the death of P. in his executors, and a delivery without assignment by them to C. did not vest the title in C.

In *Lewis v. Eutsler*, 4 Ohio St. 354, the question was, whether the descent of the personal estate of a decedent was affected by a statute passed while the estate was in the course of settlement, and Ranney, J., in the opinion said: "When Perkey died, the legal title to all his personal property vested in his personal representative. He alone could sue for and recover it, and convert it into money. It vested in him, it is true, as a mere trust estate, for the benefit of creditors and distributees." And this case is cited by him in support of his contention that such is the law in *Davis v. Corwine*, 25 Ohio St. 668, where it is expressly ruled that: "The heirs of an estate cannot, even after settlement by the administrator, and where there are no outstanding debts, maintain an action in their own names to recover possession of assets belonging to the estate, or to compel the executors of a party who had a life interest in such assets, and has wrongfully ²⁶⁵ disposed of them by will, to account for the same."

In *Chappelear v. Martin*, 45 Ohio St. 126, 12 N. E. 448, the suit was brought by Martin as administrator of the estate of a Mrs. T. to foreclose a mortgage made by C. to secure certain notes given by him to her, and made payable to her or

bearer. She was in ill-health and did not expect to live long, and by her direction the notes were made payable to her or bearer, upon the assumption that in the event of her death they might be collected by her husband without the trouble and expense of administration. She died intestate shortly thereafter, and C. paid a large amount on the notes to the husband. The administrator was appointed about eight years after her decease, and it was decided that: "Where a note was taken by a wife payable to herself or bearer, with the design that, in case of her death, it might be collected by her husband without the expense of administration, the fact that after her death it was presented by him to the maker, who paid it, supposing that the husband, by reason of the intention of the wife at the time the note was executed, was entitled to receive payment, will not constitute a defense as against the administrator of the wife's estate," on the ground that any agency she may have conferred on her husband in her lifetime to collect the notes was revoked by her death and that the title on her death passed to the administrator. In *Sommers v. Boyd*, 48 Ohio St. 648, 29 N. E. 497, Williams, C. J., quotes with approval the statement of Parker, C. J., in *Jewett v. Smith*, 12 Mass. 310, that "The property may be considered in abeyance until administration is granted, and is then vested in the administrator by relation from the time of the death." And based upon that, this court there ²⁶⁶ held that: "When administration is granted upon the estate of a deceased ward, the assets vest immediately in the administrator, whose title, by relation, dates back to the time of the decease."

In *Presbury v. Pickett*, 1 Kan. App. 631, 42 Pac. 405, it is decided that: "The right to maintain an action on a promissory note belonging to the estate of a deceased person is vested in the personal representative of the deceased, and not in his heir at law."

And in a well-considered case in Alabama, *Costephens v. Dean*, 69 Ala. 385, it is decided that: "Distributees or legatees have no title to the personal assets of a decedent's estate, and are not appointed by law to demand or receive them. All their interest is secondary, and is capable of conversion into unqualified ownership only through the process of administration."

Woerner, section 201, refers to quite a number of states in which exceptions to the general rule are made in equity,

holding administration unnecessary where there are no debts of the estate, and only distribution to be made to those entitled, but this is not an equitable action, and there is no proof that there are no debts, so that it is unnecessary to consider whether there may be exceptions in this state.

The plaintiff below having failed to prove title in herself to the note, the finding and judgment in her favor are not sustained by the evidence, and the judgments of the circuit court and of the court of common pleas are reversed.

Davis, C. J., Shauck, Price and Spear, JJ., concur.

RIGHTS OF AN HEIR IN THE PERSONAL PROPERTY OF HIS ANCESTOR.

I. Descent of Title to Personal Property.

- a. General Rule of Succession, 727.
- b. Abeyance of Title and Relation to Time of Death, 728.
- c. Nature of Executor's Title, 728.

II. Dispensing with Administration of Estate.

- a. By Agreement Among Heirs, 729.
- b. In Courts of Equity, 730.

III. Possession of Personal Assets.

- a. Right of Heir to Possession in General, 731.
- b. Authority to Confer Lien upon Attorney, 731.

IV. Actions in Respect to Personal Estate.

- a. Right of Heir to Maintain in General, 731.
- b. In Case of Misconduct of Executor, 732.
- c. When No Debts nor Administration, 733.
- d. After Long Lapse of Time Without Administration, 734.
- e. After Death of Administrator, 734.
- f. After Close of Administration, 735.

I. Descent of Title to Personal Property.

a. General Rule of Succession.—At the common law, and under the law as it exists in a majority of the American states, personal property, including choses in actions as well as goods and chattels, vests, on the death of the owner, in his executor or administrator, and does not descend to his heirs except through the medium of administration: Beattie v. Abererombie, 18 Ala. 9; Costephens v. Dean, 69 Ala. 385; Pryor v. Ryburn, 16 Ark. 671; Roorbach v. Lord, 4 Conn. 347; Hall v. Cowle's Estate, 15 Colo. 343, 25 Pac. 705; Smith v. Turner, 112 Ga. 533, 37 S. E. 705; Bishop v. Matney (Ky.), 78 S. W. 856; Schaub v. Griffin, 84 Md. 557, 36 Atl. 413; Dawes v. Boylston, 9 Mass. 337, 6 Am. Dec. 72; Prouty v. Wilson, 123 Mass. 297; Bowen v. Lansing, 129 Mich. 117, 95 Am. St. Rep. 427, 88 N. W. 384, 57 L. R. A. 643; Green v. Tillman, 124 Mo. 372, 27 S. W. 391; Perkins v. Goddin, 111 Mo. App. 429, 85 S. W. 936; Cox v. Yeazel, 49 Neb. 343, 68 N. W. 483; Robinson v. Adams, 30 Misc. Rep. 537, 63 N. Y. Supp. 816; Bungard v. Miller (Pa.), 8 Atl. 209; Thurman v. Shelton, 18 Tenn. (10 Yerg.) 383; Murphy v. Hanrahan, 50 Wis. 485, 7 N. W. 436; Melms

v. Pfister, 59 Wis. 186, 18 N. W. 255. Even though a chose is given as a specific legacy, it passes, on the death of the testator, to his executor: *Hayes v. Hayes*, 45 N. J. Eq. 461, 17 Atl. 634.

In some of the states, however, the statutes provide that the personal estate of a deceased person, as well as his real estate, shall vest in his heirs, subject only to the right of his personal representative to possession for specific purposes: *Beckett v. Selover*, 7 Cal. 215, 68 Am. Dec. 237; *Rankin v. Newman*, 114 Cal. 635, 46 Pac. 742, 34 L. R. A. 265; *Litz v. Exchange Bank*, 15 Okla. 564, 83 Pac. 790; *Ansley v. Baker*, 14 Tex. 607, 65 Am. Dec. 136; *Powers v. Morrison*, 88 Tex. 133, 53 Am. St. Rep. 738, 30 S. W. 851, 28 L. R. A. 521. In some of the states, moreover, the common-law doctrine has been so much relaxed, as will directly appear, that the administration of personal property may in some cases be dispensed with.

b. Abeyance of Title and Relation to Time of Death.—Where a person dies intestate, the common-law theory is that the title to his personal estate remains in abeyance until the appointment of an administrator, and then it vests in him by relation as from the death of the owner: See the principal case, ante, p. 723; *McDearmon v. Maxfield*, 38 Ark. 631; *Liptrot v. Holmes*, 1 Ga. 381; *Haynes v. Harris*, 33 Iowa, 516; *Hagthorp v. Hook's Admrs.*, 1 Gill & J. 270; *Pritchard v. Norwood*, 155 Mass. 539, 30 N. E. 80; *Gilkey v. Hamilton*, 22 Mich. 283; *Brackett v. Hoitt*, 20 N. H. 257; *Whit v. Ray*, 26 N. C. 14; *Brown v. Bibb*, 42 Tenn. (2 Cold.) 434; *McKenney v. Minahan*, 119 Wis. 651, 97 N. W. 489. In this last case it is said: "It is elementary that by the common law, which prevails here on the subject, upon the decease of the owner of personalty, the title is at once suspended and remains so till the proper official designation of a personal representative shall have been made and he shall have duly qualified as such, when it at once devolves upon him, and a transfer from him in due course of law is necessary to pass the title to another." Until an administrator is appointed, however, an heir may rightfully take possession of and care for the property: *Hardy v. Wallis*, 103 Ill. App. 141; *Pritchard v. Norwood*, 155 Mass. 539, 30 N. E. 80.

The theory that the title to the personal property of an intestate is in abeyance until the appointment of an administrator does not prevail in all of the states. Said Chief Justice Hemphill in *Bufford v. Holliman*, 10 Tex. 560, 60 Am. Dec. 223: "The theory that the personal estate is in abeyance until the grant of administration was never the law of this state. It vested in its true owners, and required no aid of an administrator to invoke it from the clouds for no other purpose, perhaps, than to transfer it to a legatee."

c. Nature of Executor's Title.—At the ancient common law it seems that the title to personal property of a deceased person vested absolutely in his personal representative, and the surplus thereof, after the payment of legacies, debts and the charges of administration, belonged to the executor or administrator as recompense for his ser-

vices. This doctrine, however, has never obtained in America. Executors or administrators, in this country, have always been regarded as trustees who hold the title and possession of the personal estate of their decedent for the benefit of the creditors, legatees, heirs and distributees: See the notes to *Hubbard v. Ricart*, 23 Am. Dec. 201; *Fletcher v. American Trust etc. Co.*, 78 Am. St. Rep. 181; and the cases of *Chamberlin's Appeal*, 70 Conn. 363, 39 Atl. 734, 41 L. R. A. 204; *Lewis v. Lyons*, 13 Ill. 117; *Jaques v. Ballard*, 111 Ill. App. 567; *Byers v. Weeks*, 105 Mo. App. 72, 79 S. W. 485; *Carpenter v. United States Fidelity etc. Co.*, 123 Wis. 209, 101 N. W. 404; *Burnes v. Burnes*, 137 Fed. 781. "An executor," says Justice Follett, "as such, takes the unqualified legal title of all personalty not specially bequeathed, and a qualified legal title to that which is bequeathed. He holds, not in his own right, but as a trustee, for the benefit of the creditors of the testator; and of those entitled to distribution under the will, or, if not all bequeathed, under the statute of distributions": *Blood v. Kane*, 130 N. Y. 514, 29 N. E. 994, 15 L. R. A. 490; *Huyler v. Dolson*, 101 App. Div. 83, 91 N. Y. Supp. 794.

II. Dispensing with Administration of Estate.

a. **By Agreement Among Heirs.**—In many of the states there is no absolute necessity for an administration of the estate of a decedent to vest title to his personalty in the heirs, if there are no debts against the estate, and the heirs agree upon a division or distribution among themselves: See the note to *Hubbard v. Ricart*, 23 Am. Dec. 203; *McCleary v. Menke*, 109 Ill. 294; *Martin v. Reed*, 30 Ind. 218; *Andrews v. Brumfield*, 32 Miss. 107; *McDowell v. Orphan Asylum*, 87 Mo. App. 386; *Elliott v. Wheedbee*, 94 N. C. 115; *Christian v. Clark*, 78 Tenn. (10 Lea) 630; *McIntyre v. Chappell*, 4 Tex. 187; *Babbitt v. Bowen*, 32 Vt. 437. To quote from *Granger v. Harriman*, 89 Minn. 303, 94 N. W. 869: "It is true that the personal property of a person dying intestate passes to his personal representative, but the title and right acquired by the latter is a qualified one, and for the purposes of administration only. The administrator is charged with the duty of collecting the assets of his intestate and paying and discharging the debts chargeable against the estate, and, when that is fully accomplished, delivering the remainder of the property, if any, to the heirs. Subject to this right of possession and qualified title, the property descends direct to the heirs, and no final decree of the probate court is necessary where those entitled to the estate agree upon a division of the same. The substantial facts accomplished by the administration are the payment of debts and the distribution of the residue of the property. So that, if there are no debts and a division of the property be amicably made by those entitled to it, nothing remains for an administrator to act upon. Many of the authorities sustain the right of the interested parties in such cases to dispense with administration, even before the time limited for creditors to appear and present their claims, by paying all debts, or showing that none ex-

isted, and distributing the property among those entitled to it: *Foote v. Footé*, 61 Mich. 181, 28 N. W. 90; *Glover v. Hill*, 85 Ala. 41, 4 South. 613; *Akin v. Aiken*, 78 Ga. 24, 1 S. E. 267; *McCrackin v. McCaslin*, 50 Mo. App. 85; *Roberts v. Messinger*, 134 Pa. St. 298, 19 Atl. 625; *Pratt v. Manhattan Life Ins. Co.*, 47 La. Ann. 855, 17 South. 341."

To quote from the opinion of Justice Sherwood: "The legal estate only in personal property vests in the administrators; the equitable estate therein is in the heirs, or other persons entitled to distributive portions thereof. The estate of the administrators therein is a trust for that purpose, and is created only for the purpose of laying hold of the estate and making such distribution. When there are no creditors, the heirs and legatees, may collect, if they can, the estate together, and make such distribution of the estate among themselves as they may agree to and carry into effect, without the intervention of any administrators; and the law favors such arrangements. In such cases it is only where the heirs or legatees fail to make such collection and distribution that administration becomes necessary. When such arrangement and distribution have been made and executed, it will be binding between the parties making it, whenever the rights of creditors do not intervene. And where there are no creditors, the heirs or legatees may divide up and distribute the personal property of the decedent, without converting it into money, in such manner as they see fit; and when such division has been executed, even though it is not such as the decedent has made by his will, or such as the law would make where there is no will, it will be binding upon all the parties to the agreement": *Footé v. Footé*, 61 Mich. 181, 28 N. W. 90; *Ormsbee v. Piper*, 123 Mich. 265, 82 N. W. 36.

"We have uniformly held," said Chief Justice Stone in *Wright v. Robinson*, 94 Ala. 479, 10 South. 319, "that where nothing remains to be done except the reduction of the assets to possession and their distribution among the next of kin, administration may be dispensed with." "While it is true," said Justice Sterrett in *Roberts v. Messinger*, 134 Pa. St. 298, 19 Atl. 625, "that administration is the legally appointed channel through which an absolute title to personal property of an intestate is acquired, it is equally true that the property of such intestate passes to those entitled to the succession, subject to the claims of creditors and the laws in force by administering it; but, if there be no debts to pay and no distribution needed, administration is not indispensable to that dominion over the property which is necessary to maintain trespass, trover, or an action of account render."

b. In Courts of Equity.—In some jurisdictions, notably in Alabama, courts of equity will, in exceptional cases, dispense with an administration of the personal property of a deceased person, and collect and distribute the assets of the estate: *Cooper v. Davison*, 86 Ala. 367, 5 South. 650; *Robertson v. Robertson*, 120 Ind. 333, 22 N. E. 310. "When an estate is entirely free from debt, and the

only office of an administrator would be the reduction of the assets to possession and distribution, the administration is deemed a 'useless ceremony,' and it has long been the practice of courts of equity in this state to dispense with it, entertaining suits by the next of kin': *McGhee v. Alexander*, 104 Ala. 116, 16 South. 148.

III. Possession of Personal Assets.

a. Right of Heir to Possession in General.—The right to the possession of the personal property of a deceased person is in his personal representative, and not in his heirs or distributees, until after distribution: *Page v. Tucker*, 54 Cal. 121; *Freese v. Hibernia Sav. etc. Soc.*, 139 Cal. 392, 73 Pac. 172; *Roorbach v. Lord*, 4 Conn. 347; *Williams v. Williams*, 125 Ind. 156, 25 N. E. 176; *Ormsbee v. Piper*, 123 Mich. 265, 82 N. W. 36; *Gillet v. Camp*, 19 Mo. 404; *Buckley v. Buckley*, 16 Nev. 180; *Tappan v. Tappan*, 30 N. H. 50. And the right of possession, upon the appointment of an administrator, extends by relation to the time of the death of the intestate: *Jahns v. Nolting*, 29 Cal. 507; *Lawrence v. Wright*, 40 Mass. (23 Pick.) 128. The intervening possession of the heirs, however, for the purpose of caring for the property, is not wrongful: *Hardy v. Wallis*, 103 Ill. App. 141; *Pritchard v. Norwood*, 155 Mass. 539, 30 N. E. 80.

The fact that an executor has the right to the custody of the title deeds of his testator does not bar the right of parties in interest to examine them: *Neece v. Neece*, 104 Va. 343, 51 S. E. 739.

b. Authority to Confer Lien upon Attorney.—As an heir has neither the right of possession of the papers and money of his ancestor nor an ascertained and certain interest therein, he cannot confer upon an attorney, by employing him to protect his interest in the estate, a lien which can be actively enforced: *Foss v. Cobler*, 105 Iowa, 728, 75 N. W. 516.

IV. Actions in Respect to Personal Estate.

a. Right of Heir to Maintain in General.—The general rule is that an heir, although he may be the sole distributee, cannot, before a decree of distribution, maintain an action at law or a suit in equity in respect to the personal estate of his ancestor, the right to maintain such suits and actions ordinarily being vested in the personal representative alone: *Lemon's Heirs v. Rector*, 15 Ark. 436; *Wheelan v. Edwards*, 31 Ark. 723; *Valencia v. Bernal*, 26 Cal. 328; *Morgan v. Woods*, 69 Ga. 599; *Pond v. Sweetser*, 85 Ind. 144; *Jewell v. Gaylor*, 157 Ind. 188, 60 N. E. 1083; *Emerson v. Staton*, 19 Ky. (3 T. B. Mon.) 116; *Hellman v. Wellenkamp*, 71 Mo. 407; *Upehurch v. Anderson* (Tenn. Ch.), 62 S. W. 1115; *Stehn v. Hayssen*, 124 Wis. 583, 102 N. W. 1074; *Newman v. Schwerin*, 61 Fed. 865, 10 C. C. A. 129.

For example, an heir cannot maintain an action to recover possession of personalty belonging to his ancestor: *Adey v. Adey*, 58 Mo. App. 408; *Weeks v. Jewett*, 45 N. H. 540; *Champollion v. Corbin*, 71 N. H. 78, 51 Atl. 674; *Woodin v. Bagley*, 13 Wend. 453; *Segelken v.*

Meyer, 94 N. Y. 473; Varner v. Johnston, 112 N. C. 570, 17 S. E. 483; nor can he sue for the conversion of such property: Thompson v. Fenn, 100 Ga. 234, 28 S. E. 39; Smith v. Turner, 112 Ga. 533, 37 S. E. 705; Niehaus v. Cooper, 22 Ind. App. 610, 52 N. E. 761; Scruggs v. Scruggs, 105 Fed. 28. An heir cannot recover a debt, demand or chose due the estate: Walpole's Admr. v. Bishop, 31 Ind. 156; Wiggin v. Cracraft (Ky.), 40 S. W. 907; Loyd v. Loyd, 20 Ky. Law Rep. 347, 46 S. W. 485; Hollowell v. Cole, 25 Mich. 345; Darwin v. Moore, 58 S. C. 164, 36 S. E. 539; Cochran's Admr. v. Thompson, 18 Tex. 652; Richardson v. Vaughn (Tex. Civ. App.), 22 S. W. 1112. He cannot sue on a note payable to his ancestor: See the principal case, ante, p. 723: Leamon v. McCubbin, 82 Ill. 263; Baird v. Brooks, 65 Iowa, 40, 21 N. W. 163; Presbury v. Pickett, 1 Kan. App. 631, 42 Pac. 405; Mears v. Smith (S. Dak.), 102 N. W. 295. He cannot recover the unpaid purchase price of lands sold by the decedent: Anthony v. Peay, 18 Ark. 24; Bryant v. Atlantic Coast Line R. R. Co., 119 Ga. 607, 46 S. E. 829. Nor can he maintain an action for the breach of a contract made with his ancestor: Bourget v. Monroe, 58 Mich. 563, 25 N. W. 514; Brueggeman v. Jurgensen, 24 Mo. 87. He cannot recover on a covenant in a bond for the payment of money: Johnson v. Pierce, 12 Ark. 599; nor for the breach of a covenant in a deed against encumbrances: Frink v. Bellis, 33 Ind. 135, 5 Am. Rep. 193. As to his right to recover for a trespass to the lands of his ancestor committed during his lifetime, see Conklin v. Alabama etc. Ry. Co., 81 Miss. 152, 32 South. 920; Mast v. Sapp, 140 N. C. 533, 111 Am. St. Rep. 864, 53 S. E. 350.

The heirs of a deceased legatee or distributee cannot, as a rule, maintain an action to recover the legacy or distributive share of their ancestor, the right to sue being in his personal representative; Sullivan v. Lawler, 72 Ala. 68; Gale v. Nickerson, 151 Mass. 428, 24 N. E. 400, 9 L. R. A. 200; Shaver v. Shaver, 1 N. J. Eq. 437. This rule has been modified in some jurisdictions so as to permit such an action when there are no debts owing from the ancestor and there is no administration of his estate: McDowell v. Orphan School, 87 Mo. App. 386; Hart v. Fisher, 96 Tenn. 570, 35 S. W. 1085.

b. In Case of Misconduct of Executor.—While an heir cannot, as a general rule, maintain an action to recover the assets or collect the debts due the estate, still, if there are special circumstances, such as fraud, collusion, insolvency or unwillingness to act on the part of the personal representative, the heir may turn to a court of equity and obtain relief by suing in his own name: Worthy v. Johnson, 8 Ga. 236, 52 Am. Dec. 399; Southwestern R. R. Co. v. Thomason, 40 Ga. 408; Thomas v. White, 13 Ky. (3 Litt.) 177, 14 Am. Dec. 56; McChord v. Fisher's Heirs, 52 Ky. (13 B. Mon.) 193; Randel v. Dyett, 38 Hun, 347; Fleming v. McKesson, 56 N. C. (3 Jones Eq.) 316; Trotter v. Mutual Reserve etc. Assn., 9 S. Dak. 596, 62 Am. St. Rep. 887, 70 N. W. 843; Patton v. Gregory, 21 Tex. 513; Roberts v. King, 10 Gratt. 184; note to Hubbard v. Ricart, 23 Am. Dec. 202. The jurisdiction of

equity may be invoked by an heir after the final settlement of the estate, if the administrator has neglected to enforce demands due the estate: *Graves v. Pinchback*, 47 Ark. 470, 1 S. W. 682.

In the case of *Rowell v. Rowell*, 122 Wis. 1, 99 N. W. 473, Justice Dodge remarked in answer to the proposition that the plaintiffs showed no right of action in themselves because they, as heirs or distributees, had no title to the personal estate of their ancestor, such title being vested in the administrator: "Doubtless the law is so as to the legal title to any specific personal property. Nevertheless, the equitable beneficial interest in all property of a solvent estate is in the legal distributees during the whole period of administration. If that interest is invaded, they must have the right that a court's aid be invoked. Primarily and ordinarily that right is sufficiently protected by the power and duty of the administrator to bring suit to protect or reclaim any property of the estate. When, however, he allies himself with the wrongdoer, and serves as an obstacle to, instead of a protector of, the rights of his cestuis que trustent, courts of equity have no hesitation in recognizing the equitable interests of the latter as sufficient to give them standing as plaintiffs in a suit to accomplish that which the administrator ought, with all diligence and good faith to pursue, but will not. Such case is entirely analogous to that of any other holder of legal title, with fiduciary duties, who refuses to take the proper steps to protect the property. Those who must suffer ultimate injury may sue in equity to protect themselves."

c. When No Debts nor Administration.—In many jurisdictions an heir may maintain an action to recover the personal assets of the estate or collect the debts due it, if no administrator has been appointed and no indebtedness rests on the estate: *Moore*. Board of Commissioners, 59 Ind. 516; *Begien v. Freeman*, 75 Ind. 398; *Holzman v. Hibben*, 100 Ind. 338; *Ricks v. Hilliard*, 45 Miss. 359; *Lee v. Gibbons*, 14 Serg. & R. 105; *Hurt v. Fisher*, 96 Tenn. 570, 35 S. W. 1085; *Walker v. Abercrombie*, 61 Tex. 69. This rule is applicable in South Carolina in favor of a sole heir: *Grant v. Poyas*, 62 S. C. 426, 40 S. E. 891. In Texas, the widow and children of an insured may maintain an action on the life insurance policy, by averring that there are no debts and no administration, although the policy is made payable to the executors, administrators or assigns of the insured: *Sun Life Ins. Co. v. Phillips* (Tex. Civ. App.), 70 S. W. 603.

But such actions cannot be maintained, even in the above jurisdictions, without alleging and proving that there are no debts owing from the estate, and that no administration has been granted, or if granted has been closed: *Bryant v. Atlantic etc. R. R. Co.*, 119 Ga. 607, 46 S. E. 829; *Humphries v. Davis*, 100 Ind. 369; *Williams v. Williams*, 125 Ind. 156, 25 N. E. 176; *Finnegan v. Finnegan*, 125 Ind. 262, 25 N. E. 341; *Hall v. Brownlee*, 28 Ind. App. 178, 62 N. E. 457; *Cox v. Yeazel*, 49 Neb. 343, 68 N. W. 483; *Richardson v. Vaughan*, 86 Tex. 93, 23 S. W. 640. In Indiana, it is necessary to show that there is no surviving husband or wife of the decedent: *State v. Sanders*, 90

Ind. 421; *Brown v. Critchell*, 110 Ind. 31, 7 N. E. 888, 11 N. E. 486. An administration pending in another state does necessarily bar the action: *Hynes v. Winston* (Tex. Civ. App.), 54 S. W. 1069.

In some jurisdictions courts of equity are open to suits by heirs in case the deceased leaves no debts, and administration is not necessary. "When a person dies intestate, owing no debts, and the only duty which would devolve on the administrator, if one were appointed, would be that of making distribution, the equity of the distributees is perfect, and the court will dispense with an administration, entertaining suits by them for the recovery of the personal assets": *Teal v. Chancellor*, 117 Ala. 612, 23 South. 651.

d. After Long Lapse of Time Without Administration.—If the rule of the common law that the title to the personal estate of an intestate does not descend to his heirs but remains suspended and in abeyance until the appointment of an administrator, when it vests in him, is strictly adhered to, then if there is no administration, even for a long lapse of time, the title to personal assets does not vest in the heirs and they cannot maintain an action to collect or recover the same: *Haynes v. Harris*, 33 Iowa, 516; *McKenney v. Minaham*, 119 Wis. 651, 97 N. W. 489. This rule, however, has been departed from in some states, and heirs have been permitted to sue when many years have elapsed since the death of their ancestor, notwithstanding there has been no administration of his estate: *McDowell v. Orphan School*, 87 Mo. App. 386; *Bufford v. Hollman*, 10 Tex. 560, 60 Am. Dec. 223; *Clay v. Clay*, 13 Tex. 195.

Under a statute providing that administration cannot, under ordinary circumstances, be granted after the lapse of a certain period of time, the title to the personal property and choses seems to vest in the heirs jointly at the expiration of that period, and they may then maintain an action thereon: *Phinney v. Warren*, 52 Iowa, 332, 1 N. W. 522, 3 N. W. 157. As a rule, however, no such action can be maintained until the statutory time has expired: *Baird v. Brooks*, 65 Iowa, 40, 21 N. W. 163; *Mears v. Smith* (S. Dak.), 102 N. W. 295. "If the time had not expired within which an administrator might be appointed," to quote from *Phinney v. Warren*, 52 Iowa, 332, 1 N. W. 522, 3 N. W. 157, "it would seem certain that the action could not be maintained. But it is shown that the statutory period has expired and that no administrator can be appointed. Whether the heirs can now be regarded as holding the legal title to the note, we need not now determine. They acquired an interest in it at the death of the intestate, subject only to such rights as an administrator might have if one should be appointed. As no administrator can now be appointed, it appears to us that their interest is subject to nothing. Whatever obstacle, then, there might have been at one time to their maintaining an action, it has ceased to exist."

e. After Death of Administrator.—Where the administration of an estate has ceased by reason of the death of the administrator, and no attempt has been made by creditors, if any, to renew it, the sole heir

of the decedent may maintain an action to enforce a vendor's lien existing on land of the estate sold by the administrator under an order of court: *Sanders v. Moore*, 52 Ark. 376, 12 S. W. 783. And where an administrator recovers a judgment, and, after the settlement of the estate and the payment of debts, dies pending scire facias sued out by him on the judgment, the proceedings therein may be revived in the name of the distributees: *Crane v. Crane*, 51 Ark. 287, 11 S. W. 1.

f. After Close of Administration.—Where the administration of an estate has been closed and the debts of the decedent have been paid, the heirs and distributees have been permitted to maintain actions to recover personal assets and enforce written obligations payable to the deceased: *Wooten v. Steele*, 98 Ala. 252, 13 South. 563; *Lacey v. William's Heirs*, 8 Tex. 182. A contrary doctrine, however, has been laid down by some authorities: *Davis v. Corwine*, 25 Ohio St. 668. Where an administrator, on his final settlement and discharge, turns over to the heirs or distributees uncollected notes due the estate, perhaps in the belief that they are of little or no value, the heirs or distributees may sue on them in their own name (*Suit v. Crawford*, 100 Ky. 355, 38 S. W. 500; *Pratt v. Pratt*, 22 Minn. 148), and foreclose the mortgages, if any, given to secure them: *Plummer v. Park*, 62 Neb. 665, 87 N. W. 534; *Stanley v. Mather*, 31 Fed. 860. In case there is no administration of an estate, and no debts against it, an heir may sue on a note set apart to him upon a division of the personal assets by an agreement between the heirs: *Granger v. Harri-man*, 89 Minn. 303, 94 N. W. 869. After an estate has been finally settled and the administrator discharged, the heirs and distributees may sue in equity to recover personalty of which their ancestor was defrauded and which was not administered upon: *Hubbard v. Urton*, 67 Fed. 419.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

**PRETHROW v. WEST JERSEY AND SEASHORE RAIL-
ROAD COMPANY.**

[214 Pa. St. 112, 63 Atl. 415.]

CARRIERS—Through Ticket.—If a passenger purchases a single ticket for the whole journey with nothing on its face to indicate that any part of the transportation is to be by means of another carrier, in case of injury to him on a ferry during the transportation, he need not show, in order to recover, that the railroad company selling him the ticket also operated the ferry. (p. 737.)

CARRIERS—Passengers—Negligence—Question for Jury.—If a passenger on a ferry-boat is injured by a collision between such boat and a bulkhead, the question of the negligence of the railroad company operating the ferry is a question for the jury. (p. 737.)

E. J. Sellers, for the appellant.

T. J. Meagher, for the appellee.

¹¹³ FELL, J. The plaintiff purchased at the station of the defendant company in Gloucester, New Jersey, a ticket on which the following words were printed: "West Jersey and Seashore Railroad Company. Good for one passage from Gloucester to Philadelphia, Market street wharf." The method of transportation was by railroad from Gloucester to the defendant's station in Camden, thence by ferry across the Delaware river to Market street wharf, Philadelphia. The ticket was taken up by the conductor on the train. When the ferry-boat reached the Philadelphia side of the river, it ran into a bulkhead and the plaintiff was injured.

¹¹⁴ The defendant offered no evidence at the trial but relied on two grounds of defense: 1. That the ticket sold by

the defendant imposed no liability for the negligence of a connecting carrier, and there could be no recovery without evidence that the carrier operated the ferry-boat; 2. That there was no affirmative evidence of negligence in operating the boat.

The ticket purchased by the plaintiff was a single ticket for the whole journey, and there was nothing on its face to indicate that any part of the transportation was to be by means of another carrier. It imported prima facie that the defendant owned or operated all the means of transportation between the points named on the ticket, and no question of the liability of a connecting carrier arose in the case. The plaintiff was a passenger injured through the means of transportation, and she might have rested her case on the proof of these facts, and relied on the presumption of negligence arising from them. She, however, produced testimony to show actual negligence, and it is urged that this testimony rebutted the presumption and exonerated the defendant from blame. The substance of this testimony was that in order to avoid running into a tugboat which passed in front of the ferry-boat, the latter was turned from its course down stream and brought nearly to a stop; that after this the pilot seemed to have lost control of the boat and in the effort to get back to the dock after the tugboat had passed he ran the ferry-boat with great force into the bulkhead. Which boat had the right of way did not appear, but if we assume that the pilot of the ferry-boat was not negligent in not sooner stopping or turning from his course, the emergency in which he was suddenly called to act had passed and the collision with the bulkhead occurred when he was trying to get back to his course. The question of his negligence was therefore for the jury.

The judgment is affirmed.

The Liability of an Initial Carrier for the torts or negligence of connecting lines is discussed in the monographic note to *Pennsylvania Co. v. Loftis*, 106 Am. St. Rep. 604-612. If a person buys a coupon ticket over connecting railways, knowing that in issuing it the initial carrier acts only as agent of the others, the relation of carrier and passenger does not exist between him and the first railway after the train leaves its road: *McDonald v. Central R. R. Co.*, 72 N. J. L. 280, 111 Am. St. Rep. 672.

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. RICE v. PHILADELPHIA RAPID TRANSIT COMPANY.

[214 Pa. St. 147, 63 Atl. 419.]

STREET RAILWAYS—Passenger's Assumption of Risk.—A passenger who voluntarily rides on the running-board of a street-car takes upon himself the risk of his position. (p. 739.)

W. C. Gross, for the appellant.

T. Leaming and C. Biddle, for the appellee.

148 POTTER, J. Judgment of compulsory nonsuit was entered in this case, for the reason that it appeared from the evidence that the plaintiff, in anticipation of the stopping of the car, took a position on the outside of an open car, with one foot on the running-board ¹⁴⁹ and the other on the body of the car. She expected it to stop in front of the car barn, on the near side of Allegheny avenue, but instead of stopping at this point the car continued in motion and passed across the street, to stop at the far side. The plaintiff remained in the same position, which was evidently insecure, with the result that, as she claims, a sudden jerk threw her off in the middle of the street which the car was crossing. The suggestion of counsel for appellant that she was not voluntarily riding on the running-board does not seem to be borne out by the evidence. No satisfactory explanation was given as to why she could not have regained a position upon the body of the car, when she found that it had passed the point where she first expected to alight. She had been standing between the seats, and the space where she was standing was not apparently filled up when she left it.

In describing the accident she says: "I stood where I was, thinking maybe the car would stop; and before it did stop, it went on faster until it threw me off; it gave a sudden jerk in the middle (of Allegheny avenue)." The evidence does not show that the jerk to which she referred caused any disturbance to any other passenger.

In the case of Barry v. Union Traction Co., 194 Pa. St. 576, 45 Atl. 321, the plaintiff stood in much the same position as did this appellant, with one foot on the lower step and one on the platform, and while in that position was

jolted off at a street-crossing. The judgment of nonsuit there entered was affirmed by this court.

Again, in *Bumbear v. United Traction Co.*, 198 Pa. St. 198, 47 Atl. 961, we said that a passenger who rides upon the running-board of an open car assumes the risks incident to the usual swaying and jolting of the car. And in *Bainbridge v. Union Traction Co.*, 206 Pa. St. 71, 55 Atl. 836, where the plaintiff stepped down on the running-board, and while there the car stopped with a sudden and violent jerk which threw him off, we said: "When the appellant left his seat where he was safe and stepped down on the running-board of the car and remained there while it was in motion, he voluntarily put himself in a place of danger and took upon himself the risk of his position from any cause."

Under the authority of these cases, and others which might be cited, the trial court was entirely justified in entering judgment of compulsory nonsuit. The running-board is not intended ¹⁵⁰ as a place of conveyance, but only as an aid to passengers in getting on and off the car. If passengers voluntarily ride upon it, they must do so at their own risk.

The assignment of error is overruled and the judgment is affirmed.

One Who Rides on the Running-board of a street-car is not chargeable with contributory negligence if the car is full and he cannot get inside and other passengers are already riding on the outside when he takes passage: Indianapolis St. Ry. Co. v. Haverstick, 35 Ind. App. 281, 111 Am. St. Rep. 163, and cases cited in the cross-reference note thereto. It is otherwise, however, if he takes such a position when there is room inside the car: Woodroffe v. Roxborough etc. Ry. Co., 201 Pa. St. 521, 88 Am. St. Rep. 827.

MCCOLLIGAN v. PENNSYLVANIA RAILROAD CO.

[214 Pa. St. 229, 63 Atl. 792.]

MASTER AND SERVANT.—A Master is One who stands to another in such a relation that he not only controls the result of the work of such other, but also may direct the manner in which such work shall be done. (p. 741.)

MASTER AND SERVANT.—A Servant is one who is engaged to render personal services to his employer otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the direction and control of the latter. (p. 741.)

MASTER AND SERVANT.—The Relation of Master and Servant Exists where the employer has the right to select the employé, the power to remove and discharge him, and the right to direct both what work shall be done and the manner in which it shall be done. (p. 741.)

MASTER AND SERVANT—Contract of Bailment.—If a railroad company owning cabs leases them to drivers for a fixed sum per day under agreement that the driver shall assume all liability for damages to persons or property, shall not use any one horse longer than a certain time, that he shall not use intoxicating liquor, and shall conform to established rates and regulations, the company reserving the right to cancel the lease for breach of conditions, the contract is one of bailment, and does not create the relation of master and servant between the driver and the company. (p. 742.)

BAILMENT—Cabdrivers—Liability of Bailor for Negligence of Bailee.—If, under an agreement between a railroad company and the driver of a cab owned by such company, the relation of master and servant is not created, but the contract is one of bailment, the company is not liable for personal injury sustained through the negligence of such driver. (p. 744.)

T. J. Meagher, for the appellant.

E. J. Sellers, for the appellee.

231 ELKIN, J. The decisive question raised by this appeal is whether, as between the defendant and the driver of the hansom, the relation was one of master and servant or of bailor and bailee. If the former, the master is liable for the negligence of the servant; if the latter, the negligence of the bailee cannot be imputed to the bailor. The contract of letting is in writing, the printed rates and regulations are made part thereof, so that the determination of the relation is a question of law for the court and not of fact for the jury.

The lease under which the defendant let the hansom to the driver provides that "for and in consideration of the sum of four dollars and fifty cents, and on the conditions stated below, hires to H. Priest, driver, hansom No. 65 with two horses, for thirteen hours from 9.30 A. M. of the date stamped on the back of this certificate." The conditions stated therein are in substance that the driver shall assume all liability for damages to any person or property, and that he agrees not to use a horse longer than six and one-half hours without returning to the stable for exchange, to wear a uniform, to abstain from the use of intoxicating liquors and to present a neat and clean appearance, to conform to the prescribed rates and regulations, and upon failure to observe these

conditions the company reserves the right to cancel the unexpired term of the lease:

There can be no doubt that upon its face this contract of letting establishes the relation of bailor and bailee. The learned counsel for appellant, who has ably and exhaustively presented the question, concedes that if the case rested upon the contract alone, a bailment would result within the meaning of the law. It, however, is earnestly contended that this *prima facie* relation is changed by reason of the conditions, rules and regulations, made part of the contract, to which the driver was subjected. ²³² These regulations provide in considerable detail the rates to be charged for various distances, different kinds of vehicles, and length of time used. Certain boundaries are prescribed beyond which the driver cannot go without permission, and he is not permitted to perform other kinds of work, such as carrying baggage and doing errands, during the term of the lease. It is also argued that because defendant company employs a cab agent to supervise this service, to secure men for the work, make contracts with the drivers, and enforce the terms and conditions of the lease, such control is thereby exercised as to make the company liable as master.

We must first consider what is necessary to establish the relation of master and servant. This question has been considered by a large number of text-writers and frequently passed upon by the courts. All authorities agree upon the following definitions of master, servant and the relation existing between them: "A master is one who stands to another in such a relation that he not only controls the results of the work of that other, but also may direct the manner in which such work shall be done." "A servant is one who is employed to render personal services to his employer otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter." "The relation of master and servant exists where the employer has the right to select the employé, the power to remove and discharge him, and the right to direct both what work shall be done and the way and manner in which it shall be done": 20 Am. & Eng. Ency. of Law, 2d ed., pp. 11, 12. In more concise form these definitions mean that the master directs the manner in which the work shall be done and controls the results of the work. The servant is under the entire control and always

subject to the direction of the master. The relation exists when the master not only has the right to select his servant but has the power to remove and discharge him, with or without cause, and to direct what shall be done and the manner of doing it.

In the case at bar the defendant company does not control the results of the work, has no right to the proceeds arising from the fares paid drivers by passengers, and hence the fundamental and essential principle necessary to create the relation ²³³ of master is lacking. The driver did not remain under the absolute direction and control of the company, and thereby cannot be said to be a servant within the meaning of the definition. The right of the master to discharge and remove the servant is incident to the relation, but in this case the abstract right did not exist. It is true the lease could be canceled for the unexpired term, but only when the conditions thereof, or some of them, had been violated. The cancellation of the lease was a contractual right and did not arise because of the employment relations of the parties. The driver under the contract had legal rights enforceable against the company and only limited by the conditions therein contained. If the company undertook to cancel the lease, or remove the driver, for a reason not set out in the conditions of letting, it would be liable in damages for breach of the contract. Then, again, as has been stated, the driver is entitled to all the proceeds derived from fares received from passengers who hire the cab. The aggregate of these fares may be five dollars or twenty-five dollars a day, but the company has no control over, or interest in, the results of the work in this most important respect. All of these things are inconsistent with the relation of master and servant and indicate that of bailor and bailee.

We, have, then, under the express terms of the contract a bailment, and this relation is supported by the inferences and results just stated. As against this admittedly *prima facie* relation of bailor and bailee we are asked to say that by reason of the conditions limiting the rates, fixing boundaries, prescribing kinds of uniforms, requiring cleanly and sober habits and other incidental matters, the relation is not what it appears to be on its face, but is something different. The contention is not sound. The conditions and regulations, incidents of the contract of letting, in some instances, it is true, are consistent with the relation of **master**

and servant, but not inconsistent with that of bailor and bailee. If the company, in order to protect its property and give the traveling public modern conveniences and suitable accommodations, has deemed it advisable to embody in the contract of letting certain reasonable regulations, no legal or business reason can be properly assigned why the real relation of the parties should be changed thereby. The contract itself is one of bailment. The conditions are not necessarily ²³⁴ inconsistent with this relation, and no sufficient reason is suggested why a different construction should be adopted.

It is true the contention of appellant is sustained by the rule of the English cases under the metropolitan hackney carriage act: *Powles v. Hider*, 6 El. & Bl. 207; *Fowler v. Lock*, L. R. 7 C. P. 272; *Venables v. Smith*, L. R. 2 Q. B. D. 279; *King v. London Improved Cab Co.*, L. R. 23 Q. B. D. 281; *Gates v. Bill*, [1902] L. R. 2 K. B. 38. It is not difficult to distinguish the present case from the English cases either in principle or fact. The cab system of the city of London is regulated by act of parliament. The entire system is a public service function. It is extensive in its operation and covers a wide area within the corporate limits of the city. It is operated by a limited number of companies enjoying valuable and almost exclusive privileges. Even under these circumstances, when the question was first before the English courts in 1856, it was doubted whether the common-law relation of bailor and bailee should be changed to that of master and servant, even when indicated by act of parliament, and the decisions were largely based on the ground that the companies owning the cabs enjoyed valuable privileges, held themselves out to the public as the owners, and ought not to be permitted to deny their liability as masters on this account. That the English courts did not consider the decision as resting on a firm foundation is shown by the fact that when in 1902 the question was again before the courts for consideration in the case of *Gates v. Bill*, [1902] L. R. 2 K. B. 38, Lords Williams and Romer, delivering the opinion of the court, said, in substance, that at common law there could be no doubt that the relation was that of bailor and bailee, and that if the question were a new one, they would hesitate to draw from the provisions of the statute the relation of master and servant so as to charge the owner with liability. In the opinion of the court there was nothing in the act which

established the relation of master and servant, but the decisions on the question having firmly established the principle they felt themselves bound to accept the rule as the settled law of the realm.

If the English courts doubt the soundness of the rule after almost half a century has passed since its announcement, it ²³⁵ cannot be argued with much confidence that our courts should adopt it in the first instance under conditions entirely dissimilar. We have no act of assembly regulating this matter and hence, following the reasoning of the English courts, independent of the act of parliament, the common-law relation of bailor and bailee exists. The cab service of the defendant company does not enjoy exclusive and special privileges. It is limited in extent. It does not perform public service functions generally, and has no rights and privileges conferred by legislative enactment. It does not belong to the class of companies organized under the hackney carriage acts of parliament. The rule of those cases is not applicable to the facts of the present case.

We are of opinion, therefore, that a proper construction of the written contract, including the conditions and regulations, under which the driver took the custody of and operated the hansom, shows that the relation established was that of bailor and bailee, and there can be no recovery in this case.

Judgment affirmed.

In the Relation of Master and Servant upon contract of service, express or implied, between the parties, the essential elements are that the master shall have control and direction not only of the employment to which the contract relates, but of all its details, and shall have the right to employ at will and for proper cause discharge those who serve him. If these elements are wanting, the relation does not exist: *Baltimore etc. Mfg. Co. v. Jamar*, 93 Md. 404, 86 Am. St. Rep. 428. See, also, *Waters v. Pioneer Fuel Co.*, 52 Minn. 474, 38 Am. St. Rep. 564. This question of when the relation of master and servant exists is considered at some length in the note to *Brown v. Smith*, 22 Am. St. Rep. 459-463.

COMMONWEALTH v. BOND.

[214 Pa. St. 307, 63 Atl. 741.]

STREET RAILWAYS—Use of Street.—If a street railway company obtains permission from a municipality to use a certain street, the municipality reserving the right to grant the “common use” of such street to another street railway company, in common with the first, it cannot require a later company, to whom it grants permission to use the same street, to so lay its tracks as to “straddle” the tracks of the first company, when the street is amply wide enough to accommodate two parallel tracks. (p. 746.)

STREET RAILWAYS—Use of Streets.—If a street railway company is granted permission to lay its tracks in a street, a later permission to another street railway company to lay a part of its track on the track of the first company is an unconstitutional taking of the property of the latter without compensation. (pp. 746, 747.)

G. Q. Horwitz, F. K. Swaitley and J. W. Shelley, for the appellant.

W. C. Ryan and L. R. Bond, for the appellees.

308 ELKIN, J. The appellant company by ordinance was granted a right by the borough of Morrisville to construct a track and operate a railway along, over and upon Bridge street for the distance of one block. At the time of the passage of the ordinance an older street company had in operation a line on Bridge street, by rights acquired under a prior ordinance. The borough had imposed upon the first street railway corporation as a limitation of its grant the condition that it should only occupy Bridge street subject to the right of the borough at any subsequent time to grant to another street railway company the use of said street in common with it. The condition of the first grant is as follows: “Upon the express condition, and with the clear understanding that the burgess and town council of said borough of Morrisville may at any time by ordinance grant to any other street railway company now or hereafter incorporated the use of Bridge Street and Trenton avenue, or either of them, in common with the Yardley, Morrisville and Trenton Street Railway, its successors and assigns, and the right and power to grant such consent is hereby expressly reserved accordingly.”

Under this condition and reservation of rights in the prior ordinance it was clearly within the power of the borough to

309 subsequently grant the right claimed by the appellant company in the common use of the street. These grants were made with the express condition imposed that the companies "shall be subject to such reasonable legislation in regard to the construction, maintenance and operation of their street railway as shall from time to time hereafter be ordained and enacted by the said burgess and town council."

The borough, under its authority to reasonably regulate the construction, maintenance and operation of the later company in the use of the street, has required that its line be located in such manner as to straddle the tracks of the older corporation. The street has sufficient width to permit of the construction of both tracks thereon without interfering with each other, but for its own purposes the borough has thought proper to compel the construction of the track of the later company so to occupy the track of the former company. The right to do this particular thing is claimed by the borough under the phrase "common use of the street" contained in the ordinance. When the first corporation accepted the ordinance under which its tracks were constructed with the reservation of the "common use" of the street to a later company, it did not thereby agree to give the "common use" of its tracks over the street, but in effect waived its right to the exclusive use of the street. "Common use" of the street did not mean "common use" of its tracks. This court has decided that while the legislature may, in the exercise of the right of eminent domain, take franchises and property engaged in a public use, and apply them to another public use, a statute cannot be sustained which confers upon one corporation for profit the right to appropriate the property of another corporation to exactly the same public uses for the convenience and profit of the younger corporation: *Philadelphia etc. Ry. Co.'s Petition*, 203 Pa. St. 354, 53 Atl. 191. It has also been decided that section 14 of the act of May 14, 1889 (Pub. Laws, 211), as amended by the act of June 7, 1901 (Pub. Laws, 514), giving one street railway company the right to use the tracks of another street railway company for certain prescribed distances is unconstitutional: *Commonwealth v. Uwchlan Street Ry. Co.*, 203 Pa. St. 608, 53 Atl. 513.

The rule in these cases is based on the principle that the 310 grant of the use of the tracks of a former company to a later company was the taking of property of the former

company for the convenience and profit of a younger corporation, and therefore unconstitutional. The principle of those cases rules the one at bar. To superimpose on the tracks of the former company the whole or any part of the tracks of a later company is the taking of the property of the former company within the meaning of the rule of the cases just cited. There is no distinction in principle between the taking of the whole of the tracks of the former for the use of the later company and the taking of part of the tracks. The appellant company under its ordinance is entitled to construct and maintain its tracks on Bridge street alongside of and parallel with the line of the former company without in any way interfering with it.

Judgment reversed, and it is ordered and directed that judgment be entered for the plaintiff in accordance with the prayer of the petitioner asking for a writ of alternative mandamus.

For Authorities upon the relative rights of two public service corporations occupying the same street, see *American Tel. etc. Co. v. Morgan etc. Tel. Co.*, 138 Ala. 597, 100 Am. St. Rep. 53, and cases cited in the cross-reference note thereto.

MURTLAND v. ENGLISH.

[214 Pa. St. 325, 63 Atl. 882.]

LANDLORD AND TENANT—Option to Extend Lease.—If a lessee for years has the privilege of renewal for a like term longer, on three months' notice, a mere holding over is not an acceptance of the option when the required notice is not given. (p. 749.)

NEW TRIAL.—Power of the Supreme Court to grant a new trial will not be exercised, except in clear cases of wrong or injustice which the lower court should have remedied. (p. 750.)

APPEAL—Assignment of Error.—An assignment of error to a portion of a charge to the jury, which fails to quote the portion of the charge complained of "totidem verbis," will not be considered on appeal. (p. 750.)

APPEAL.—Assignments of Error that the court did not charge specifically as to certain matters will not be considered, if no request therefor was made. (p. 750.)

LANDLORD AND TENANT—Damages for Holding Over. Compensation or indemnity is the proper measure of damages to the landlord for detention of the premises by the tenant after the expiration of his term. Judgment in such case should be for the possession and such damages. (p. 751.)

G. B. Carr, for the appellant.

A. B. Repetto, for the appellees.

328 POTTER, J. On January 31, 1896, the plaintiffs, in writing, leased certain premises to one Franklin S. Gibson, for the term of five years to be computed from February 1, 1896, at the yearly rental of six hundred dollars, payable in monthly installments of fifty dollars each. Subsequently, with plaintiff's assent, the lease was assigned to J. J. English, the defendant in this case. In the ninth clause of the lease it is "expressly covenanted and agreed that if the lessee, his heirs and assigns, shall perform all the covenants of this lease, then he, his heirs and assigns, shall have the privilege of extending the term of this lease for five years longer, upon their giving to the lessors, their heirs and assigns, three months' notice of their intention to avail themselves of this covenant, upon the terms herein contained." English entered into possession of the leased premises and remained therein until the expiration of the term of five years. He did not give the three months' notice required by the lease, nor any notice of his intention to exercise the option to extend the lease for another term of five years. But after the first five years had expired, he remained in possession of the leased premises, and continued to pay the same rent each month, which was accepted by the lessors, apparently without question, until August 22, 1902, when the lessors served defendant with a notice to vacate at the expiration of his current term which was stated to be January 31, 1903. He did not vacate at the date named, but tendered a month's rent falling due February 1, 1903, at the same rate which he had been paying, which the lessors refused to accept. The lessors then brought proceedings before a magistrate to recover possession, and on February 21, 1903, judgment was entered against the defendant for fifty dollars damages and costs. He appealed from this judgment to the court of common pleas. On the trial the court instructed the jury that defendant having failed to give three months' notice of his intention ³²⁹ to extend the lease, it was not renewed but expired by its own limitation. By holding over after the expiration of his term, defendant became a tenant from year to year. Notice to quit was admittedly given to him more than three months prior to the end of the current year, and, therefore, the only question left to the jury was the amount

of damages to be awarded. The jury were instructed that plaintiffs were entitled to recover, first, the possession of the premises; and, second, a sum of money to compensate them for the occupation of the premises during the time for which defendant had paid nothing. There was evidence that the premises had a rental value of seventy-five dollars per month. The jury found a verdict for plaintiffs for eighteen hundred dollars, being at the rate of seventy-five dollars a month, for the two years defendant had paid no rent.

The first assignment of error complains that the learned court below erred in instructing the jury that the lease expired by its own limitation. This raises the main question in the case. The trial judge is sustained in this statement of the law by the great weight of authority. In *Trickett's Landlord and Tenant*, section 550, the rule in Pennsylvania is thus stated: "The lease may confer the privilege of renewal or of continuing in possession for a prescribed time beyond the term, upon giving previous notice to the landlord of the intention to claim it. Giving the notice in such a case is requisite. The burden is upon the tenant, if he claims any rights upon the renewal clause, to prove the giving of the notice": Citing *Pollman v. Morgester*, 99 Pa. St. 611; *Burgwin v. Bishop*, 91 Pa. St. 336; *McClelland v. Rush*, 150 Pa. St. 57, 24 Atl. 354. In 2 *Wood on Landlord and Tenant*, section 413, it is said: "It very often happens that the lease gives the lessee an option to remain as tenant for another term. . . . In such cases, if the lease requires that notice of a certain description must be given of a tenant's election, the requirement in this respect must be strictly complied with." Counsel for appellant has cited in his argument many cases which illustrate the law as to forfeitures; but, in the present case, there was no forfeiture or breach of covenant. It was merely a matter of the lease expiring by its own limitation, as was stated by the court below, without any intimation by the lessee that he desired another term. The tenant had the option of renewal, but he did not see fit to exercise that option. ³³⁰ We can see no merit in the suggestion that mere continuance in possession of the premises after the lease had expired was in itself an acceptance of the option upon the part of the tenant for an additional term of five years. The authorities cited on behalf of the appellant apply only to cases in which no specific notice of an intention to exercise the privilege of re-

newal is prescribed in the lease. There might be conduct, such as the payment of an increased rental, which would be equivalent to an acceptance of the option. Thus, in *Stone v. St. Louis Stamping Co.*, 155 Mass. 267, 29 N. E. 623, where the lease provided for a renewal at an increased rental, the holding over and payment of the increased rent by the lessee was considered evidence of his election to renew although no proof was offered of the notice prescribed in the lease having been given. But in the case at bar, the tenant neither gave notice nor paid any increased rental. There was nothing to indicate that the tenant had any intention of binding himself to stay upon the premises for another full term of five years. And, when he held over after the expiration of the term, without making any new arrangements, the tenancy became one for another year upon the same conditions as before: *Harvey v. Gunzberg*, 148 Pa. St. 294, 23 Atl. 1005. This continued until the plaintiffs, by giving the proper notice, three months prior to the end of the current year, prevented any further renewal. The first specification of error is dismissed.

The second assignment of error complains of the refusal of the court below to grant a new trial. The reasons for which a new trial was asked are not printed in appellant's paper-book. It was pointed out in *Smith v. Times Publishing Co.*, 178 Pa. St. 481, 36 Atl. 296, 35 L. R. A. 819, that the power of this court to grant a new trial under the act of May 20, 1891, is exceptional in character, and only to be exercised in very clear cases of wrong or injustice which the court below should have remedied. No such compelling reason exists here.

The third assignment violates rule 30, in that it does not quote the part of the charge complained of "*totidem verbis*": *Crawford v. McKinney*, 165 Pa. St. 605, 30 Atl. 1045.

The fourth, fifth, sixth, eighth and ninth assignments complain that the court below did not specifically charge as therein stated, although no request for such instructions was made. ³³¹ These assignments are, therefore, bad, and will be disregarded: *Burkholder v. Stahl*, 58 Pa. St. 371; *Kaufman v. Pittsburg R. R. Co.*, 210 Pa. St. 440, 60 Atl. 2.

The seventh assignment complains of the form in which the judgment was entered by the court. It was for possession of the premises, as well as for the money damages found by the jury. This was what the plaintiffs were entitled to recover under the instructions of the court to the jury, and the form into which the judge molded the verdict no doubt expressed

the real finding of the jury. The action of the court in thus amending the verdict was clearly within his power: See *Cohn v. Scheuer*, 115 Pa. St. 178, 8 Atl. 421. The damages awarded to the landlord for the detention of the premises, after the end of the term, do not arise out of contract, but they are indemnity. Compensation is the proper measure of such damages.

We see nothing in the record of this case which would properly convict the trial court of error, and, therefore, the judgment is affirmed.

HOLDING OVER BY TENANT AS EXERCISE OF OPTION TO RE-NEW OR EXTEND LEASE.

I. Merely Holding Over, 751.

II. Holding Over With Notice that the Lessee Intends to Vacate, 754.

III. Holding Over Without Giving Required Notice, 754.

I. Merely Holding Over..

It is well settled, according to great weight of authority, that under a lease to one for a definite time with an option or privilege of retaining the leased premises for another and additional definite term, no notice by the lessee of his intention to continue being required, a holding over by him after the expiration of the first period is an extension of the demise for the whole of such additional period: *Hayes v. Goldman*, 71 Ark. 251, 72 S. W. 563; *Brown v. Samuels* (Ky.), 70 S. W. 1047; *Montgomery v. Board of Commissioners*, 76 Ind. 362, 40 Am. Rep. 250; *Terstegge v. First German Ben. Soc.*, 92 Ind. 82, 47 Am. Rep. 135; *Gerhart Realty Co. v. Brecht*, 109 Mo. App. 25, 84 S. W. 216; *Clendinning v. Linder*, 9 Misc. Rep. (N. Y.) 682, 30 N. Y. Supp. 543. This general rule is recognized in Pennsylvania in the case of *Harding v. Seeley*, 148 Pa. St. 20, 23 Atl. 1118, where the court said; "That a holding over by a tenant who has an option for an additional term is notice to his landlord of his election to exercise his privilege is generally held in this country"; citing *Kramer v. Cook*, 7 Gray, 550; *Kimball v. Cross*, 136 Mass. 300; *Delashman v. Beny*, 20 Mich. 292, 4 Am. Rep. 392; *Holley v. Young*, 66 Me. 520; *Insurance Co. v. National Bank*, 71 Mo. 58; *Long v. Stafford*, 103 N. Y. 174, 8 N. E. 522. If the lease is for a year and gives the tenant the right to retain the premises "as long as he wishes to occupy the same," his remaining in possession at the expiration of the year is an election that the tenancy is to continue, and such stipulation in the lease is not to be regarded as an agreement for a lease, but operates as a lease upon the election of the tenant to remain: *Holley v. Young*, 66 Me. 520; *Kimball v. Cross*, 136 Mass. 300. Under a lease for a certain term, and at the election of the tenant for a further term, the election of the lessee to hold for the additional term may be inferred from

his continuing to hold the premises and paying rent for two quarters, without proof of any formal election or notice to the lessor at the time of the expiration of the first term: *Kramer v. Cook*, 7 Gray, 550; *Kimball v. Cross*, 136 Mass. 300. In *Atlantic Nat. Bank v. Demmon*, 139 Mass. 420, 1 N. E. 833, it was said that "the fact of holding over and paying rent would undoubtedly raise a certain presumption that a tenant has elected to hold over for the further term stipulated for in the lease. This, however, is not a conclusive presumption of law, but is rebuttable by evidence. In the absence of anything to the contrary, a court or jury would properly infer such election by these acts, but this is merely because such would be the natural inference from the conduct of the parties, if unexplained."

A lessee in possession of premises for definite term, with the privilege of having the premises for a further definite term at the option of the lessee, signifies his intention to hold for the further term by simply retaining possession after the expiration of the first term, and is not bound to give notice to the lessor: *Delashman v. Beny*, 20 Mich. 292, 4 Am. Rep. 392. In *Caley v. Thornquist*, 89 Minn. 348, 94 N. W. 1084, it appeared that a written lease of premises for one year contained a provision for its renewal for the term of two years at the option of the lessee. The occupancy of the tenant continued, and the rent was duly paid for two years, which was received without objection, and it was held that the lease was renewed for the longer period, and could not thereafter be terminated by either party without the consent of the other. And to the same effect are the cases of *Insurance etc. Co. v. National Bank*, 5 Mo. App. 333, 71 Mo. 58; *Mershon v. Williams*, 62 N. J. L. 779, 42 Atl. 778. If the tenant by the terms of the lease has an option to remain for a longer period, such additional term is not a new demise but a continuation of the old one, and if the lease does not provide that notice shall be given by the tenant of his election, merely remaining after his term has expired is sufficient to bind him and the landlord for the additional term: *Cusack v. Gunning System*, 109 Ill. App. 588; *Voegel v. Renalds*, 83 Hun, 114, 31 N. Y. Supp. 353; *Kelly v. Varnes*, 52 App. Div. 100, 64 N. Y. Supp. 1040. It must be admitted that there is some conflict of authority upon the subject under consideration. Thus in *Renoud v. Daskam*, 34 Conn. 512, it appeared that the lease of a tenant for the term of five years provided that at the option of the lessee the lessor might renew and make a new lease for a further term of five years and it was held that to entitle the lessee to a renewal of the lease, it was necessary for him to declare his election, before the expiration of the original term and that his remaining in possession thereafter and upon receiving notice to quit, stating his election to take a renewal of the lease would not entitle him to such renewal or to relief in equity. In an early case in Indiana it appeared that a lease for two years provided that the lessee might hold the premises for the additional term of one, two or three years, at his election, upon the

same terms, and it was held that the mere continuance in possession after the termination of the first term, if a sufficient notice of an election to renew the lease for one year, was not sufficient notice of an election to renew for the longer term: *Falley v. Giles*, 29 Ind. 114. Again, in *Thieband v. First Nat. Bank*, 42 Ind. 212, it was held that where the lease was for a term of five years and provided that the lessee was to have the privilege of renting said premises for another term of five years," and, after the first term expired, the lessee continued in possession for a considerable time, paying rent as before, without any demand for possession by the landlord or for a renewal of the lease, until just prior to the expiration of the second year of the second term, when he demanded possession and gave notice to the tenant to quit; the mere continuing to hold possession after the expiration of the first term and paying rent according to the terms of the lease, and the acceptance of such rent by the lessor, did not amount to the creation of a new term for five years, but that, under the agreement to renew the lease, the lessee to create a new term, under such lease, must have elected to renew it and must have given notice thereof at or before the expiration of the first term, and that it was too late to do so when possession was demanded some eighteen months after the termination of the first term. These Indiana cases are in apparent conflict with the later cases in that state which, with the great weight of authority, support the contrary doctrine. In *Montgomery v. Board of Commissioners*, 76 Ind. 362, 40 Am. Rep. 250, the court maintained that a tenant under a lease for three years, with a privilege of five more, holding over his first term, is bound for the full further term of five years. And in the later case of *Terstegge v. First German Ben. Soc.*, 92 Ind. 82, 47 Am. Rep. 135, it was held that under a lease for a definite period "with the privilege of five years more," a holding over after the expiration of the first period is an election to continue the demise for the second period.

In Iowa the supreme court adopted the doctrine of the minority cases and holds that mere holding over under a lease which gives to the lessee the privilege of renewal for a definite term is not sufficient to establish an exercise of the option to renew: *Andrews v. Marshall Creamery Co.*, 118 Iowa, 595, 96 Am. St. Rep. 412, and note, 92 N. W. 706, 60 L. R. A. 399. In this case the court drew a distinction between a "privilege of extension" and a "right of renewal" of a lease, and held that a mere holding over is not sufficient to show an election to renew the lease, and there must be additional affirmative acts to establish an exercise of such right: *Andrews v. Marshall Creamery Co.*, 118 Iowa, 595, 96 Am. St. Rep. 412, and note, 92 N. W. 706, 60 L. R. A. 399. In a later case it was held that a mere holding over under a lease providing that the lessee shall have an option to rent the premises for four years longer will not establish an exercise of the option so as to bind the tenant for rent accruing after a surrender of the premises: *Spangler v. Rogers*, 123 Iowa, 724, 99 N. W. 580.

Of course if a tenant having a right of renewal for another year notifies his lessor that he will not surrender the premises at the expiration of his term, and holds the premises after the term expires until dispossessed by a writ of sequestration, he sufficiently manifests his intention to renew the lease and makes himself liable as a tenant for another year: *Ewing v. Miles*, 12 Tex. Civ. App. 19, 33 S. W. 235.

II. Holding Over With Notice that the Lessee Intends to Vacate.

If a tenant in possession of premises under a lease for one year, with the privilege for three years more, prior to the expiration of the year notifies the lessor that he has rented other premises, and will at once vacate the premises held under such lease, and thereupon the former arrangement and agreement is mutually rescinded, such tenant thereby elects not to hold such premises longer than one year, and the tenancy is terminated at that time, and, in such case, the mere occupancy of the premises at and after the expiration of the year cannot be deemed an election to hold them for three years longer, in the face of the express notification to the contrary and after the lessor acting thereon has leased the premises to another person: *Barnett v. Feary*, 01 Ind. 95. But if a tenant under a lease for five years with an option to renew the lease for another five years gives notice to his landlord of an intention to vacate the premises at the end of the first term, but does not do so and holds over after the expiration thereof, he elects to hold for the second term and is bound for the rent therefor, in the absence of any binding agreement that the option to renew the lease was either abrogated or modified: *McBrier v. Marshall*, 126 Pa. St. 390, 17 Atl. 647.

III. Holding Over Without Giving Required Notice.

Although it must be admitted that there is some authority for the position taken and ruling made in the principal case, yet it is undoubtedly true that the great weight of authority is opposed to the doctrine therein announced, and we are totally unable to reconcile the rule announced in *Thompson's Estate*, 205 Pa. St. 555, 55 Atl. 539, with that promulgated in the principal case. In the former case it was held that where a tenant has an option to renew a lease upon a written notice, and if he does not renew the lease he is to pay the landlord a certain sum at the end of the term, and prior to that time he transfers his business to his sons, but gives no notice of an intention to renew, does not surrender the premises, does not pay to the landlord the amount stipulated in case he fails to renew, and the landlord refuses to release him or to accept his sons in his place, the lease will be deemed to have been renewed, and the tenant will be liable for the rent for the renewal term: *Thompson's Estate*, 205 Pa. St. 555, 55 Atl. 539. This ruling is in direct conflict with that made in the principal case, although the opinion in both instances was written by Mr. Justice Potter.

The better established rule is in keeping with that announced in *Thompson's Estate*, 205 Pa. St. 555, 55 Atl. 539, and is that a lessee, who enters into possession of demised premises under a lease, for a fixed term with the privilege of renewal or extension for another term by giving written notice to the lessor, and who continues in possession after the fixed term has expired, pays the rent thereafter as it becomes due, thereby elects to exercise the option for renewal or extension of the term, although no express notice of such election is given. In such a case the requirement of a written notice may be waived by the parties and a waiver by them will be implied when the lessee remains in possession and pays rent to the lessor, and the former will be liable for the rent to the end of the extended term: *Long v. Stafford*, 103 N. Y. 274, 8 N. E. 522. This ruling has been followed in a number of cases. Thus in a case very similar to that of *Thompson's Estate*, 205 Pa. St. 555, 55 Atl. 539, it was held that an assignee of a lease providing for a fixed term with the privilege of renewal and extension by giving written notice to the lessor, who enters into possession of the demised premises and continues therein after the term has expired without any claim of right to do so, except as authorized by the lease, and who pays the rent thereafter as it becomes due, impliedly elects to exercise the option for an extension of the term, although no express notice of such election is given, and the lessor by receiving the rent impliedly waives the requirement of a written notice and consents to such occupancy. The assignee, therefore, continues liable for the rent for the unexpired term of extension, although before its expiration he assigns the lease and abandons the premises: *Probst v. Rochester Steam Laundry Co.*, 171 N. Y. 584, 64 N. E. 504. In *Bailie v. Plant*, 11 Misc. Rep. 30, 31 N. Y. Supp. 1015, it appeared that a lease for a term of three years contained a provision giving the lessees a right to renew for the term of two years, provided they gave notice thereof in writing six months prior to the expiration of the lease. No written notice was given and the lessees continued in possession for an additional year and paid rent therefor. The court decided that the provision for a written notice of renewal of the lease was waived by the acts of the parties which worked a renewal for the term named in the lease, and that the lessees were liable for rent for the remainder thereof. If a lease contains a provision for renewal for a term upon the tenant's written notice, and rent is accepted after the expiration of the term originally agreed upon, in accordance with the terms of the renewal, written notice by the tenant is waived, and he is entitled to hold for the balance of the renewed term: *Schuck v. Schwab*, 84 N. Y. Supp. 896. Under a lease for a specified term for a certain rental, and, at the election of the tenant, upon giving thirty days' notice, for a further term, for an increased rental, the provision for notice is solely for the benefit of the lessor, who can waive, and does waive it, and an election to hold for the additional term at the increased rent is inferred as against

the lessee from continuing to occupy the premises and paying the rent at the increased rate without proof of notice or formal election at the expiration of the first term: *Stone v. St. Louis Stamping Co.*, 155 Mass. 267, 29 N. E. 623. In the principal case a distinction is sought to be drawn between the case last cited and the one then under consideration, and it was intimated that the fact that the tenant remained in possession after the expiration of the first term and continued to pay an increased rental which was received and accepted by the landlord, changed the rule as to the necessity of giving notice of renewal as required by the lease. This distinction is more specious than sound, and aside from this the fact existed in the principal case that the tenant remaining in possession after the termination of his first term paid rent according to the terms of the agreement for the second term, and such rent was received and accepted by the landlord.

In an early case in New York, it appeared that the lessee, as assignee of a long lease containing a covenant to renew, omitted by accident or mistake to give notice of election to exercise his option until about one month after the contract time. He remained in possession after the termination of the first term and the lessor continued to receive rent paid thereafter, and the lessee had a very large vested interest in the property. In an action to forfeit the lease the court decided as time was not originally of the essence of the contract, and was not ingrafted into it by subsequent notice, and the delay on the lessee's part in accepting the option was not so great as to constitute laches, hence, the lessor must be required to execute a renewal of the lease: *New York Life Ins. Co. v. St. George's Church*, 64 How. Pr. 511, 12 Abb. N. C. 50.

In an inferior court in Missouri learned counsel were unable to show the court exactly how the question under consideration should be decided. Consequently, the court attempted to straddle the question as nearly as possible by ruling that where the lease provides for a written notice from the lessee to the lessor of an intention to renew, such a provision is for the benefit of the lessor and may be waived by him. However, the intention of the tenant to claim the extended term must be shown by giving notice of such intention, or must be otherwise manifested and cannot be inferred from a mere holding over, but if the tenant under a lease providing for renewal by giving notice fails to give notice and holds over paying the rent provided for in case of renewal, on demand of the lessor, and with notice that he will be held to the terms of the renewal, it is a question of fact for the court, as a trier of facts, to determine whether the tenant has elected to renew: *Gerhart Realty Co. v. Brecht*, 109 Mo. App. 25, 84 S. W. 216.

In Michigan it has been decided that where a lease provides for notice by the lessee of his intention to claim the benefit of an option

given him in the lease for an additional term, such notice must be given, or such intention on his part otherwise manifested, and that a naked holding over is insufficient to warrant a finding against the tenant that the lease has been extended: *Beller v. Robinson*, 50 Mich. 264, 15 N. W. 448; *Cooper v. Joy*, 105 Mich. 374, 63 N. W. 414.

PURVIS v. UNITED BROTHERHOOD OF CARPENTERS.

[214 Pa. St. 348, 63 Atl. 585.]

LABOR—Right to—Property Right.—The right of a workman to freely use his hands and to use them for whom he pleases, upon such terms as he may choose, is his property, and an absolute right, of which he cannot be deprived. (p. 764.)

CONSPIRACY—Criminal.—Every Man has the Right to Employ His Talents, industry and capital as he pleases, free from the dictation of others; and if two or more persons combine to coerce his choice in this behalf, it is a criminal conspiracy. (p. 764.)

CONSPIRACY—Interference with Business Rights.—Every person has an absolute right, as between his fellow-citizens and himself, to carry on his business within legal limits according to his own discretion and choice, with any means which are safe and healthful, and to employ therein such persons as he may select, and with such right third persons have no right to interfere with intent to injure, if not to destroy, it, if their demands are not complied with. (p. 765.)

CONSPIRACY, CRIMINAL.—An attempt to coerce by unlawful means, by conspiring to injure and destroy property, is in itself an unlawful act, no matter what end is to be accomplished. (p. 765.)

CONSPIRACY—Coercion by Labor Union—Injunction.—If a labor union attempts to injure a person in his business in order to coerce him into submission to the demands of such union requiring him to furnish the capital and his business to be controlled in its essential features by such union, which is in no way responsible for the capital invested or the losses entailed, such attempt is a conspiracy, and equity will restrain such interference by injunction. (p. 766.)

CONSPIRACY—Coercion by Labor Union—Employment of Union Labor Alone.—If a labor union by concerted action attempts to coerce an employer to employ only union workmen, upon certain terms and conditions, and to compel him to submit himself and his business to the control of such union, such attempt is an attempt to form a conspiracy, and will be enjoined at the suit of such employer. (p. 768.)

CONSPIRACY—Coercion by Labor Union—Employment of Union Workmen.—Declarations by a labor union that it intends to drive an employer out of business unless he unionizes his mill, together with notice to customers of such employer not to use the latter's materials unless he employs only union workmen, with threats of strikes in such customer's business, constitute such coercion and conspiracy as will be restrained by injunction. (p. 768.)

CONSPIRACY—Coercion—Construction of Statute.—A statute providing that labor unions may adopt ways and means to make their rules and regulations, by-laws and resolutions effective, sanctions no rules, regulations, by-laws or resolutions to commit wrong or coercion, or to form a conspiracy against an employer, his business or his customers. (p. 768.)

The decree appealed from was as follows: "That the defendants (not including L. C. Wick) and each and every of them, their officers, committees, agents, employes, servants, members, associates and all others that may act in concert with them, or by their direction, each and every one, be restrained and strictly enjoined from interfering and from combining, conspiring or attempting to interfere, for the purpose of doing injury to plaintiffs in their business, with the sale or contract for sale by the plaintiffs of building materials by representing or causing to be represented in express or implied terms to any customer of the plaintiffs, or to any person or persons or corporation who might become customers of the plaintiffs, that such customers will suffer or are likely to suffer loss or trouble in their business for purchasing or continuing to purchase or contracting for the purchase of building materials from the plaintiffs; or by intimidating or attempting to intimidate by threats, direct or indirect, express or implied, of loss or trouble in business, or otherwise, any persons or corporation who are now customers or who may hereafter become or desire to become customers of the plaintiffs; or from sending out to any person or persons or corporation who are now customers, or who may hereafter become or desire to become customers of the plaintiffs, through the mails, or delivering to them otherwise, any written or printed card, letter, circular or other notice, stating that members of the United Brotherhood of Carpenters and Joiners will not handle or work millwork or materials coming from mills which fail to comply with regulations of the Carpenters' District Council, and that the plaintiffs had failed to comply with an agreement of the planing-mill association of Western Pennsylvania with the Carpenters' District Council, or an agreement adopted by the Master Builders' Association and said council, and requesting such customers or prospective customers of the plaintiffs to have their millwork done by mills that operate under said agreement so that no controversy can arise on account of nonunion millwork, or from sending out to such customers or prospective customers of the plaintiffs any card, circular or other notice of similar character or purpose,

directly or indirectly, or from writing or sending through the mails or otherwise any written or printed card, circular, letter or other communication, conveying or intending to convey to any customers or prospective customers of the plaintiffs, that the plaintiffs are under the ban of Local No. 500, United Brotherhood of Carpenters and Joiners of America, or the Carpenters' District Council of Pittsburg, Allegheny and vicinity, United Brotherhood of Carpenters and Joiners of America, or other trades union, or of similar import; or from attempting by any scheme, combination or conspiracy among themselves or with others, to annoy, hinder or interfere with or prevent any person or persons or corporation from purchasing building materials, or making contracts for the purchase of the same, from the plaintiffs, and from any and all acts, and from the use of any and all ways, means and methods with a purpose to injure plaintiffs in their business, which (acts, ways, means and methods) by putting or attempting to put any person or persons or corporation in fear of loss or trouble will tend to hinder, impede or obstruct the plaintiffs from making sale, or making contracts for sale, of building materials; or from interfering and from combining, conspiring, or attempting to interfere, for said purpose, with the business of the plaintiffs, by the enforcement, under pain of penalties and forfeitures, of rule 7 of the working rules adopted for the government of local unions under the jurisdiction of the Carpenters' District Council of Pittsburg, Allegheny and vicinity, United Brotherhood of Carpenters and Joiners of America, which provides that 'No member shall be allowed to work any material coming from any nonunion mill, and shall comply with this rule when the local unions are so informed and instructed by the district council,' or by other like coercive rules, the natural and necessary effect of which would be to deter the members of said trades unions or others from working upon buildings or other constructions to which the plaintiffs were furnishing materials, or contractors, builders or owners of said buildings or other constructions, or others, from purchasing materials from the plaintiffs; or from interfering and from combining, conspiring or attempting to interfere with the business of the plaintiffs for the purpose of injuring them in their business, by the enforcement of fines or forfeitures, suspension or expulsion from membership in any of the locals within the jurisdiction of

the Carpenters' District Council of Pittsburg, Allegheny and vicinity, United Brotherhood of Carpenters and Joiners of America, for failure to observe rule 7 of the working rules adopted for the government of local unions under the jurisdiction of said Carpenters' District Council of Pittsburg, Allegheny and vicinity, United Brotherhood of Carpenters and Joiners of America, or for failure to observe any of the rules adopted and in force in that union, or that may hereafter be adopted, which would by coercion of said members interfere with the business of the plaintiffs, or from otherwise restraining, coercing and intimidating any one or more of the members of said union for said purpose from working for any contractors, builders, owners or other persons because they are doing or desire to do business with the plaintiffs; or from interfering and from combining, conspiring or attempting to interfere with the business of the plaintiffs by the issue of union labels to any mill within the jurisdiction of the Carpenters' District Council of Pittsburg, Allegheny and vicinity, United Brotherhood of Carpenters and Joiners of America, such issue of labels being made for the purpose of interfering with the business of the plaintiffs. From the doing of any and all of which acts and things, for the purpose of injuring plaintiffs in their business and thereby compelling them to unionize their mill or have such injury continued, the said defendants (not including L. C. Wick) and each and every of them, their officers, committees, agents, employés, servants, members, associates and all others that may act in concert with them, or by their direction, are hereby enjoined and restrained."

The decree also assessed damages against the defendants, and in favor of the plaintiffs.

L. McQuiston and W. J. Brennan, for the appellants.

T. C. Campbell and W. B. Purvis, for the appellees.

353 BROWN, J. The zeal of counsel may account for, but can hardly excuse, the statement in appellants' paper-book of the questions involved on this appeal. They are there stated to be: "Is the dissemination by means of printed notices by a lawfully constituted lodge of union laborers to its members and employers of labor, of its adopted rules by virtue of its constitution forbidding its members to work

nonunion material, an unlawful conspiracy? Is it lawful by peaceful means to make effective such rules?" From an examination of the averments of plaintiffs' bill, the ample proofs submitted in support of them, and of the facts found by the court below, it is ³⁵⁴ most manifest that the only question before us is, whether the appellants were properly enjoined from injuring and destroying the business of the appellees, in pursuance of a conspiracy to do so, as a penalty for their refusal to unionize their mill. This would mean to the appellees, as they aver, that they would be compelled to employ only union workmen and to yield their free and unrestricted right to select their own employés in the conduct of their business; that they would be compelled to submit themselves to the control of the union, and to put themselves within its power to dictate to them the number of hours to constitute a day's work in their mill, the compensation to be paid therefor, the time of payment thereof and the selection of their employés. It would be a recognition of the power of the agents of the union to practically control their business.

The opinion of the court below is learned and exhaustive, and upon it the decree might well be affirmed. The briefs on each side are most elaborate; but, after all, the question involved is a very simple one and calls for no lengthy discussion by us. The rights of mechanics and laborers, and of labor organizations and unions, as recognized in innumerable cases, are not affected by the decree, and need not, therefore, be considered here. The question is the unlawfulness of the conspiracy of the appellants to injure and destroy the property of others, if their demands as to the employment of workmen are not complied with. The question is not as to the unlawfulness of the demands which they make, but is as to their conduct upon learning that these demands are ignored by the appellees. The demands in themselves can do no harm to the latter; it results from the means employed to coerce compliance with them. The appellants contend that they seek only to persuade, and not to coerce; but their means of persuasion are the destruction of the property of those whom they would persuade. As well might it be said that the sight of the club or gun of the highwayman without actual violence simply persuades. No violence was used by the appellants, and it does not appear that any was contemplated or threatened; but coercion may

be accomplished without threats or violence and the attempt to so accomplish it was made in this case. Putting one in actual fear of loss of his property or of injury to his business, ³⁵⁵ unless he submits to demands made upon him, is often no less potent in coercing than fear of violence to his person. "Restraint of the mind, provided it would be such as would be likely to force a man against his will to grant the thing demanded, and actually has that effect, is sufficient in cases like this": *Plant v. Woods*, 176 Mass. 492, 79 Am. St. Rep. 330, 57 N. E. 1011, 51 L. R. A. 339. Of the conduct of the appellants the words of our late Brother Dean, in *Erdman v. Mitchell*, 207 Pa. St. 79, 99 Am. St. Rep. 783, 56 Atl. 327, 63 L. R. A. 534, may well be repeated: "How absurd is it to call this peaceable persuasion, and how absurd to argue that if the law attempts to prevent it the right of the workmen to organize for their common benefit is frustrated."

After reciting the material facts found, the court below thus summarizes the situation: "These things all point to a combined purpose on part of Local No. 500 and the District Council to compel plaintiffs to unionize their mill by working injury to their business. To accomplish this the whole power of the union was brought to bear upon them, both in the Pittsburg district and the home community. The members of Local No. 500 who were found working material from their mill were coerced by the compelling power of the union to quit work on pain of trial, fine or expulsion, with its attendant annoyance and possible ostracism, in case of their refusal. By the same power owners, former customers and contractors were coerced through the urgency of their circumstances to withhold their patronage, while through the conditions thus created the public was deterred, as the evidence indicates, from placing orders with plaintiffs, which would otherwise have gone to them. Along these converging ways the whole power of the union was brought to bear upon the plaintiffs to coerce them into submission. If any doubt remained as to the correctness of this inference, drawn from the acts of the defendants, it is removed by the expressed purpose of their official agent. Joseph L. Purvis, one of the plaintiffs, testifies that in the latter part of January last, Mr. Lewis, a business agent of the District Council, came, with others, to plaintiffs' place of business to urge upon them that they unionize their mill. The matter was considered at length, and reasons were given by Mr. Purvis why it was not prac-

licable for them to do so. Mr. Purvis says: 'I explained all this to Mr. Lewis and tried to show him; the only alternative he showed us to joining the ³⁵⁶ union was for us to quit business as a manufacturing business—that was the only alternative left, which we declined; then they intimated inasmuch as we declined to do that we would have to stop estimating in Pittsburg; to that I replied I would prefer to stop unless we could estimate in Pittsburg and could see a reasonable profit.' Again Mr. Purvis testifies: 'Mr. Lewis and Mr. Dougherty were there together, they were there together most of the time. Mr. Dougherty was there all the time. Mr. Lewis went away and would come back again, and a great deal of this conversation they were both present and joined in; it may not have been Mr. Lewis, it may have been Mr. Dougherty, but between them we were given to understand that unless we unionized our mill we would be obliged to quit business.' L. O. Purvis, also a member of plaintiffs' firm, testifying to the same interview with Mr. Lewis, says: 'He undertook to argue that it would be better for our mill to be a union mill inasmuch as there was going to be trouble if it was not unionized.' W. E. Cochran, a building contractor, and a witness on part of plaintiff, testifies that in January last he had a conversation with Mr. Lewis and Mr. Swartz, another business agent of the District Council, also a defendant in this case, in which conversation Mr. Lewis stated to him 'that they had come to Butler prepared to drive Purvis & Company into the union; that they had at that time sufficient leverage to enable them to see that it was done.' It is worthy of notice that at this time the plaintiffs had a contract with Mr. Kreusler, a building contractor of Pittsburg, to furnish material amounting in price to about twenty thousand dollars, for a large building then being constructed by him in the city of Pittsburg. Great pressure at that time seems to have been brought to bear on both Mr. Kreusler and the plaintiffs, through the medium of this contract, to compel the unionizing of plaintiffs' mill. The union men, employed by Kreusler to put the work together before removing it from plaintiffs' warehouse in Butler, were called off at a time when the material was urgently needed by the contractor to complete his contract, and when, according to the testimony, about ten thousand dollars' worth of the material was still in plaintiffs' hands. It was during this period of urgency that the conversations and declarations

above referred to were had and made. These declarations as well as the acts of the defendants ³⁵⁷ leave no reasonable doubt that the purpose of defendants was to compel plaintiffs to unionize their mill or otherwise suffer irreparable injury to their business, and that they were acting in concert to effect that purpose."

We shall not quote the specific findings, but attention ought to be directed to one of them: "The Central Hotel in Butler had been partially destroyed by fire, and was being repaired, under the supervision of Ed. Weigand, a building contractor, who, under instructions from Mr. Nixon, the owner, was ordering the material as needed from the plaintiffs. The work was urgent, as the owner was anxious to utilize the building. The union men at work on the building were called off and were not permitted to resume work until Mr. Nixon entered into a written agreement with the business agent, Goerman, business agent of Local No. 500, bearing date, January 9, 1904, 'that no material delivered after January 8, 1904, coming from S. G. Purvis & Co. shall be used on the Central Hotel until said mill is operated according to union rules.' "

The right of a workman to freely use his hands and to use them for just whom he pleases, upon just such terms as he pleases, is his property, and so in no less degree is a man's business in which he has invested his capital. The right of each—employer and employé—is an absolute one, inherent and indefeasible, of which neither can be deprived, not even by the legislature itself. The protection of it, though as old as the common law, has been reguaranteed in our bill of rights. "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness": Const., art. 1, sec. 1. "The principle upon which the cases, English and American, proceed, is, that every man has the right to employ his talents, industry and capital as he pleases, free from the dictation of others; and if two or more persons combine to coerce his choice in this behalf, it is a criminal conspiracy. The labor and skill of the workman, be it of high or low degree, the plant of the manufacturer, the equipment of the farmer, the investments of commerce are all, in equal sense, property": *State v. Stewart*, 59 Vt. 273, 59 Am. Rep. 710, 9 Atl. 559. A person's business is prop-

erty, entitled under ³⁵⁸ the constitution to protection from unlawful interference. Every person has a right, as between his fellow-citizens and himself, to carry on his business, within legal limits, according to his own discretion and choice, with any means which are safe and healthful, and to employ therein such persons as he may select: *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881. With the absolute right of the appellees in their property, the appellants assumed to interfere, and would injure, if not destroy, it, if their demands are not complied with. This no court will tolerate.

As already stated, of the demands in themselves the appellees could not be heard to complain. The appellants contend that they are made for the benefit of the members of their union. This is undoubtedly so, and, if the injury resulting from a disregard of them is confined to its members, they alone can complain; and even if injury incidentally results to outsiders, through compliance by the members of the union with its rules and orders, there may be no remedy for it. An agreement by those to be benefited by it that they will themselves observe its terms in accepting employment, even if employers be incidentally embarrassed thereby, can occasion no injury to employers which the law will recognize, for workmen, whether bound by a compact among themselves or not, have the absolute right to give their services to whom they please, or to withhold them from whom they please, without responsibility for consequences to employers or to anyone else. But this is not the case when the primary purpose is to unlawfully coerce others, that, as a result of the coercion benefits may accrue to those who coerce. The attempt to coerce by unlawful means, by conspiring to injure and destroy property, is in itself an unlawful act, no matter what end is to be accomplished, and the concern of the law is only for the protection of those who are to be wronged. Benefits which it is alleged will result to the wrongdoers cannot be considered without sanctioning the wrong, without justifying unlawful means for the accomplishment of an end. By no specious reasoning can the conduct of the appellants be construed into anything else than a conspiracy to perpetrate wrong for the accomplishment of beneficial results to themselves. In this connection we adopt as expressive of our views and rendering ³⁵⁹ any further comment unnecessary the following from the well-considered opinion of the learned judge below:

“The business of the plaintiffs is property within the meaning of the law. The defendants sought, by concerted action, to injure them in their business, in other words, their property; in order to coerce them into submission to the demands of the union. Compliance with these demands meant that the plaintiffs, who furnish the capital, were not to be dominant in the control of their business, but that both they and their business were to be controlled, in most of its essential features, by others who were in no way responsible for the capital invested or the losses that might be entailed. The purpose of defendants to effect this by injury to and, if need be, by the destruction of plaintiffs’ business was an unlawful purpose and the combination of defendants to accomplish that purpose was an unlawful combination and therefore in law a conspiracy. True, the defendants contend and testify that their purpose was to benefit their own members. This, doubtless, in a sense, is true, but the benefits sought were the remote purpose, which was to be secured through the more immediate purpose of coercing the plaintiffs into complying with their demands, or otherwise injuring them in their business, and the court cannot, in this proceeding, look beyond the immediate injury to the remote results. Such is the doctrine laid down in *Eddy on Combinations* and quoted with approval in the case of *Erdman v. Mitchell*, 207 Pa. St. 79, 99 Am. St. Rep. 783, 56 Atl. 327, 63 L. R. A. 334, as follows: ‘The benefit to the members of the combination is so remote, as compared to the direct and immediate injury inflicted upon the nonunion workmen’ (in this case the nonunion mill owners) ‘that the law does not look beyond the immediate loss and damage to the innocent parties to the remote benefits that might result to the union.’

“In the case of *Plant v. Woods*, 176 Mass. 492, 79 Am. St. Rep. 330, 57 N. E. 1011, 51 L. R. A. 339, the court says: ‘The necessity that the plaintiffs (members of one union) should join this association (defendants’ union) is not so great nor is its relation to the rights of the defendants, as compared with the rights of the plaintiff to be free from molestation, such as to bring the acts of the defendants under the shelter of the principles of trade competition. Such acts are without justification and therefore are malicious and unlawful, ³⁶⁰ and the conspiracy thus to force the plaintiffs was unlawful. Such conduct is intolerable and is inconsistent with the spirit of our law.’

"In the case of *Curren v. Galen*, 152 N. Y. 33, 57 Am. St. Rep. 496, 46 N. E. 297, 37 L. R. A. 802, it is said: 'The social principle which justifies such organization is departed from when they are so extended in their operation as either to intend or to accomplish injury to others.'

"It is unnecessary to multiply authorities to establish the unlawfulness of defendants' purpose as expressed by their agents and indicated by their acts. In reaching this conclusion I do not ignore, but gladly recognize, the right of workmen and others to combine for the worthy purpose of bettering their condition. In their efforts to attain this end they may inflict more or less inconvenience and damage on others. But these results should be incidental damage and inconvenience consequent on the operation of general rules, lawful in themselves, rather than those which follow a specific intent and immediate purpose of injury to others in order that good may ultimately come to themselves.

"The doctrine that the end sanctifies the means has no place in a condition of society where law prevails. Even a good purpose must abide its time and follow the path marked out by law, rather than hasten its accomplishment by ignoring the equal rights of others. A patient recognition of these safeguards which the law has thrown about every lawful possession, and of those limitations and restraints within which every lawful endeavor must be advanced, is the only sure way of helping on any worthy cause.

"Turning from a consideration of the nature of the purpose of defendants, as indicated by their words and deeds, I desire to briefly consider the means used to effect that purpose. On part of plaintiffs it is alleged that the means used are a boycott of their business. The defendants contend that their methods were persuasive and were not accompanied with violence, threats or intimidation.

"No violence was used nor does any seem to have been contemplated or threatened. But acts may be coercive in character without threats or commission of violence or personal injury. When the District Council with its seven thousand members in the Pittsburgh district gave notice to practically all the building ³⁶¹ contractors of that district that the plaintiffs refused to run their mill in accordance with union rules, and calling attention to the working rule which forbids union workmen to work material from any nonunion mill, the contractors understood what the request not to

patronize plaintiffs' mill meant. When the members of Local No. 500, who were willingly working material from plaintiffs' mill, were visited by the business agent of the union, who called them off, they doubtless knew that it meant trial, fine or expulsion and ostracism if they continued to work. When the owner of the Central Hotel was required, in the urgency of his situation, to sign a contract with the business agent of the union not to purchase any more material from plaintiffs as the condition of having work continued on his building, it can scarcely be said that his freedom of action was not interfered with; when the business agents of the District Council declared that they had come to Butler prepared to drive Purvis & Company into the union, when they stated to plaintiffs there was going to be trouble if the mill was not unionized, and gave them to understand that they must unionize their mill or quit business, all parties well understood what that meant. In all these things the attitude of the defendants was threatening and coercive, rather than persuasive."

In attempting to justify their conduct the appellants allege authority for it in the act of June 16, 1891 (Pub. Laws, 300). While that act provides that they may devise and adopt ways and means to make rules, regulations, by-laws and resolutions of their order effective, it sanctions no rules, regulations, by-laws or resolutions to commit wrong, and if it attempted to do so by authorizing the appellants to interfere with the absolute rights of the appellees, the legislation would be a dead letter, for the legislature cannot abolish the declaration of rights; to do that the whole people of the commonwealth must be directly consulted and they must give assent: *Erdman v. Mitchell*, 207 Pa. St. 79, 99 Am. St. Rep. 783, 56 Atl. 327, 63 L. R. A. 334.

In assessing the damages sustained by the plaintiffs and directing their payment no error was committed by the court. All of the assignments are dismissed and the decree is affirmed at the costs of the appellants.

Boycotting is the subject of an extended note to *Gray v. Building Trades Council*, 103 Am. St. Rep. 488-503. This subject is further discussed, with special reference to conspiracies, in the recent cases of *Franklin Union v. People*, 220 Ill. 355, 110 Am. St. Rep. 248; *Purrlington v. Hinchliff*, 219 Ill. 159, 109 Am. St. Rep. 322, and cases cited in the cross-reference note thereto. Strikes and strikers are also discussed in the note to *O'Neill v. Behanna*, 61 Am. St. Rep. 706-711.

MEIGS v. TUNNICLIFFE.

[214 Pa. St. 495, 63 Atl. 1019.]

MORTGAGES—Effect of Partial Release.—If, after conveyance of mortgaged premises by the mortgagor by deed containing a covenant against encumbrances, the mortgagee, without notice of such deed, releases a portion of the mortgaged premises from the lien of the mortgage without the knowledge or consent of the mortgagor, the latter is thereby released and discharged from further liability for the mortgage debt. (p. 770.)

J. G. Johnson, G. B. Lindsay and W. B. Harvey, for the appellant.

W. B. Broomall and A. D. MacDade, for the appellee.

⁴⁹⁶ STEWART, J. Dr. Meigs, here the appellant, was obligee in a certain bond of the sum of five thousand five hundred dollars given by Sarah Brierley, now Sarah Tunnicliffe, the appellee. The bond was secured by a mortgage executed by Miss Brierley upon certain real estate owned by her in the city of Chester, which she subsequently conveyed to her sister, Mrs. Cooper. At the instance and the request of the latter, after she became owner of the property, Dr. Meigs released a certain part of the mortgaged premises. Later on he foreclosed his mortgage, the unreleased premises selling for three thousand five hundred and fifty dollars. With a view to collect from Miss Brierley, the mortgagor, the balance of the debt, he caused to be entered a judgment against her on her bond containing a confession. Upon the defendant's application, in which she represented that the mortgagee, without her knowledge or consent, had released from the lien of the mortgage a certain part of the premises included therein, and that in consequence she was discharged from further liability for the debt, the court opened the judgment for purposes of defense, and awarded an issue to determine the amount remaining unpaid on the mortgage, and whether the defendant had been released or discharged from liability thereon by the conduct of the plaintiff. It was agreed that the amount due and unpaid was two thousand eight hundred and two dollars and twenty-six cents; and but two ⁴⁹⁷ questions of fact were submitted to the jury for their determination: 1. Did the mortgagee, Dr. Meigs, know when he executed a release of part of the

mortgaged premises, that the mortgagor was no longer the owner of the mortgaged premises, but had conveyed the same to Mrs. Cooper? and 2. Did the said mortgagor in any way give her consent to, or acquiesce in, the release? There could be no dispute with respect to the first of these questions, as the fact of a previous conveyance of the property to Mrs. Cooper was set out in the release. The second was the vital question in the case. The jury, upon what unquestionably was sufficient evidence, found both issues for the defendant, and under the instruction of the court to the effect that if the release was executed without the knowledge and consent of the mortgagor, it operated in law to discharge the defendant from liability, they rendered a verdict accordingly. The assignments of error, thirteen in number, are but so many different ways of challenging the correctness of the court's instruction, and therefore they may all be considered together.

The question resolves itself into one of duty. What duty, if any, did the mortgagor owe to the mortgagee? As she was out of possession, she could do nothing to the prejudice of the mortgagee; and therefore it may be safely affirmed that she owed no duty to him with respect to the mortgage. What, if any, did the mortgagee owe to the mortgagor? He was her creditor, and held as collateral for the debt the mortgage she had given upon her real estate. She had conveyed the real estate to another, but in the hands of her grantee it was still collateral for the debt. It was in the power of the mortgagee to impair or utterly destroy the security by releasing part or all the property bond. Such action might or might not be to the injury of the mortgagor, depending wholly upon the understanding or agreement between the mortgagor and her grantee, with respect to the liability for the mortgaged debt as between themselves. When a mortgagee releases property from the lien and operation of the mortgage, it is his own act, for his own purposes, and determined by his own pleasure. Since by doing so he may work serious injury to the mortgagor, the law requires that he exercise caution. He dare not be indifferent to the rights of the mortgagor except at his own cost. ⁴⁹⁸ The mortgage is his to hold or dispose of as suits his pleasure; but it is not his to reduce or impair at the expense of the mortgagor. It is not necessary to refine on any established equitable principles in order to deduce a duty resting upon a mortgagee, under such a state of facts, to withhold his

hand from any release until he shall have first inquired of the mortgagor whether his interest in the mortgage would be affected by such release. The same principle that charges the holder of a collateral with loss in connection therewith, where such loss results from his own want of care, both suggests and commands it. What we have said does not conflict in the least with the principle that saves harmless the earlier encumbrancer who releases part or all the mortgaged premises to the prejudice of a junior encumbrancer, except as the latter has imposed upon him a duty to observe his equity by giving him notice of it. Between the earlier and junior encumbrancer there is no privity; they are strangers, neither owing any duty to the other until notice is given; until then the former is not supposed to know of the existence of the latter. To impose upon the earlier the duty of investigating to see whether his act in releasing would prejudice the latter, as said in *Schrack v. Shriner*, 100 Pa. St. 451, "would compel the senior to do for the holder of the junior security, or a subsequent vendee, what in equity and good conscience he ought to do for himself." In our case, the question is not between strangers but between the pledgor and the holder of the pledged security. In the case of encumbrancers, because they are strangers, except as the junior moves to restrain the earlier from releasing the premises, the earlier may do what he pleases with his security; in our case, except as the mortgagor allows it, the mortgagee can do nothing by way of impairment. Therefore, it is that the duty of inquiry is not with the mortgagor, who is not the acting party, but with the mortgagee, who to accomplish his own ends proposes to do something which may imperil the property of another in his keeping. If he attempts it without the consent of the mortgagor and to the latter's prejudice, on every principle of justice and equity, he should be held responsible for the consequence.

We take the fact to be as the jury found it, that the mortgagee here made no inquiry of the mortgagor, and that the release was given without her knowledge or consent. That the 499 release operated to deprive her of a fund upon which she had a right to rely for the payment of the debt, was a fact which, while not expressly found by the jury, seems to have been conceded, since the facts in connection with the mortgage and the subsequent conveyance to Mrs. Cooper, were all recited in the charge to the jury, as the basis of the court's conclusions of law, and no exception was taken thereto. Assum-

ing, then, that a duty rested upon Dr. Meigs to inquire of Miss Brierly before executing the release, and that he failed in this regard, was there anything shown that would excuse his failure? It was argued with much earnestness that inasmuch as the mortgaged premises were conveyed by the mortgagor to Mrs. Cooper, not under and subject to the mortgage, but by deed covenanting against encumbrances, the mortgagee had a right to assume that the transaction was just as it purported to be and that the mortgagor had relinquished the mortgage as a means of satisfying the debt. The argument itself is based on an unwarranted assumption of fact. It nowhere appears in the evidence that Dr. Meigs knew anything of the covenants in the deed from Miss Brierly to Mrs. Cooper when he executed the release. The record of the deed was not notice to him; it could be only to one bound to search for it: *Maul v. Rider*, 59 Pa. St. 167. There is only one aspect in which he could be heard to assert anything with respect to the conveyance and its covenants. Had he known it, acted upon it, and thereby been misled into executing the release, it might be argued with some, we do not say convincing, force, that in equity the loss under such circumstances should fall upon the mortgagor. But none of these features appear in the case; and it is therefore of no consequence as between the parties to this contention what covenants the deed to Mrs. Cooper contained. That the transaction between Miss Brierly and Mrs. Cooper, whatever the legal effect of the papers with respect to the mortgage, contemplated the mortgage as a continuing security for the benefit of the former, is a fact in the case. The appellant could have learned this fact had he made inquiry of the mortgagor. He made no such inquiry, and therefore by the act of releasing the mortgaged premises he became liable for whatever injury resulted therefrom to the mortgagor.

The exceptions are overruled and the judgment affirmed.

For Authorities bearing upon the principal case, see Woodward v. Brown, 119 Cal. 283, 63 Am. St. Rep. 108.

RINKER v. AETNA LIFE INSURANCE COMPANY.

[214 Pa. St. 608, 64 Atl. 82.]

CONTRACTS—Reformation.—Parol Evidence is inadmissible to reform a written contract, according to the intention of the parties, unless the declaration specially sets forth fraud or mistake as a ground for such reformation. (p. 774.)

INSURANCE, LIFE—Reformation of Contract—Fraud or Mistake.—If the declaration upon a life insurance policy is in the ordinary form, it is error to admit parol evidence that the insurance agent, either by fraud or mistake, inserted a clause in the policy different from that agreed upon. (pp. 774, 775.)

INSURANCE, LIFE—False Answers—Evidence.—If an application for life insurance contains a warranty of the truth of the answers given therein, and that such warranty and answers shall form the basis, and be part of the contract, and, if untrue in any respect, the policy shall be void; and further, that no statement made to any agent or other person and not contained in the application shall be considered as having been brought to the knowledge of the insurer, a willfully false answer contained in the application avoids the policy, whether written by the insured or the insurance agent, and in such case, in the absence of an allegation of fraud or mistake, parol evidence is not admissible to show that the insurance agent filled out the answers contained in the application, and that the applicant signed it at his request, without reading it, or that the applicant gave to the insurance agent a true answer to the questions in issue. (pp. 776, 777.)

J. W. Carpenter and G. M. Watson, for the appellant.

E. Warren, for the appellee.

609 **POTTER, J.** This was an action to recover the amount of a policy of life insurance issued by the defendant company to Elizabeth M. Rinker, for the sum of two thousand dollars payable to the plaintiff as beneficiary. A copy of the policy was attached and made a part of the declaration, and, as a part of the policy, there appears a copy of the application for insurance in which all the statements therein contained are warranted to be true. In the application certain questions appear with the **610** answers made thereto by the applicant, among them being question 22: "Have you ever met with any severe personal injury or been subjected to any severe surgical operation, or have you any material defect of eyesight or hearing? If so, state the particulars." The answer was "No." Upon the trial, after the plaintiff had formally made out a case, evidence was offered on the part of the defendant tending to show that the answer thus made to question 22 was untrue, and that, as

a matter of fact, some time before the application was made, the insured had undergone a very severe surgical operation. That this was the truth was uncontroverted, but in rebuttal the plaintiff offered to show that the insured had not really answered the question as was indicated on the application, but that the agent had set down a written answer thereto without the knowledge of the insured. This offer of evidence was overruled by the trial judge, because it was at variance with the allegations of the statement of claim. It appears from the application, which was signed by the applicant, that she warranted the statements to be full, accurate and true, and she agreed that the declarations and warranties made and the answers to the questions, should be the basis, and form part of the contract between herself and the defendant company, and agreed "that if the same be in any respect untrue said policy shall be void." And she further agreed in the application "that no statement or declaration made to any agent, examiner or other person, and not contained in this application, shall be taken or considered as having been made to or brought to the notice or knowledge of said company, or as charging it with any liability by reason thereof."

Under the policy, then, as it stands, the agreement was to insure the life of Elizabeth M. Rinker, upon condition that she had never undergone a severe surgical operation. Plaintiff made no averment in the statement that a mistake had been made in filling in the answers to the questions; but, on the trial, attempted by parol evidence to contradict and nullify what had been declared as verity in the statement of the cause of action. "Parol evidence is inadmissible to reform a written contract, according to the intention of the parties, unless the declaration specially sets forth the fraud as a ground for such reformation": *Renshaw v. Gans*, 7 Pa. St. 117. And Justice ⁶¹¹ Sharswood, in delivering the opinion of this court in *Hunter v. McHose*, 100 Pa. St. 38, reasserted the principle that in a suit upon a contract under seal, in order to prove a parol contemporaneous agreement as part of the contract, fraud or mistake in omitting such agreement from the terms of the contract must be averred in the declaration. In the present case there was no averment either of fraud or mistake, and defendant, therefore, had no notice that any such claim would be made. A general statement of the rule in such cases, which is amply supported by authority, is found in 4 *Joyce on Insurance*, paragraph 3756: "If the

declaration upon the policy is in the ordinary form, it is error to admit evidence that the defendant's agent either by fraud or mistake inserted a clause in the policy different from that agreed upon."

The first assignment of error complains of the rejection of the offer made by plaintiff to prove that the agent wrote down the answers of the applicant to the questions, and that, after finishing the writing, he asked her to sign the paper, which she did without reading it. This offer was properly rejected. There is no allegation that the applicant was blind or deaf or that she was unable to read. The statement simply is that she signed the paper without reading it. If she was incorrectly reported therein, it was then her own fault.

The rule laid down in *Greenfield's Estate*, 14 Pa. St. 489, is perfectly good to-day. Chief Justice Gibson there said (page 496): If a party who can read "will not read a deed put before him for execution; or if, being unable to read, will not demand to have it read or explained to him, he is guilty of supine negligence, which, I take it, is not the subject of protection, either in equity or at law."

The second and third assignments also complain of the refusal of the court below of an offer to show that the agent filled out the answers and asked the applicant to sign the paper, which she did without reading, and, further, that the witness heard applicant state to the agent that she had undergone an operation.

Neither of these offers was admissible under the pleadings. Her application was in writing, was signed by her and it was the basis upon which the contract of insurance was issued. This suit was brought upon the policy and upon the application ⁶¹² as part thereof, without any averment in the declaration that any fraud or mistake was committed in making out the application. If the evidence offered tended to prove anything, it would be fraud or misconduct on the part of the agent in inducing applicant to sign a statement contrary to the truth; but there is no such averment in the declaration. The application for the policy, by its plain terms, brought to the assured distinct notice of a limitation upon the power and authority of the agent, in that it contained an explicit agreement that no statement or declaration made to any agent, examiner or any other person, and not contained in the application, should be considered as having been made to, or brought to the notice of the company, or

as charging it with any liability by reason thereof. This case, therefore, differs in that respect, and is to be distinguished from the line of cases such as *Smith v. Farmers' etc. Ins. Co.*, 89 Pa. St. 287, *Susquehanna Mut. Fire Ins. Co. v. Cusick*, 109 Pa. St. 157, and *Kister v. Lebanon Mut. Fire Ins. Co.*, 128 Pa. St. 553, 15 Am. St. Rep. 696, 18 Atl. 447, 5 L. R. A. 646, cited by counsel for appellee, in none of which does it appear that notice was brought to the assured of the limitation upon the power of the agent, or that anything was done to put the assured on guard in this respect during the negotiations for the issue of the policy. In pointing out this distinction between cases in which the authority of the agent is not limited, or the notice of such limitation is not communicated to the person with whom he deals, and other cases where the limitation is brought to the notice of the assured, the supreme court of the United States in *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. Rep. 837, 29 L. ed. 934, said: "Where such agents, not limited in their authority, undertake to prepare applications and take down answers, they will be deemed as acting for the companies. In such cases it may well be held that the description of the risk, though nominally proceeding from the assured, should be regarded as the act of the company. Nothing in these views has any bearing upon the present case. Here the power of the agent was limited, and notice of such limitation given by being embodied in the application, which the assured was required to make and sign, and which, as we have stated, he must be presumed to have read. He is, therefore, bound by its statements."

In the case at bar when the agent was taking the application of the assured and was explaining the questions and the meaning ⁶¹³ of the terms used, he was very properly to be regarded, for those purposes, as the representative of the company; but if the evidence offered by the plaintiff is true, the agent must have attempted to commit a deliberate fraud upon the company. He knew that if the correct answers were given to the questions, the applicant would not be considered a fit subject for insurance, and no policy would be issued. It was his duty not only to write down truly the answers given by the applicant, but also to make known to his principal any other facts material to the risk which might come to his knowledge. Therefore, if he was guilty of any such conduct as the offer of the plaintiff would tend to prove,

he grossly violated his duty, and the effect of his action was to benefit the applicant at the expense of the company. But in perpetrating such a fraud, the agent would not be alone. The signing of the application made the assured a party to it, and when she signed it she was bound to know what she was doing. Good faith required of her correct answers to the questions and reasonable diligence to see that the answers were correctly written. If it be assumed that the answers were falsified, as alleged, that fact would at once appear, when the policy was delivered to her, by the copy of the application attached to it. Inspection would have shown that a fraud had been committed, both upon her and the company, and it would have been her plain duty to make the fact known to the company. She had it within her power to prevent the fraud, as knowledge of it was within her reach. Neither she nor her beneficiary can be permitted to take the fruits of the misrepresentation.

The assignments of error are dismissed, and the judgment is affirmed.

The Effect of False Answers inserted in applications for insurance by the agents or medical examiners of the insurance company is discussed in the recent monographic note to *Johnson v. Aetna Ins. Co.*, 107 Am. St. Rep. 108-117.

CASES
IN THE
SUPREME COURT
OF
SOUTH DAKOTA.

IN RE RENSHAW.

[18 S. Dak. 32, 99 N. W. 83.]

CHATTEL MORTGAGES—Sale of Property—Construction of Statute.—The statute of a state providing that if a mortgagor in an unsatisfied chattel mortgage shall willfully sell or dispose of the mortgaged property without the mortgagee's written consent, he shall be guilty of larceny, embraces a sale in that state of chattels mortgaged to residents thereof, although the mortgage was executed, delivered and filed in another state by residents thereof. (p. 780.)

EXTRADITION—Sufficiency of Indictment—Burden of Proof. In extradition proceedings of prisoners held pursuant to an indictment found in another state, the burden is on them in habeas corpus proceedings to show that such indictment is insufficient, by producing the statute under which it was found, or other competent evidence, and the fact that such statute was not submitted with the requisition papers will not warrant the presumption that it is the same as that of the state from which extradition is asked and under which the indictment would be insufficient. (p. 780.)

EXTRADITION—Sufficiency of Indictment—Presumption.—It is presumed that acts charged in an indictment found in another state, under which extradition of fugitives from justice is asked, are sufficient under the laws to constitute the crime charged. (pp. 780, 781.)

EXTRADITION—Sufficiency of Indictment.—In a case involving the surrender, under the acts of Congress, of a fugitive from justice, the objection cannot be sustained that the indictment is not framed according to the technical rules of criminal pleading, if it conforms substantially to the laws of the demanding state, and that must be determined in the forum of that state. (pp. 781, 782.)

E. P. Wanzer, J. W. Lindsey and R. B. Tripp, for the appellants.

French & Orvis, for the respondent.

33 FULLER, J. This habeas corpus proceeding was instituted in the circuit court to secure the discharge of C. M.

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and C. S. Renshaw from alleged unlawful confinement and retention by G. M. Shuck as sheriff of Charles Mix county. On this appeal from an order dismissing the writ, and remanding the accused to the custody from which they were brought, it will be necessary to consider the following facts disclosed by the record: On the sixth day of May, 1903, an indictment was found, returned and filed in the district court of Woodbury county, Iowa, charging appellants, and each of them, with the crime of larceny committed by the sale of certain mortgaged personal property, which, under the laws of that state, constitutes a felony. After the presentment and filing of this indictment in the above-mentioned court, having full jurisdiction to entertain the case, an application for a requisition was regularly made to the governor of Iowa, showing that appellants, as fugitives from justice, were in the state of South Dakota. Thereupon the governor of Iowa issued a requisition, which, together with the necessary papers and proof, were presented to the governor of this state, and the same was accepted and allowed, together with a warrant in due form, directed to the sheriff, coroner, ³⁴ or any other peace officer of Charles Mix county, or any other county in the state of South Dakota, requiring the arrest of appellants at any place within the limits of this state, to be safely kept and delivered to C. W. Jackson, the person duly authorized by the governor of Iowa to receive them. By virtue of the foregoing indictment, warrant and proceedings, respondent, G. M. Shuck, sheriff of Charles Mix county, arrested each of the accused, and still retains them both in custody, ready to be turned over to C. W. Jackson, as in such warrant commanded.

One of the important questions presented is whether the statute of Iowa, declaring the sale of mortgaged personal property to be larceny, applies to chattels described in a mortgage executed and delivered in South Dakota to a person residing in the state of Iowa, where it is charged the sale took place. To determine the point, it will be necessary to construe the following provision of the Iowa statute, under which the indictment was drawn: "If any mortgagor of personal property, while the mortgage upon it remains unsatisfied, willfully destroy, conceal, sell, or in any manner dispose of the property covered by such mortgage, without the written consent of the then holder of such mortgage, he shall be guilty of larceny, and punished accordingly." It seems rea-

sonably clear that this statute was couched in general terms for the purpose of covering all unauthorized disposition of mortgaged personal property effected in that state by the mortgagor, and there is nothing to suggest that the legislature intended to exclude from its operation delinquents who sell personal property in Iowa, that is described in a mortgage made payable therein to ³⁵ one of her residents, but executed and delivered elsewhere. Neither the flagrancy of the offense nor the probability of its commission would be lessened by the exoneration of dishonest nonresident mortgagors, and it was not the intention of the legislature to deprive Iowa mortgagees and resident dealers in personal property of the protection afforded by the statute simply because a mortgage running to one of her citizens was of necessity executed, delivered, and filed in another state.

While conceding that the sufficiency of an indictment must be determined by the law of the demanding state, it is urged that the Iowa statute was not submitted with the requisition papers to the governor nor to the court at the hearing below, and therefore the presumption must be indulged that such statute is the same as the law in this state, under which it is maintained that facts sufficient to constitute a public offense are not stated. It is only in the absence of something to the contrary that the law of a sister state is presumed to be the same as our own, and when, as in this case, it is alleged by the petitioners for the writ of habeas corpus that they are illegally deprived of their liberty under an indictment which fails to state facts sufficient to constitute a public offense, the burden is upon them to establish such allegation by producing the controlling statute or other competent proof.

In the well-considered case of *Barranger v. Baum*, 103 Ga. 465, 68 Am. St. Rep. 113, 30 S. E. 524, there are many apt quotations from supporting authorities to the effect that the finding of an indictment in a sister state is at least prima facie evidence that the acts charged constitute a crime, and in disposing of the question here presented, the court say: "But it is insisted in this case that the judge below, upon the trial of the writ of ³⁶ habeas corpus, did not have before him any law of the state of Maryland, and that, therefore, there was no evidence that the indictment charged any crime against the laws of that state. . . . The burden of proof is upon him to show the illegality of the act of the executive of this state. The fact that an indictment had been

found charging him with certain acts against the penal laws of another state raises a presumption that the acts charged constitute an offense against said laws, and that the indictment substantially conforms to the rules of criminal procedure thereunder. . . . An indictment, being an official proceeding, instituted by a branch of the government, found upon the oath of a tribunal, presumed to act without fear or favor, and with impartiality, carries with it more weight and validity than the affidavit of an individual, which has not upon it the stamp of official authority. These views, we think, are sustained by an unbroken current of authority upon the subject."

While the action of the grand jury in finding an indictment never justifies an inference of guilt, the presumption is that the acts charged therein, when made the basis of a requisition, are sufficient to constitute a crime, under the laws of a demanding state.

Appellants being in custody by virtue of the warrant of our governor, issued upon proper papers and in strict compliance with the act of Congress, the technical sufficiency of the indictment to charge larceny, under the statute of Iowa, is a question that must be determined in that forum.

The Nebraska court quotes with approval from Moore on Extradition, as follows: "It is believed that there is no case in which a court has, on habeas corpus, discharged a fugitive ³⁷ from custody on a rendition warrant, on the ground that an indictment accompanying the requisition did not constitute or contain a sufficient charge of crime": *In re Van Seeiver*, 42 Neb. 772, 47 Am. St. Rep. 730, 60 N. W. 1037. To the same effect are the following cases: *Matter of Leary*, 10 Ben. 197, Fed. Cas. No. 8162; *Commonwealth v. Dennison*, 24 How. 66, 16 L. ed. 717; *Matter of Clark*, 9 Wend. 212; *Robinson v. Flanders*, 29 Ind. 10; *Ex parte Lewis*, 79 Cal. 95, 21 Pac. 553; *Ex parte Swearingen*, 13 S. C. 74.

The headnote, fully sustained by the decision in *Ex parte Reggel*, 144 U. S. 642, 5 Sup. Ct. Rep. 1148, 29 L. ed. 250, is as follows: "Each state has the right to prescribe the forms of pleading and process to be observed in its courts, in both civil and criminal cases, subject only to those provisions of the national constitution designed for the protection of life, liberty and property in all the states of the Union; consequently, in a case involving the surrender, under the act of Congress, of a fugitive from justice, it may not be objected

that the indictment is not framed according to the technical rules of criminal pleading, if it conforms substantially to the laws of the demanding state." Assuming that the law of Iowa was presented to the governor and considered by the court below, it would still appear probable therefrom, and from papers regularly issued and duly authenticated, that appellants are charged with a crime, and are fugitives from justice.

The order appealed from, by which the writ is dismissed and the petitioners remanded to the custody of respondent, is therefore affirmed.

Proceedings on the Extradition of fugitives from justice are discussed at length in the monographic note to *Farrell v. Hawley*, ante, pp. 103-144.

FISH v. KIRLIN-GRAY ELECTRIC COMPANY.

[18 S. Dak. 122, 99 N. W. 1092.]

NEGLIGENCE—Defective Appliances—Injury to Third Person.

If a person is injured while attending church by the fall of an electric light, which an electric company has placed in the church under an agreement to keep it in repair and furnish electricity and carbons therefor, a complaint alleging that the light fell by reason of such company's negligence in failing to keep the light in proper repair is not open to demurrer on the ground that it fails to charge that such company was the owner of the church or of the light causing the injury. (p. 784.)

NEGLIGENCE—Defective Appliances—Injury to Third Person.

If an electric company sells an arc light to a church under contract to furnish electricity for and keep such light in repair, and through its negligence in failing to properly repair the light after notice, it falls, injuring a person who is attending church services, the electric company is liable therefor. (p. 785.)

W. S. Glass, for the appellant.

G. W. Case, for the respondent.

124 CORSON, P. J. This was an action brought by the plaintiff to recover from the defendant damages for injuries alleged to have been received by her while attending church in the city of Watertown by the falling of an electric arc-light lamp suspended from the ceiling. Verdict and judgment were in favor of the plaintiff, and from the order denying a new trial the defendant has appealed.

A demurrer to the complaint was interposed, which was overruled by the court, and its ruling thereon is assigned as error, and will be first considered. The plaintiff in her complaint alleges, in substance, that the defendant is a corporation engaged in the business of furnishing electricity for electrical lights to be used in dwelling-houses, churches, etc., in the city of Watertown; that prior to the injury alleged in the complaint the defendant entered into a contract with the trustees of the Methodist church to furnish the appliances and properly and safely suspend and hang a certain arc light in said church, and it was further agreed by the said defendant to keep the said light and the appliances incident thereto in a good and safe condition and repair, and to furnish the necessary carbons therefor; that under and by virtue of the said contract and agreement it became and was the duty of the said ¹²⁵ defendant to not only properly suspend said arc-light to be used in the lighting of the said church, but it became and was its duty to keep the said light and all the appliances incident thereto in a good and safe condition and repair; that the trustees of the said church paid the defendant for said care and attention to said light, and relied upon it to comply with the agreement and keep and maintain the light in a good and safe condition; that prior to the injury set forth the said light became out of repair, unsafe and insufficient for the purpose for which it was to be used, of which the defendant company was notified a short time prior to the injury complained of, and the said company was requested to make the necessary repairs; that one of the defendant's servants pretended to repair the said light, but negligently and carelessly failed and neglected to properly repair the same; that on or about the second day of June, 1901, while the plaintiff was attending services in the said church, and without any knowledge on her part of the unsafe, insecure, or dangerous condition of the said light or of its appliances, and without any negligence on her part, and while sitting under the said light, by reason of the negligence of the said defendant the same fell upon her without any warning, thereby painfully and severely injuring her.

It is contended by the appellant, among other things, that the complaint is insufficient, for the reason that it is not alleged that the defendant was the owner of the church or the owner of the arc light which caused the injury. We are of the opinion that the contention of the appellant is untenable. It

will be noticed that it is alleged in the complaint that the defendant agreed with the church authorities to hang and care for the said light, furnish it with carbons, keep it in order, and supply ¹²⁶ it with the necessary electricity to produce the required light, for a consideration paid by the said church authorities. Notwithstanding the church and the arc light were owned by the church society, the electricity, as we have seen, was furnished by the defendant, and the hanging, care and custody of the light were under the control and management of the defendant. For reasons more fully hereinafter stated, we are of the opinion that the court ruled correctly in overruling the demurrer to the complaint.

On the trial it was shown that the defendant originally furnished the arc light, and superintended the hanging of the same, but that a year or more prior to the injury complained of the light and the machinery in connection therewith in the church became the property of the church. It was also shown that under the contract between the authorities and the defendant the defendant agreed to furnish the required electricity for said light, and also agreed to keep the said light and the machinery connected therewith in good order, furnish carbons, etc. It was further shown that prior to the injury complained of the light worked badly, and notice was given to the defendant to repair the same and put it in order; that in compliance with the said request the defendant sent an employé, who had had about two months' experience, to make the necessary repairs; that he made some slight changes on the evening of the injury, but left the church before the light was really in good working order; that subsequently, during the services, the light again worked badly, and thereupon fell upon the plaintiff, who was sitting immediately under the same.

It is contended by the appellant that when the defendant transferred the arc light to the church it ceased to be liable ¹²⁷ for any injury caused by the fall of the same, and the defendant seeks to invoke the principle that one who constructs or builds machinery is only answerable to his employers for want of care or skill in the execution thereof, and he is not liable to third parties for accidents or injuries which may occur after the completion and delivery of the machinery, as laid down in *Losse v. Clute*, 51 N. Y. 494, 10 Am. Rep. 638, and *Loop v. Litchfield*, 42 N. Y. 351, 1 Am. Rep. 513. In the former case an action was instituted for damages resulting from injuries caused by the explosion of a steam boiler against the

party who manufactured the same. The court of appeals of New York held that the action could not be maintained, for the reason that the boiler had been manufactured and delivered to the party operating it, and the defendant was not, therefore, liable to the party injured. It will be observed in that case that the steam boiler had been delivered and accepted by the party who was operating the same, and that the person injured was a third party having no connection with the defendant, and to whom the defendant owed no duty. In that case the court says: "They contracted with the company, and it did what was done by them for it and to its satisfaction, and when the boiler was accepted they ceased to have any further control over it or its management, and all responsibility for what was done with it devolved upon the company and those having charge of it, and the case falls within the principle decided by the court of appeals in *City of Albany v. Cunliff*, 2 N. Y. 165, which is that the mere architect or builder of a work is answerable only to his employer for any want of care or skill in the execution thereof, and he is not liable for accidents or injuries which may occur after the execution of the work."

¹²⁸ We are of the opinion that the principle established by the cases which we have just cited is not applicable to the case at bar. In the case before us the defendant not only furnished and suspended the electric arc light, but it had agreed to keep the same in good repair, to supply the necessary carbons and electricity necessary for its proper use. The defendant, with full knowledge of the dangerous character of the force it supplied, was bound to use the same with a care commensurate with the danger of its employment; and if the injury, as found by the jury, was caused by the defendant's negligence in its care and management of the light, it is liable to the plaintiff for the injuries sustained. As we have seen, the defendant's duty did not cease upon suspending the arc light and its acceptance by the church trustees, but continued by reason of its agreement to furnish carbons, and to keep the light in good repair, and to supply the electricity required for the same. The case of *Thomas v. Maysville Gas Co.*, 108 Ky. 424, 56 S. W. 153, 53 L. R. A. 147, establishes the principle which, in our opinion, should control in this case. In that case it was held: "A corporation which generates and sends electricity into the wires of a street railway company is chargeable with the duty to see that such wires are properly insulated, and it, as well as the street railway company, is liable

for failure to perform that duty, if a person is killed because the wires are not properly insulated." In that case the street railway company operated an electric car line, and the defendant gas company was engaged in the business of furnishing gas and electricity. The defendant, under a contract with the street railway company, supplied the electricity necessary for operating the car line, but the defendant had no interest in the railway company. The ¹²⁹ railway company not only operated its own road, but owned the wires through which the electricity passed. A third party came into contact with one of the wires by reason of its want of insulation, and was thereby killed. His administrator brought the action against not only the railway company, but also the gas company that furnished the electricity. A judgment having been directed in favor of the gas company, the plaintiff took an appeal. Judgment was also rendered against the street railway company, from which no appeal seems to have been taken. The question, as stated by the supreme court, is, Was the defendant gas company responsible for the death of the plaintiff's intestate, if such death was the result of negligence of the said company in failing to keep the wires charged by the gas company with electricity properly insulated? The court held the gas company liable, and reversed the ruling of the lower court in directing a verdict in favor of that company. It does not appear from the statement of facts in that case that the gas company was under any contract to keep the wires in proper condition, but the court held, notwithstanding that fact, that it was its duty to see that they were properly insulated, and that the public were properly protected from the dangerous element furnished by the company. The case at bar, as will have been observed, presents some stronger elements against the defendant than was shown in that case. In the case at bar the defendant not only furnished the electricity necessary for operating the arc light, but it obligated itself to keep the same in repair and in good order. Clearly, under such a contract, it was liable for any injury resulting from its negligence in suspending, care, and management of such light. The case of *Excelsior Electric Co. v. Sweet*, ¹³⁰ 57 N. J. L. 224, 30 Atl. 553, is somewhat analogous to the case at bar. It was an action against an electric light company for damages for injuries resulting from the fall of one of its lamps suspended in a street of the city, caused by the negligence of the defendants. In that case the electric light company owned the wire and the

electric light lamp, and furnished the electricity for lighting the same. The court affirmed the judgment of the court below holding the electric light company responsible for its negligence in causing the injury to plaintiff, who was injured by the fall of the lamp while passing along the street under the same. Of course, the fact that the electric light company owned the arc light as well as operated the same had some influence upon the decision of the appellate court. But it would seem that the court would have taken a similar view had it been shown that the city owned the electric light lamp, and that the electric light company was under a contract to keep it in good order and furnish carbons and electricity necessary for lighting the same. As was stated in *Thomas v. Maysville Gas Co.*, 108 Ky. 424, 56 S. W. 153, 53 L. R. A. 147, the question presented here is a new one, upon which no decisions have heretofore been made. But we are of the opinion that, where an electric light company not only furnishes the electricity, but contracts to furnish the carbons and keep the light in proper repair and order, such company is liable for injuries caused by the negligence in the suspension and management of such light. As before stated, electricity is an exceedingly dangerous element, and must necessarily be under the control of persons who are familiar with the management of electrical machinery and appliances.

Neither the church authorities nor persons in attendance ¹³¹ upon church services were presumed to know whether the electrical lamp was in order or properly suspended. But it was the duty of the company to know and see that the lamp was so properly suspended, and kept in good working order. It is true that in this case the cause of the falling of the electric lamp was not distinctly shown, but there was evidence tending to prove that the upper part of the lamp became overheated, and that the small cotton cord by which the same was suspended was burned off or charred so that it became so weakened that it was not able to sustain the lamp suspended by it, and we think that the jury was fully warranted in finding such to be the fact from the evidence introduced, as it evidently did. That the lamp was out of order and working badly immediately prior to its fall was clearly shown. As we have seen the company was notified that the lamp was out of order and was working badly, and that it attempted to repair the same by sending an experienced workman to make such repair. That he failed to remedy the difficulty is also shown

by the evidence. In our opinion the evidence was amply sufficient to justify the verdict of the jury, and the motion for a new trial was properly denied.

The order denying a new trial is affirmed.

The Right to Recover for Negligence where there is no privity is discussed in the monographic note to *Woodward v. Miller*, 100 Am. St. Rep. 192-203. This subject is further considered, with special reference to the liability of manufacturers to third persons in the monographic note to *Kuelling v. Lean Mfg. Co.*, 111 Am. St. Rep. 701-717.

BRUCE v. WANZER.

[18 S. Dak. 155, 99 N. W. 1102.]

MORTGAGE as Evidence of Indebtedness.—If the execution and genuineness of notes secured by mortgage sought to be foreclosed are denied, the recital of their execution and delivery in the mortgage is alone insufficient after the maturity of the notes, to prove the existence of the indebtedness secured by the mortgage. In the absence of the production of such notes by the person claiming under them they are presumed to be paid. (p. 792.)

MORTGAGES—Existence and Genuineness of Mortgage Notes—Burden of Proof.—If the execution and genuineness of notes secured by mortgage are denied, when the mortgage is sought to be foreclosed, the burden is on the mortgagee to prove the existence of the notes, or to account for their nonproduction, and that they were in fact executed by the maker or mortgagor. (p. 792.)

R. B. Tripp and C. H. Dillon, for the appellant.

E. P. Wanzer, in propria persona.

¹⁵⁵ **CORSON, P. J.** This is an action to foreclose a mortgage on certain premises in Douglas county. It is alleged in substance in the complaint that one Fred E. Summers in December, 1887, executed and delivered to one John T. M. Pierce five certain promissory notes, each for the sum of fifteen dollars, with interest at the rate of twelve per cent per annum after maturity; that, to secure the payment of said notes, said Summers executed a mortgage on a quarter section of land described in the complaint; that said Summers, having made default in the payment of the moneys secured by the said mortgage in August, 1890, ¹⁵⁶ attempted to foreclose the same by advertisement; that thereafter, on December 24, 1895, the said Pierce assigned in writing the certificate of sale ac-

quired by him at said attempted foreclosure sale; that in or about May, 1896, the said Summers, the mortgagor, conveyed the said property to one Alfred Thomas by quitclaim deed, and said Thomas thereafter, in June of the same year, transferred the same to the defendant, Wanzer; that there is now due the plaintiff on said notes the sum of \$75, with interest from the maturity of the same; that on the twenty-fourth day of December, 1900, said Pierce, by his attorney in fact, duly sold and transferred the said notes and mortgage to the plaintiff, who was also the equitable owner thereof by reason of the assignment of said certificate of sale, and is now the lawful owner and holder of the same; and the plaintiff demands judgment that the mortgage be foreclosed, and the property sold to satisfy the same. The defendant answered, denying each and every allegation of the said complaint not specifically admitted; denied that Summers ever executed the notes set forth in paragraph 1; denied that Summers ever executed the mortgage described in paragraph 2; admitted the allegations of paragraphs 4, 5 and 6. These paragraphs are that the said mortgage was duly acknowledged; that the said Summers made default in payment of the moneys secured by the said mortgage; that the said Pierce attempted to foreclose the same, and that the certificate of sale was issued by the sheriff of Douglas county to said Pierce; and that in December, 1895, said Pierce assigned the said certificate of sale to the plaintiff. Defendant further admitted that said Summers did on the eighteenth day of May, 1896, convey the real estate described in the complaint to one Alfred Thomas, and that the said Thomas conveyed ¹⁵⁷ the same to the defendant. Defendant denied that there is due the plaintiff the sum set forth in paragraph 10 of the complaint, and alleged that there is no sum whatever due the plaintiff on said notes, or any of them; denied that defendant was, at the commencement of this action, the owner of the notes set out in the plaintiff's complaint; and pleaded as a further defense the six year statute of limitations. The case was tried to the court without a jury, and its findings and judgment being in favor of the defendant, the plaintiff has appealed.

The court, in its findings of fact, finds that no evidence was offered by plaintiff to prove the execution or delivery of the five notes alleged in paragraph 1 of the plaintiff's complaint, except the recital contained in the instrument set out in paragraph 2 of these findings, purporting to be a mortgage, and

that in paragraph 2 the court finds that said Summers did, on the fifth day of December, 1887, execute to said Pierce an instrument in writing, being the instrument alleged by the plaintiff in paragraph 2 of his complaint, to be a mortgage on the premises described, setting forth a copy of the instrument. The court further finds that the property was conveyed to Wanzer, and that he is now the owner in fee of the said premises, and was such owner at the time this action was commenced, and that the said Summers has no interest in or title to the said premises. The court further finds "that the cause of action set forth in the plaintiff's complaint did not accrue within six years after the commencement of this action." The court thereupon concludes from the findings that the plaintiff was not entitled to recover as against the defendant; that the instrument purporting to be a mortgage, described in the plaintiff's complaint and in the findings, is not a sealed instrument; that the time ¹⁵⁸ within which the plaintiff or the original owner or holder of the said instrument might have instituted proceedings thereupon expired long before the commencement of the action; and that the defendant is entitled to judgment of dismissal of plaintiff's action. A motion for a new trial was made and denied. The bill of exceptions contained in the abstract is as follows: "For the purpose of showing an assignment of the mortgage involved in this action, the plaintiff introduced in evidence a power of attorney executed by the mortgagee, John T. M. Pierce, and his wife, Annie W. Pierce, to one Harry Eller, found recorded in the office of the register of deeds of Douglas county. Said power of attorney was dated the twenty-fifth day of June, 1891, and the execution of it was acknowledged before a notary public in Yankton county, and recorded in book 2 of Miscellaneous Records of Douglas county, page 44. It was a general power of attorney, and also authorized the said Eller to 'assign' mortgages of the said Pierce: Page 24. Thereupon plaintiff offered in evidence Exhibit 'C,' an assignment to plaintiff 'of the mortgage in this action by John T. M. Pierce, through his attorney in fact, Harry Eller, together with the acknowledgment thereon, the certificates of registration by the register of deeds of this county, and the seal,' and the same was received in evidence. The assignment was in the usual form of assignments, and also assigned to the plaintiff 'the promissory notes' described in said mortgage: Page 35." It will be ob-

served from the bill of exceptions that neither the notes nor the mortgage were introduced in evidence, and that there was no evidence proving or tending to prove that the alleged promissory notes were ever executed or delivered by the said Fred E. Summers to the said Pierce, except the recital ¹⁵⁹ in the purported mortgage, or that the said notes were ever assigned or transferred to the plaintiff, except so far as the transfer of the certificate of sale and assignment of the mortgage tended to prove that transfer.

It is contended by the respondent, in support of the judgment of the court below, that there is really no alleged error before this court to review, for the reason that no exceptions were taken to the findings of the court, or to any errors of law. The plaintiff, in his motion for a new trial, states that he will move for the same on the following grounds: "1. Insufficiency of the evidence to justify the findings of the court, in this: that there is no evidence whatever that the said Fred E. Summers was a resident of the state of South Dakota at any time after the execution of said mortgage; 2. Errors in law occurring on the trial of the said cause, in this: that it is not in any manner shown that the said action is barred by the statute of limitation; 3. That under the findings made by the court, the plaintiff is entitled to judgment for the reason that the six year statute of limitation has no application to cases of this kind; 4. That under the findings of the court, the said action would not be barred until the expiration of ten years from the maturity of the debt secured by said mortgage; 5. That the evidence is insufficient to show that said action is barred by the statute of limitation, it not being shown that ten years has elapsed since the maturity of said mortgage." The only assignments of error are: "1. That the court, upon the record presented, should have rendered a judgment in favor of appellant; 2. That the court erred in denying plaintiff's motion for a new trial, for the reasons assigned in his said motion."

¹⁶⁰ It will thus be seen that there is great force in the contention of respondent's counsel, as the court made no finding with reference to the residence of Summers, and the only alleged error of law presented is that the court erred in holding that the action was barred by the six year statute of limitations. As will be seen from an examination of the pleadings, the execution and delivery of the five notes was alleged in the complaint and denied by the answer, and the abstract fails to

disclose that any evidence was offered proving or tending to prove the execution of these notes, except the recitals in the alleged mortgage. In our opinion these recitals were insufficient to sustain the allegations as to the execution and delivery of the notes denied by the answer, and specially were they insufficient to prove any existing indebtedness on the same, and the notes being past due, in the absence of their production by the party claiming under them they are presumed to be paid: *Bergen v. Urbahn*, 83 N. Y. 49. So far as the record discloses, the failure to produce the notes on the trial was not in any manner accounted for. The court, therefore, was clearly right in holding that the plaintiff was not entitled to recover in this action.

It is contended by the appellant that it was the duty of the court to have found upon the issue of the execution and delivery of the said notes, as there was evidence introduced by the plaintiff to sustain the allegations of his complaint as to such execution and delivery, but, in our opinion, the court was clearly right in finding that there was no proof to sustain the allegations, except the recitals in the alleged mortgage; and, as before stated, in our view, these recitals did not, in the absence of the notes in evidence, sustain these allegations, or ¹⁶¹ prove or tend to prove the genuineness of Summers' signature to the same. The denial of the defendant raised the issue of the genuineness of the purported signature to the instruments. There was no denial of the existence of the notes purported to be signed by Summers, but their execution was denied; and the burden of proof was therefore upon the plaintiff to sustain the allegations of his complaint, not only to prove that there were in existence five notes purporting to be executed by Summers, but that they were in fact executed by him: *Baker v. Warner*, 16 S. Dak. 292, 92 N. W. 393.

In our opinion, therefore, the record discloses no evidence tending to prove the genuineness of Summers' signature to the notes, and hence there was no evidence upon which the court could base a finding other than the finding made by it. While the evidence may have been sufficient to prove such transfer, neither the assignment of the mortgage so denied by the defendant, nor the mortgage itself, gave the plaintiff a right of action, in the absence of the notes, and the absence of proof accounting for their nonproduction at the trial: *Bergen v. Urbahn*, 89 N. Y. 49.

The circuit court was clearly right, therefore, in dismissing the action, and its judgment and order denying a new trial are affirmed.

Recitals in Mortgage as Evidence of Indebtedness.—In an early case in South Carolina it was maintained that upon the foreclosure of a mortgage given to secure the payment of a bond, the bond must be produced as the highest evidence of the debt, or its nonproduction must be accounted for, and that the recital of the bond in the mortgage is not of itself sufficient evidence of the debt: *Cheuning v. Proctor*, 2 McCord, 11. The principal case relies upon *Bergen v. Urbahn*, 83 N. Y. 49, as authority for its ruling, but the effect or admissibility of the recitals in a mortgage as evidence of the existence of an indebtedness was not involved directly in that case. It was an action to foreclose a mortgage which by its terms was given to secure the payment of money as specified in the condition of a bond, and the defense of payment was interposed. The court held that the nonproduction of the bond was evidence of the discharge of the mortgage debt, and, if unexplained, was conclusive. It has also been held that in a foreclosure proceeding it is error to receive the mortgage in evidence, without first producing or accounting for the note which it secures: *Bennett v. Taylor*, 5 Cal. 502; and that unless the note accompanying a mortgage is produced or accounted for, it is presumed to be paid: *Bassett v. Hathaway*, 9 Mich. 28. Or, if a bond secured by mortgage is not produced or its loss accounted for, the presumption of payment of the mortgage debt is conclusive: *Ward v. Munson*, 105 Mich. 647, 63 N. W. 498.

On the other hand, a line of cases maintain that if a mortgage or trust deed recites indebtedness, the presumption is that such indebtedness remains unpaid, and that such presumption can only be rebutted by affirmative proof of its payment: *Graham v. Anderson*, 42 Ill. 514, 92 Am. Dec. 89. Approved in *Chapin v. Billings*, 91 Ill. 539. Or, if specific execution of an instrument, in form of a mortgage to secure the payment of a debt particularly described, is sought, the recitals in such instrument are *prima facie* evidence of the existence of the debt, and cast on the mortgagor the onus of disproving them: *Roney v. Moss*, 74 Ala. 390. In *Scott v. Cotten*, 91 Ala. 623, 8 South. 783, the court said: "The mortgage recites an indebtedness of eight thousand five hundred dollars, as shown by two promissory notes specifically described, and that it is executed to secure the payment of such indebtedness and of such notes. These recitals are express admissions of an indebtedness in a specified sum by the mortgagor to the mortgagee, and are sufficient evidence in the absence of countervailing proof," and although the execution of the notes is not proved.

It is not quite clear whether the principal case is authority for the proposition that a mortgage is of itself not sufficient evidence of the

execution of the notes therein recited, or only that such notes not being produced or accounted for may be presumed to have been paid. Where a mortgage, in distinct terms, states the existence of indebtedness from the mortgagor to the mortgagee, or sets out copies of notes by which such indebtedness is evidenced, and the time and conditions upon which payment is to be made, we confess that the statements so made in the mortgage seem to us to amount to formal, and in the absence of fraud or mistake, conclusive admissions of the facts stated, and as such receivable in evidence against the mortgagor, and if alleged in the complaint and not denied in the answer we see no reason for formally offering the mortgage in evidence.

WAALER v. GREAT NORTHERN RAILWAY COMPANY.

[18 S. Dak. 420, 100 N. W. 1097.]

MASTER AND SERVANT—Assault by Servant—Scope of Authority.—If a railroad section boss is directed by the company to build a fence on property not owned by it, and a servant of the owner of such property at her request goes to such section boss and forbids him to erect such fence, whereupon one of the section crew, at the command of such boss, commits an assault upon such servant, the assault is not within the scope of the authority of either the section boss or one of his crew, and the railroad company is not liable therefor. (p. 797.)

MASTER AND SERVANT—Acts Outside Scope of Employment. A servant cannot bind his master to respond in damages, unless it is shown that the act done by the servant causing the injury was an act which was expressly or by necessary implication within the line of his duty under his employment. (p. 797.)

R. A. Wilkinson and Winsor & McNaughton, for the appellant.

G. W. Case, for the respondent.

420 CORSON, P. J. This is an appeal from an order overruling ⁴²¹ the demurrer interposed by the defendant to plaintiff's complaint. The action was instituted to recover damages for an alleged assault and battery committed by one of the defendant's employes upon the person of the plaintiff. The plaintiff, in his complaint, alleges, in substance, that the defendant is a railroad corporation; that on the twenty-sixth day of January, 1903, and for a long time prior thereto, one Berit Pramhus was the owner and in possession of certain real estate described in the complaint; that upon the said twenty-

sixth day of January the said defendant, under instructions of one of its general superintendents, ordered and commanded its section crew, of which Henry Doust was foreman and Edward Faust was one of the laborers, together with other men, to enter upon the premises above described, belonging to the said Berit Pramhus, adjacent to the defendant company's right of way, and a distance of not less than fifty feet from the outside of the said right of way, for the purpose of building and constructing a snow fence, which said entry was made upon the said premises without the consent of the said Berit Pramhus, and against her protest; that the said Henry Doust was the foreman in charge of the said section crew, and with the authority of the said defendant company, who performed the act complained of, and his crew of men, including the said Edward Faust, were attempting to build and construct the snow fence upon the land aforesaid; and said Berit Pramhus instructed the said plaintiff to go to the said Henry Doust, as foreman of said section crew, and to advise him not to place said snow fence upon said land, and to remonstrate with, and to forbid them so to do; that the plaintiff, complying with such request, and in obedience to the commands of said Berit Pramhus, for whom he was then employed, went to ⁴²² the said Henry Doust, foreman of the said section crew, and to said crew, and remonstrated with them, and forbade them to erect and construct a snow fence upon said land, and demanded of them that they remove the same therefrom, whereupon, at the instance and request of the said Henry Doust, the section foreman as aforesaid, acting in behalf and for the benefit of the said defendant company, commanded the said Edward Faust to "go after" the said plaintiff, and thereupon the said Edward Faust did willfully and wantonly, and with force and arms, and without any just provocation therefor, beat and strike this plaintiff with his clenched fist, thereby knocking him down, and did then and there kick this plaintiff roughly and viciously with both of his feet in the side, whereby and on account of said willful and malicious striking and kicking by the said Edward Faust of this plaintiff, and while the said Edward Faust was acting for and in behalf of the said defendant company, he did cause the face of the said Lars O. Waaler to become sore, swollen, and bleeding, and did fracture and break one or more of the ribs of the said Lars O. Waaler, thereby causing him great bodily harm, suffering and injury, rendering him unable

to perform manual labor; all to his damage in the sum of fifteen hundred dollars. The demurrer to the complaint was interposed upon the ground that the complaint does not state facts sufficient to constitute a cause of action. The question for determination by this court is, Can the railroad company be held liable, upon the facts as stated, for the act of Edward Faust in assaulting and beating the plaintiff?

It will be observed that the defendant, through its general agent, directed its section foreman or boss to construct a snow fence on the land of Berit Pramhus without the line of the ⁴²³ railroad property, and that the section foreman took with him certain of his crew, among whom was Edward Faust, to perform the work as directed to be done; that while constructing the said fence the plaintiff, under the instruction of Berit Pramhus, the owner of the land, forbade them to erect the same and requested them to remove the part completed therefrom; that thereupon the foreman directed said Faust to "go after" the said plaintiff, and thereupon the said Faust did "willfully, wantonly, and with force and arms, and without just provocation therefor, beat and strike the plaintiff," and continue his assault upon him by striking and kicking him, resulting in serious injuries to the plaintiff. It is contended by the appellant that in making this assault upon the plaintiff, neither Faust, who made the actual assault, nor the foreman, who instructed him to make it, were acting in the line of their duty as employés of the company, and that the assault so made was the willful and malicious act of the foreman and of said Faust, for which the defendant company is not liable. It is insisted by the respondent in support of the court's ruling upon the demurrer that the acts of the foreman and Faust were done by them in furtherance of their employment, and was within the rule laid down by the courts holding the principal liable for the acts of its employés. The rule applicable to this class of cases is thus stated by the supreme court of Connecticut in *Stone v. Hills*, 45 Conn. 47, 29 Am. Rep. 635: "For all acts done by a servant in obedience to the express orders or directions of the master, or in the execution of the master's business, within the scope of his employment, and for acts in any sense warranted by the express or implied authority conferred upon him, considering the nature of the services required, the ⁴²⁴ instructions given, and the circumstances under which the act is done, the master is responsible; for acts which are not within these conditions, the servant

alone is responsible." Of these conditions of liability the one under which the present case comes, if it comes under any of them, is the one for acts done "in the execution of the master's business within the scope of his employment." While the rule itself is simple, there is great difficulty in its application, for the reason that in many cases it is not easy to determine when the employé is acting in the execution of the master's business and within the scope of his employment. It is clear from the allegations in the complaint that the defendant owed no duty, by contract or otherwise, to protect the plaintiff from the willful assault of its employés, and it does not appear from these allegations that the foreman or employés were expressly or impliedly authorized to commit the assault complained of upon the plaintiff. The plaintiff was not interfering with the act of the foreman and employés in erecting the fence they were ordered to erect, nor did he threaten to interfere with them. He simply performed the duty imposed upon him by the owner of the property to remonstrate with them against erecting the fence and request them not to proceed further. The act of the foreman in directing the employé and the act of the employé in assaulting the plaintiff were clearly without the scope of their authority. The facts, as disclosed by the complaint, bring the case within the principles of the case of *Holler v. Ross* (decided in 1902), 68 N. J. L. 324, 96 Am. St. Rep. 546, 53 Atl. 472, 59 L. R. A. 943. in which the court of errors and appeals of New Jersey held that "the servant of the master cannot bind the master to respond in damages ⁴²⁵ to the plaintiff unless it is shown that the act which the servant did, which caused the injury, was an act which was expressly or by necessary implication within the line of his duty under his employment"; and that learned court held that the trial court erred in refusing to direct a verdict for the defendant. The facts in that case are quite analogous to those in the case at bar. The defendant was the owner of personal property situated upon a wharf, and the servant who made the assault complained of was employed by the defendant to guard the property and prevent its being stolen. Early in the evening three men appeared upon the wharf, among whom was the plaintiff, and upon demand of the servant refused to throw up their hands, and started to run away; the plaintiff was shot and seriously wounded by the servant; but it did not appear that the plaintiff or those with him attempted in any manner to interfere with the goods of

the defendant, and the court, after a very full discussion of the question and consideration of the authorities, concludes its opinion as follows: "When the plaintiff rested its case the defendant moved to 'nonsuit because there is no testimony in this case which would, if true, operate to bind the defendant.' A careful examination of the plaintiff's proof makes it clear that such was the fact. The shooting by the servant of the defendant was not, under the proof made by the plaintiff, shown to have been done while the servant was acting within the lines of his duty or employment, and nonsuit should have been granted. Its refusal was error, and for this cause judgment should be reversed." We shall not attempt to review the numerous cases bearing upon this question, and shall only cite a few in support of the view we take of the case: *Henry v. Pittsburgh Ry. Co.*, 139 Pa. St. 289, 21 Atl. 157; ⁴²⁶ *Vanderbilt v. Richmond Turnpike Co.*, 92 N. Y. 479, 51 Am. Dec. 315; *Sagers v. Nuckolls* (Colo. App.), 32 Pac. 187; *Dolan v. Hubinger* (Iowa), 80 N. W. 514; *Holler v. Ross* (N. J. Eq.), 96 Am. St. Rep. 546, 53 Atl. 472, 59 L. R. A. 943; *Railway Co. v. Divinney* (Kan.), 69 Pac. 352; *Isaacs v. Third Ave. Ry. Co.*, 47 N. Y. 122, 7 Am. Rep. 418. The learned counsel for the plaintiff has cited a large number of authorities, but they are mostly railroad cases, in which parties have been assaulted or injured by conductors, trainmen, or station agents, and where the defendant was held to owe a duty to passengers to protect them from assaults and ill-treatment while transporting them on their trains. It is true it is alleged in the complaint in the case at bar that the assault of the employé was made while acting within the scope of his authority, but this is the statement of a conclusion of law, and not of a fact. From the facts stated it is the duty of the court to determine whether or not the employé was in fact acting at the time of making the assault within the line of his duty as such employé in this case, as the facts are fully set out in the complaint, and for the purpose of the decision upon the demurrer, must be taken to be true.

Our conclusion is that the circuit court erred in overruling the demurrer, and the order of that court is reversed.

The Liability of a Master for the Torts of His Servant is discussed in the monographic notes to *Goodloe v. Memphis etc. R. R. Co.*, 54 Am. St. Rep. 71-93; *Ware v. Baratania Canal Co.*, 35 Am. Dec. 192-201. The general rule is, that a master is liable for the willful or malicious torts of his servant when committed within the scope

of his employment and in furtherance of his master's business, but not when they are committed outside the scope of his employment and in the accomplishment of his own purpose: *Davenport v. Charleston etc. Ry.*, 72 S. C. 205, 110 Am. St. Rep. 598, and cases cited in the cross-reference note thereto; *Haller v. Ross*, 68 N. J. L. 324, 96 Am. St. Rep. 546. For the application of this rule to cases where an employé assaults a third person, see *Fairbanks v. Boston Storage etc. Co.*, 189 Mass. 419, 109 Am. St. Rep. 646; *Central of Georgia Ry. Co. v. Morris*, 121 Ga. 484, 104 Am. St. Rep. 164, and cases cited in the cross-reference note thereto.

MANITOBA MORTGAGE AND INVESTMENT COMPANY v. WEISS.

[18 S. Dak. 459, 101 N. W. 37.]

PAYMENT—Check as—Delay in Collection.—If a creditor receives the check of a third person, not signed or indorsed by the debtor, in payment of his debt, drawn on a bank in another place, and does not attempt to collect it nor forward it for collection until five days after its receipt, and by reason of such delay alone the check is not paid, the negligence of the creditor in not transmitting the check for collection on the day following its receipt constitutes the check an absolute payment of the debt. (p. 802.)

Crawford & Taylor, for the appellants.

French & Orvis, for the respondents.

459 **CORSON, P. J.** This is an appeal from a judgment in favor of the defendants and order denying a new trial. The case was tried to the court, and a certain special issue was submitted to a jury. The action was brought to foreclose a mortgage on which there was a balance due of \$318.50, on August 2, 1890. The defendants were residents of Hutchinson county, near Scotland, and on August 2, 1890, they applied to Lavender & Spannagel, a firm engaged in the mercantile business in Scotland, for the sum necessary to pay their note and mortgage, ⁴⁶⁰ which had previously been deposited with that firm by one of the defendants, Adam Weiss. Mr. Spannagel informed him that the firm did not have the money just then, and that he would give him a check, and send it to the agents at Huron. Spannagel then wrote a check on the Bank of Scotland for the sum above named, in favor of Kelly & Read, the agents of the plaintiff at Huron, and signed the firm name of Lavender & Spannagel. He also wrote a letter to Kelly & Read inclosing this check, addressed to them at Huron. The check and letter

were delivered to the defendant Weiss to mail, and defendant Weiss deposited this letter in the postoffice at Scotland. On the ninth day of August the check was deposited by Kelly & Read in the First National Bank of Huron for collection. This bank forwarded the check for collection on August 11th, through the Sioux National Bank of Sioux City. It was presented for payment at the Bank of Scotland, in Scotland, the bank upon which it was drawn, on August 14th, and payment was refused for want of funds to the credit of the drawers, Lavender & Spannagel having failed on the 12th of the same month. It was protested for nonpayment on the same day. Upon the 9th Kelly & Read, the agents of the plaintiff, wrote to Weiss a letter inclosing the note and mortgage, together with a coupon, a commission note, a junior mortgage, and a discharge of the same, and in the letter says: "Your \$318.50 pays up in full. We will forward release in a few days." The defendant Weiss did not sign the check as indorser, maker, or guarantor, and his name did not appear upon the check in any manner.

It was stipulated at the trial: (1) That a letter properly stamped and addressed to a person residing at Huron, South Dakota, if ⁴⁶¹ mailed at Scotland, South Dakota, during the forenoon of any business day during the month of August, 1890, would, by due course of mail, have reached Huron on the first business day following said mailing; if mailed at Scotland during the afternoon of any business day during the month of August would, by due course of mail, have reached Huron on the second business day thereafter. (2) That between the second day of August and the thirteenth day of August, 1890, the firm of Lavender & Spannagel deposited in the Bank of Scotland the sum of \$3,637.41, \$217 thereof being deposited on the twelfth day of August, 1890. (3) That between the third day of August and the thirteenth day of August, 1890, the firm of Lavender & Spannagel drew checks on said Bank of Scotland, which were paid by said bank, amounting to \$3,175.75, \$125.50 thereof being paid on the twelfth day of August, 1890. (4) That all checks drawn on said bank by said firm of Lavender & Spannagel which were presented for payment between the second day of August and 12 o'clock noon on the twelfth day of August, 1890, were paid in full by said bank. (5) It is admitted that the firm of Lavender & Spannagel ceased doing business on the afternoon of the twelfth day of August, 1890, their entire stock of goods

and other property being levied upon that day by the sheriff of Bon Homme county under execution in the case of T. O. Bogart against Lavender & Spannagel. The issue submitted to the jury was, On what day did Kelly & Read receive the letter Exhibit B and check for \$318.50, at Huron, South Dakota? To which the jury answered that the check was received at Huron August 4, 1890. This finding of the jury was adopted by the court, and the court further finds that there was no express agreement between plaintiff and defendants that said check should be received in full payment ⁴⁶² and satisfaction of the indebtedness due and owing on said note and mortgage. From the findings the court concludes that the receipt of said check by Kelly & Read from the defendant Adam Weiss operated at the time of its receipt as a provisional payment only of the note and mortgage described in the foregoing findings of fact; that the debt would remain until discharged by the payment of the check, or by such dealing with it by plaintiff or its agents as would, in judgment of law, convert what was originally a provisional payment into an absolute one; that the plaintiff, by its agents holding said check from the fourth day of August, 1890, until the ninth day of August, 1890, was guilty of such negligence as would, and did, in judgment of law, convert the provisional payment into an absolute payment of said note and mortgage; and that the note and mortgage sued on were fully paid by the defendants before the commencement of this action.

It is contended by the plaintiff and appellant that the court erred, in making its conclusions of law, in finding that the receipt of the check by Kelly & Read for \$318.50 from the defendant Adam Weiss, and the holding of the same until August 9, 1890, was such negligence as did in judgment of law convert the provisional payment into an absolute payment of said note and mortgage, and in finding that the note and mortgage were fully paid by defendant before the commencement of the suit. It is further contended by the appellant that the case is governed by section 2256 of the Civil Code of 1903, which reads as follows: "If a bill of exchange payable at sight or on demand, without interest, is not duly presented for payment within ten days after the time in which it could, with reasonable diligence, be transmitted to the proper place for such presentment, the ⁴⁶³ drawer and indorsers are exonerated unless such presentment is excused," and that the check in question was in law a bill of exchange, and was in fact presented within

the time specified in the above-quoted section. It will be observed that the section provides that the drawers and indorsers are exonerated in case the bill shall not be presented for payment within ten days after the time in which it could with reasonable diligence be transmitted to the proper place for such presentment. Lavender & Spannagel were the drawers, and the check was drawn payable to the order of Kelly & Read, and not to the defendant Weiss. We are of the opinion that the respondents are right in their contention, and that the section of the code above quoted has no application to the case, and that it must be controlled by the rule as established by the common law. Under that rule we are of the opinion that the court was right in its conclusions of law, that it was the duty of Kelly & Read to have forwarded the check on the following day after its receipt for presentment and collection. Had they so forwarded it, presumptively it would have been presented to the bank for payment not later than the 10th or 11th of August, when it seems the checks of Lavender & Spannagel were paid in full by the bank. At common law the drawee of the check has until the following day after its receipt to present it for payment as between himself and the drawer, when drawn on a bank in the same town or city where the check is given and received. When drawn on a bank in a different place, the drawee has the same time, and in addition thereto such time as will be required to transmit it to the place of payment by due course of mail: *Mowhawk Bank v. Broderick*, 13 Wend. 133, 27 Am. Dec. 192; *Smith v. Miller*, 43 N. Y. 171, 3 Am. Rep. 464 690; *Simpson v. Pacific Mutual Life Ins. Co.*, 47 Cal. 585. The drawees of a check, in the absence of an express agreement that the same should be received as payment, may still recover the amount therein specified on the drawers in case the check is duly presented and dishonored (*Estey v. Birnbaum*, 9 S. Dak. 174, 68 N. W. 290); but whenever the failure to collect the check results from the negligence of the drawees, the acceptance of the check constitutes payment, and this doctrine is applicable to checks and notes of third parties taken in payment of a debt not signed or indorsed by the debtor (*Kilpatrick v. Home Building etc. Assn.*, 119 Pa. St. 30, 12 Atl. 754; *Anderson v. Gill*, 79 Md. 312, 47 Am. St. Rep. 402, 29 Atl. 527, 25 L. R. A. 200). In the former case the supreme court of Pennsylvania, speaking upon the subject, says: "It cannot, of course, be claimed that the receipt of Beeby's check was

per se payment of the association's claim. It is well settled that, in the absence of an agreement to the contrary, a check or promissory note of either the debtor or a third person, received for a debt, is merely conditional payment—that is, satisfaction of the debt if and when paid—but that acceptance of such check or note implies an undertaking of due diligence in presenting it for payment, etc. And if the party from whom it is received sustains loss by want of such diligence it will be held to operate as actual payment.” In the latter case the supreme court of Maryland used the following language: “But whilst a check drawn bona fide on a banker having funds of the drawer is prima facie payment, if accepted as cash (*Woodville v. Reed*, 26 Md. 179), still in the absence of an express agreement, the acceptance of a check of either the debtor or a third party is in fact merely conditional payment—that is, satisfaction ⁴⁶⁵ of the debt if and when paid (*Haines v. Pearce*, 41 Md. 221); but the acceptance of such check implies an undertaking of due diligence in presenting it for payment, and if the party from whom it is received sustains loss by want of such diligence, it will be held to operate as actual payment”: See, also, *First Nat. Bank of Meadville v. Fourth Nat. Bank of New York*, 77 N. Y. 320, 33 Am. Rep. 618; *Comer v. Dufour*, 95 Ga. 376, 51 Am. St. Rep. 89, 22 S. E. 543, 30 L. R. A. 300.

It clearly appears from finding 13 that had the check of *Lavender & Spannagel* been presented for payment to the bank at Scotland within the time it should have been presented at common law, the check would have been paid. The failure to collect the check was due, therefore, to the negligence of the agents of the plaintiff in retaining it at Huron several days after it should have been forwarded for collection. The court was clearly right, therefore, in its conclusions of law that the plaintiff, through its agents, was guilty of such negligence as would in judgment of law “convert the provisional payment into an absolute payment of said note and mortgage.”

It is contended by the appellants that the court should have directed the jury to find upon the evidence of the agent Read that the check was not received at Huron until the ninth day of August, but this contention is untenable. The question was one of fact for the jury and the court: *Mutual Reserve Fund Life Assn. v. Hamlin*, 139 U. S. 297, 11 Sup. Ct. Rep. 614, 35 L. ed. 167; *Marston v. Bigelow*, 150 Mass. 45, 22 N. E. 71, 5 L. R. A. 43; *Pennypacker v. Capital Ins. Co.*, 80 Iowa,

56, 20 Am. St. Rep. 395, 45 N. W. 408, 8 L. R. A. 236; Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285; Briggs v. Hervey, 130 Mass. 186; Huntley v. Whittier, 105 Mass. 391, 7 Am. Rep. 536.

⁴⁶⁶ The finding of the jury and court that the check was received at Huron on the 4th is sustained by preponderance of the evidence, or at least we cannot say that there was a preponderance of evidence against the finding of the court.

Finding no error in the record, the judgment of the circuit court and order denying a new trial are affirmed.

The Acceptance of the Check or Note of a third person as payment is discussed in Holmes v. Briggs, 131 Pa. St. 233, 17 Am. St. Rep. 804; Shepherd v. Busch, 154 Pa. St. 149, 35 Am. St. Rep. 815; Duggan v. Pacific Boom Co., 6 Wash. 593, 36 Am. St. Rep. 182. Generally speaking, the acceptance of a check implies an undertaking of due diligence in presenting it for payment, and if the person from whom it is received sustains loss by want of such diligence, it will be held to operate as actual payment: Anderson v. Gill, 79 Md. 312, 47 Am. St. Rep. 402; Watt v. Gans, 114 Ala. 264, 62 Am. St. Rep. 99.

TURNER v. HOT SPRINGS NATIONAL BANK.

[18 S. Dak. 498, 101 N. W. 348.]

BANKS AND BANKING—Liability to Pay Check.—The check of a depositor upon his banker, delivered to another for value, transfers to that other the title to so much of the deposit as the check calls for, which may be again transferred to another by delivery, and being presented to the banker, he becomes the holder of the money to the use of the holder of the check, and is bound to account to him for that amount, provided the person drawing the check has funds to that amount on deposit, subject to his check, at the time it is presented. (p. 808.)

BANKS AND BANKING—Refusal to Pay Check—Right to Sue Bank.—The holder of a check, payment of which has been refused by the payee bank while it holds funds of the drawer sufficient to pay it, may sue the bank and recover the amount of the check. (p. 809.)

C. L. Wood and T. Turner, for the appellant.

Dudley & Eastman, for the respondent.

⁴⁹⁸ FULLER, J. The only question presented by this appeal from an order sustaining a general demurrer is whether facts sufficient to constitute a cause of action are stated in the following complaint, from which the caption and demand for

judgment are omitted: "1. That the defendant is a national ⁴⁹⁹ banking corporation, organized, existing and doing business under and by virtue of the United States banking law. 2. That prior to the nineteenth day of June, 1903, one G. M. Cleveland deposited in the defendant bank a sum of money in excess of the amount of the bank check hereinafter mentioned, to the credit and in the name of said Cleveland, and to be drawn out of said bank upon the checks of said Cleveland. 3. That on June 19, 1903, the said Cleveland, for valuable consideration, and in the usual course of business, drew, issued and delivered to this plaintiff, as payee, his bank check, in writing, signed by said Cleveland, and addressed and directed to the said defendant bank, ordering and directing the defendant bank to pay to this plaintiff the sum of five hundred and seventy-nine dollars and forty cents (\$579.40). 4. That on the twenty-fifth day of June, 1903, during business hours, and while a sum of money in excess of said sum of five hundred and seventy-nine dollars and forty cents (\$579.40) so remained in defendant bank in the name and to the credit of said Cleveland, this plaintiff caused the said bank check to be presented to and at the defendant bank for payment, properly indorsed by this plaintiff. 5. That the defendant bank wholly refused and declined to pay the check, and that thereupon the same was duly protested as for nonpayment; that the defendant bank still refuses and declines to pay said check, and that the same has not been paid, or any part thereof. 6. That this plaintiff necessarily expended and paid the sum of three dollars and fifty cents (\$3.50) for the expense of said protest, no part of which has been paid by defendant. 7. That there is due and owing to plaintiff from defendant, as statutory damages for defendant's failure to pay said check and allowing the same to go to protest, the sum of eleven dollars and ⁵⁰⁰ fifty-eight cents (\$11.58), no part of which has been paid. 8. That this plaintiff is still the owner and holder of said check." It being conceded by the demurrer that the drawer of the check had funds on deposit, subject to check, in excess of the amount demanded, the question is whether a bona fide holder of a check, which has been duly presented and payment refused, is entitled to maintain an action to recover from the bank the amount for which such check was written.

As section 2279 of the Revised Civil Code of 1903 expressly declares that a check drawn upon a bank or banker is payable

on demand, without interest, it would be logical to hold that payment must be made by the bank on presentment of a properly drawn check by the lawful holder thereof, provided the funds deposited for that purpose are sufficient. Consistent with safety and the systematic course of trade throughout the civilized world, the great bulk of business is done by the use of checks drawn on funds deposited for that purpose at the solicitation of banks, and in consideration of an implied promise to promptly pay checks drawn thereon in such amounts as the depositor may order. According to a general custom expressive of the parties' intention, and for their mutual convenience, all banks provide checks containing a blank space for the name of the person to the order of whom any check may be drawn to whom the amount written therein lawfully belongs upon presentment. The doctrine that presentment of a check transfers the funds to the full amount for which it is written, and constitutes an assignment thereof by the depositor to the payee named, or his order, furnishes ample protection to the bank paying such check, while its wrongful refusal to do so might greatly disturb important business transactions, ⁵⁰¹ impair the credit of the drawer, or, in case of his subsequent bankruptcy, ruin an innocent check-holder, who became such upon the faith that the bank would perform its duty according to the established usages of the law-merchant. In rejecting the doctrine of the early cases sustaining the view that a check is neither an assignment between the drawer and the payee nor a sufficient foundation for an action by the holder against the bank refusing payment, Mr. Morse, in his excellent treatise, writes convincingly in support of the proposition that "all advanced, clear, independent thought and reasoning sustains the right of the check-holder to sue the drawee": 2 Morse on Banks and Banking, 492-511. From *Munn v. Burch*, 25 Ill. 35, we quote at considerable length as follows: "Where a custom is so universal and of such antiquity that all men must be presumed to know it, courts will not pretend to be more ignorant than the rest of mankind, but will recognize and act upon it. Such is the custom governing checks on bankers. The general rule is that the creditor cannot divide up his demand against the debtor and require the latter to pay it in parcels. But everybody knows, and courts no less than commercial men, that an exception to this rule exists as to deposits in bank. It has been so long and so universal a custom with bankers to receive deposits from time to

time, as the convenience of the depositor may require, and to allow him to draw out his funds on checks, in parcels, in such sums as he sees fit, that the mere fact of opening a deposit account with a banker implies a contract on the part of the banker to allow the depositor to withdraw his deposits in parcels. The books are full of cases where the courts have implied such a contract on the part of the banker, and for the purpose of raising such implication, ⁵⁰² have taken notice of such custom; for it is only by force of such a custom that such a contract, which is against the general rule of law, can be implied. We advance thus far in this case upon well-trodden judicial ground, about which there is no dispute. But there is another bankers' custom, scarcely less ancient, not less universal, and as generally recognized and acted upon, and that is that the depositor may draw his check in favor of any third party, to whom, upon presentation, the banker pays the amount of the check out of the funds in his hands belonging to the depositor. Indeed, it is comparatively a rare occurrence that the depositor presents his own check to the banker for payment. In a vast majority of cases the check is presented by a third party, in whose favor it has been drawn, or to whom it has been passed in the regular course of business, in payment and satisfaction of some debt or demand. In strictly commercial circles a hundred times more debts are paid with checks than with coin or currency. They are received and passed and deposited with bankers as cash, subject, of course, to be made good if not paid on presentation. When presented, these checks are paid as the property of the presenter and not of the depositor; and not as a matter of favor to him, but as a matter of right. The custom of banks recognizes this mode of changing the title of money in their hands from one person to another. There is no custom known among banks, or any other departments of finance or commerce, more universally recognized and acted upon than this. If it is possible for any custom to create a right by entering into and forming an implied part of the contract, this would seem to be that one, for its antiquity, its universality, and, above all, its convenience, nay, its absolute necessity to meet ⁵⁰³ the wants of the vast commercial contracts of the present day. To say that the holder of a bank check has not both a legal and equitable right, after presentation of the check, to the money of the drawer in the hands of the banker, would destroy the most valuable feature of bank deposits and checks. Without

it, this whole system would become worthless and destroyed. Unless the depositor can be thus accommodated, it is worth no man's while to keep a deposit account with a bank. And no man will wish to be troubled with the check of the best drawer if he acquires no right by its presentation, and is only to receive pay upon it as a matter of favor. But we are entirely satisfied that such is not, and cannot be, the law. Well-recognized legal principles lead us inevitably to the same result which commercial convenience requires. This universal custom shows us what the contract of all the parties is. It shows us that the banker, when he receives the deposit, agrees with the depositor to pay it out, on the presentation of his checks, in such sums as those checks may call for, and to the person presenting them, and with the whole world he agrees that whoever shall become the owner of such check shall upon presentation thereby become the owner, and entitled to receive the amount called for by the check, provided the drawer shall at that time have the amount on deposit. Who shall object to that portion of the contract which the law raises by implication on the part of the banker to the third person—to anybody and to everybody? Surely, every sound lawyer will at once perceive a privity of contract between the banker and the holder of the check, created by the implied promise held out to the world by the banker on the one side and the receiving of the check for value and presenting it on the other. It is ⁵⁰⁴ a familiar principle of daily illustration that a promise made to the public that the performance of a particular act shall entitle the person performing the act to a particular right is a valid assumpsit to such person. The promise on the one hand and the performance on the other creates a privity between the parties as intimate and as obligatory as if the promise had originally been made to the particular person. We hold, then, that the check of a depositor upon his banker, delivered to another for value, transfers to that other the title to so much of the deposit as the check calls for, which may again be transferred to another by delivery; and when presented to the banker he becomes the holder of the money to the use of the owner of the check, and is bound to account to him for that amount, provided the party drawing the check has funds to that amount on deposit, subject to his check at the time it is presented." The foregoing conclusion was reached after the most studious investigation, and its correctness stands confirmed by all subsequent decisions of that court.

The following carefully considered and more recent cases are to the point that the holder of a check, the payment of which has been refused, may sue the bank to recover the amount thereof: Bloom v. Winthrop State Bank, 121 Iowa, 101, 96 N. W. 733; Fonner v. Smith, 31 Neb. 107, 28 Am. St. Rep. 510, 47 N. W. 632, 11 L. R. A. 528; McGrade v. German Sav. Inst., 4 Mo. App. 330; Dodge v. National Exch. Bank, 20 Ohio St. 234, 5 Am. Rep. 648; Roberts v. Corbin, 26 Iowa, 315, 96 Am. Dec. 146; Fogarties v. State Bank, 12 Rich. 518, 78 Am. Dec. 468; Miliani v. Tognini (Cal.), 7 Pac. 279; 2 Daniel on Negotiable Instruments, 1617. Consistent with all the authorities, and contrary to the view that the bank pays only as a matter of favor, it was held by this court in the very recent case of Manitoba Investment etc. ⁵⁰⁵ Co. v. Weiss, 18 S. Dak. 459, 101 N. W. 37, that the receipt of a check as provisional payment of a note secured by mortgage operated as absolute payment and discharge of the indebtedness by reason of unwarranted delay in the presentment of such check until the funds against which it was drawn were exhausted and the drawer had become insolvent. By the act of receiving a deposit subject to check the bank accepts in advance, and promises to pay on demand, all properly drawn checks of the depositor, so long as the credit is sufficient and not previously encumbered. This promise of the bank to allow funds to be withdrawn by third persons and in parcels to suit the convenience of the depositor takes effect on a definite amount as often as a check is presented, and constitutes an assignment thereof between the drawer and holder, which the bank, by accepting the money, obligated itself to recognize. To hold otherwise would be repugnant to the universal custom of all commercial countries, and greatly impair the most important characteristic of systematized banking.

It follows that the demurrer should have been overruled, and the order appealed from is therefore reversed.

Haney, J., dissenting.

The Authorities are divided on the question of whether a bank is liable to the holder of a check for refusing to pay it: See the monographic note to J. M. James Co. v. Bank, 80 Am. St. Rep. 870. The supreme court of California has recently held that the bank upon which a check is drawn has no contract with the payee and is under no legal obligation to him, and its refusal to pay the check does not give him a right of action against it: Pullen v. Placer County Bank, 138

Cal. 169, 94 Am. St. Rep. 19. The supreme court of Illinois, on the other hand, has recently affirmed that when the check of a depositor is presented to a banker, it is an absolute appropriation of the amount thereof to the holder; and if payment is refused, the holder may maintain an action against the banker: Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 199 Ill. 151, 93 Am. St. Rep. 113.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

BROWN v. TAYLOR.

[115 Tenn. 1, 88 S. W. 933.]

COVENANTS—Knowledge of Lease on Premises.—A purchaser of land on which there exists an unexpired lease may maintain an action for breach of covenant against encumbrances, notwithstanding his actual knowledge of the lease. (p. 814.)

COVENANTS—Counsel Fees in Case of Breach.—A purchaser of land is not entitled, in his action for a breach of covenant against encumbrances in that there is an outstanding lease on the premises, to his counsel fees expended in an unsuccessful action to evict the tenant before the expiration of his term. (p. 815.)

COVENANTS—Measure of Damages for Breach.—The measure of damages for the breach of a covenant against encumbrances, where there exists an unexpired lease on the premises, is, in the absence of special circumstances, the rental value of the property during the period the purchaser is kept out of possession. (p. 816.)

R. G. Brown, for the plaintiff.

Flippin & Neuhardt, for the defendant.

³ McALISTER, J. The plaintiff below, Harris L. Brown, recovered judgment against the defendant, Ford N. Taylor, for the sum of ninety-two dollars and sixty-five cents, as damages for breach of covenant against encumbrances contained in a deed for the sale of land. Both sides appealed and have assigned errors.

The cause was heard by the circuit judge, without the aid of a jury, upon evidence which is practically undisputed. The record reveals that on the 29th of February, 1904, Ford N. Taylor and wife conveyed to Harris L. Brown, by deed duly executed and recorded, a tract of land in the suburbs of Memphis, for which Brown agreed to pay the sum of five

thousand six hundred dollars, whereof fourteen hundred dollars was paid in cash, and notes executed for the balance of the purchase money, due in one, two and three years, with interest from date. The deed contained the usual covenants and warranties that the premises were free from encumbrances and that the grantors would forever defend the same against all lawful claims whatever.

It is disclosed by the record that the property was purchased by Brown for the purpose of making a subdivision, and it was agreed that, upon certain cash ⁴ payments being made, any portion of the property desired would be released from the operation of the trust deed executed to secure the deferred payments.

It further appears that at the date of the deed there was an encumbrance on the land, consisting of an outstanding lease, with ten months to run before its expiration. It was contended on behalf of Taylor that Brown had actual knowledge of the encumbrance, and that the lessee thereby became his own tenant. It is shown that Taylor, the vendor, before executing the conveyance, stated to the agent who was negotiating the contract of sale that there was a gardener on the land who had a lease until such time as he could get his crop gathered for that year, probably some time in September or October, and that he desired this gardener to be protected. It is further shown that this agent, before the deed was executed or title examined, communicated to Brown the fact that there was a gardener on the place and Taylor wanted him protected, and that this gardener was at the time paying as rental the sum of seven dollars and fifty cents per month. Brown replied that he did not know about the seven dollars and fifty cents per month, but supposed the matter could be arranged in some way. Plaintiff below now seeks to recover damages for breach of the covenant against encumbrances, upon the facts stated in regard to the existence of an outstanding lease on the premises. It is denied on behalf of Taylor that Brown is entitled to any recovery, for the reason that he accepted a deed with full knowledge of this encumbrance, ⁵ and that he must look to the tenant for his protection. Counsel for defendant cites in support of his contention Ballard's Law of Real Property, volume 6, section 142, in which the rule is thus stated: "Where the grantee in a conveyance of lands in fee simple which contains a covenant against encumbrances, and before execution and

delivery of the deed, has actual knowledge of the existence of a lease made between grantor in said conveyance and a tenant, the tenant being in actual possession of the premises, the grantee cannot maintain against his grantor an action for breach of covenant"; citing *Demars v. Koehler*, 60 N. J. L. 314, 38 Atl. 808. In the last case the court said: "There can exist no question in law that an outstanding term of an unexpired lease on the premises conveyed is an encumbrance, within the covenant against encumbrances contained in the deed of conveyance: *Fritz v. Pusey*, 31 Minn. 368, 18 N. W. 94; *Jarvis v. Buttrick*, 1 Met. (Mass.) 480; *Batchelder v. Sturgis*, 3 Cush. 201; *Carter v. Denman's Exr.*, 23 N. J. L. 260; *Grice v. Scarborough*, 2 Spear, 649, 42 Am. Dec. 391; *Maupin on Real Estate*, p. 293, sec. 125."

While this rule is undoubtedly supported by highly respectable authority, it is not in our view the sound rule, and is not sanctioned by the weight of authority. The true rule has thus been formulated in the *Cyclopedia of Law and Procedure*, volume 11, page 1066, as follows: "Knowledge on the part of the purchaser of the existence of encumbrances on the land will not prevent ⁶ him from recovering damages on account of it, where he protects himself by proper covenants in his deed"—that is to say, we may add, a covenant against encumbrances. The author cites in support of the text cases from twenty-three states of the Union, including the case of *Perkins v. Williams*, 5 Cold. (Tenn.) 512. In the last case cited, decided by this court in 1868, it was held that "covenant of seisin embraces a defect of title, constituting want of seisin to covenant, although such defect of title was known to covenantee at the time of the making of the covenant. Knowledge by covenant or of such a defect will not bar his action at law for breach of covenant"; citing *American notes to Wallam v. Hearn*, 2 Lead. Eq. Cas.; also *Rawle on Covenants*, c. 13. It is true that the matter involved in the last case was an alleged breach of covenant of seisin, and it was held that, while equity would not lend its aid to rescind a covenant of seisin, although the covenantor be insolvent, where it appears that the covenantee knew of the defect of title at the time he took the conveyance, in such a case the party will be left to such remedy as he can obtain at law for breach of the contract. *Rawle*, in the second edition of his valuable work on *Covenants of Title* (page 149), states the law to the same effect as follows: "In a case where there

are known encumbrances of any kind on property, subject to which purchaser agrees to take, these should for the vendor's protection, be especially and expressly excepted from the covenant, as otherwise the fact of their ⁷ being known to the purchaser will, according to the weight of authority, be no bar to his recovery upon it." So, in a case in Connecticut, it was said: "How can plaintiff's knowledge destroy the effect of defendants' covenant? Suppose defendants had sold a farm, which they and the purchaser knew they did not own, could that knowledge destroy or affect the covenant of seisin? If not, by what rule can such knowledge impair a covenant of warranty against encumbrances? Such evidence might probably be excluded on two grounds: One, because of its immateriality, and the other, under the rule that parol evidence is not admissible to control or contradict the effect of written instruments": Rawle on Covenants, p. 157. Again, on page 152, Mr. Rawle says: "It has, moreover, been said that the fact of the purchaser having notice of the encumbrance is the very reason for his taking covenant within whose scope it is included, and that the vendor may be expected to discharge it out of the purchase money. For all these reasons, therefore, whenever the contract is that the purchaser takes the land cum onere, the encumbrances should be expressly excepted in the deed from the operation of the covenant, in which case, of course, the covenantor will not be liable."

The general rule is that the right of action on covenant against encumbrances arises upon evidences of an encumbrance, irrespective of any knowledge on the part of grantee, or of any eviction of him, or of any actual injury it has occasioned him: 2 Greenleaf on Evidence, sec. ⁸ 242; 2 Washburn on Real Property, sec. 717. So that it is clear upon authorities plaintiff below was entitled to maintain his action at law for breach of covenant against encumbrances, notwithstanding his actual knowledge of the unexpired lease upon the premises.

The remaining question that arises is in respect of the proper rule for admeasurement of damages. The trial judge adopted as a measure of the damages the rental value of said property for the unexpired term at eight dollars per month. He also allowed counsel fees, amounting to ten dollars, incurred by Brown in a misdirected action before a justice of the peace to evict the lessee from the premises. It was admitted on all hands

that the lessee was rightfully in possession of the premises, and, of course, the purchaser, Brown, had no right to evict him until the expiration of his term. It may be remarked there was no authority for the allowance of counsel fees in such a case; but, on the contrary, in *Williams v. Burg*, 9 Lea, 455, it was expressly decided by this court that counsel fees are not taxed as costs, nor regulated as to amount by law in this state, and that sums paid therefor by the covenantee for defense in ejectment by adverse claimant are not recoverable from covenantor. This principle is conclusive of any allowance for counsel fees in this case.

Recurring to the question made touching the measure of damages, it is insisted on behalf of counsel for Brown that, when he purchased this land, he disclosed to his grantor that his purpose in buying the land was to make ⁹ division, and the proof of the record establishes this contention. It further appears that, by reason of the existence of this outstanding lease, the purchaser was prevented from acquiring immediate possession of the premises; but it does not appear that this fact prevented a subdivision of the premises. On the contrary, it distinctly appears that the streets upon which the subdivision was to front, although dedicated to the public, had not been formally opened, and could not have been opened up to and including the time of the expiration of this lease. The contention on behalf of Brown is that, having thus been deprived of immediate possession of his premises, he should be entitled to recover at least the interest he was paying on the deferred payments, and should not be confined to the rental value of the premises. Plaintiff invokes the familiar rule that, when a contract is made under special circumstances and those circumstances are communicated by one party to another, the damages resulting from breach of contract, which they would reasonably contemplate, constitute the true measure for the assessment of damages; citing 13 *Cyclopedia of Law and Procedure*, page 34. We are unable to concur in this contention, for the obvious reason that it does not appear from this record that the breach of covenant against encumbrances was the essential cause of preventing the opening of this land for subdivision; but, on the contrary, it appears that, if the plaintiff, Brown, had obtained immediate possession of the premises, subdivision could not have been made on account ¹⁰ of unopened streets until after the expiration of the term of this lease. Hence, it does

not appear that special damages, claimed by Brown to have been within the contemplation of the parties, in fact resulted as a proximate consequence of the breach of covenant. Hence, the facts herein stated do not present a case for the application of the rule invoked, but for the ordinary rule which obtains in such cases, namely, the rental value of the property during the period purchaser was kept out of possession. As stated in the *Cyclopedia of Law and Procedure*, in speaking of a covenant against encumbrances, that being a covenant of indemnity, the general rule for the measure of damages in actions for its breach by reason of an encumbrance existing upon the property at the time of the sale, is the loss actually sustained by the covenantee, with interest. Damages, costs and expenses, when given as a penalty for breach of covenant, mean the necessary, natural and proximate damages resulting from such known performances, and not some remote accidental or special injury to the party to whom the action accrues. The author further says that in an action for breach of covenant against encumbrances, if the encumbrance has inflicted no actual injury to plaintiff, and he has paid nothing toward removing or extinguishing it, he can only recover nominal damages. Where encumbrance is removed by the grantor without expense or trouble to grantee, the latter can recover only nominal ¹¹ damages; citing volume 11, pages 1164, 1165; *Eagan v. Yeaman* (Tenn. Ch. 1897), 46 S. W. 1012.

We are constrained to hold, upon the facts disclosed in this record, that the plaintiff has sustained actual damages in being deprived of immediate possession of the premises; but in view of all the facts, it is adjudged that he is only entitled to recover rental value of the property during the currency of the lease as compensation for the breach of covenant against encumbrances.

As modified herein, the judgment is affirmed.

A Right of Action on a Covenant against encumbrances arises upon the existence of the encumbrance, irrespective, it seems, of any knowledge on the part of the grantee: Demars v. Koehler, 62 N. J. L. 203, 72 Am. St. Rep. 642; Burr v. Lamaster, 30 Neb. 688, 27 Am. St. Rep. 428; Huyck v. Andrews, 113 N. Y. 81, 10 Am. St. Rep. 432.

FARMERS' AND MERCHANTS' BANK v. BANK OF RUTHERFORD.

[115 Tenn. 64, 88 S. W. 939.]

BANKS—Payment of Checks—Indorsement and Identification. Where a check is made payable to a designated person or bearer, a bank may pay it without indorsement or identification and not be chargeable with negligence. (pp. 819, 820.)

BANKS—Negligence in Paying Forged Check.—It is negligence for a bank to pay a forged check drawn on it in the name of one of its customers whose signature is well known to it, where the cashier does not examine the signature closely, which would have disclosed the forgery, but is thrown off his guard by indorsements on the paper. (p. 820.)

BANKS—Genuineness of Signature.—An Indorser of a check does not warrant to the drawee, but only to subsequent holders in due course, the genuineness of the signature of the maker. (p. 820.)

BANKS—Payment of Forged Check.—Where the drawee bank receives and pays a forged check which has been honored and indorsed by other banks and then holds it for thirty days or more, it cannot deny the genuineness of the signature and recover the amount of the check from the bank which cashed it and passed it on by indorsement to the other banks. (p. 821.)

BANKS.—The Drawee of a Check Makes Himself the Guarantor thereof when he accepts it. (p. 821.)

W. S. Coulter, for the complainant.

Deason, Rankin & Elder, for the defendant.

⁶⁵ WILKES, J. The bill was filed by complainant bank against defendant bank to recover from it the amount of a ⁶⁶ forged check, which was drawn on complainant bank, for fifty-four dollars and seventy-five cents, and, after, being indorsed by the defendant bank and others, was presented to, and paid by, complainant bank.

The check was in the words and figures following:

“Dyer, Tenn., Octo. 28, 1903.

“Farmers' & Merchants' Bank:

“Pay to J. L. Freeman, or bearer, fifty-four 75-100 dollars.
For cotton.

“JOHNSTON MERC. CO.”

The ground upon which the recovery was sought was that the Bank of Rutherford was negligent in cashing this check for a stranger without identification, and thereafter indorsing it, so as to give it circulation, and to mislead complainant

bank, the payee, to presume it was genuine, and pay it to the holder.

The check, after being indorsed in the name of J. L. Freeman, was cashed by the Bank of Rutherford and indorsed by it, and passed to the Jackson Banking Company, then to the St. Louis Trust Company, Continental National Bank of Chicago, and Fourth National Bank of Nashville, and by the latter bank was sent by mail to complainant as the drawee bank, and paid by it. The complainant bank at the time of payment wrote or stamped on its face the words: "Paid Nov. 7, 1903. Farmers' & Merchants' Bank, Dyer, Tenn."

The cashier of complainant bank states that, when the check was presented for payment, he did not examine the signature closely, and, if he had, he would ⁶⁷ have detected that it was a forgery, but that he was thrown off his guard by the indorsements of the defendant bank and others.

It held the check, thus cashed and marked "Paid" some thirty days, when the forgery was discovered, whereupon it entered up a credit upon the account of the mercantile company to balance the charge made against it when it was paid, and thereupon brought suit against the Bank of Rutherford for the amount of the check.

The chancellor gave judgment for the amount, and the Bank of Rutherford has appealed and assigned errors.

It is insisted that the case is governed by the principles announced in *People's Bank v. Franklin Bank*, 88 Tenn. 299, 17 Am. St. Rep. 884, 12 S. W. 716, 6 L. R. A. 724.

In that case it was held that a bank that negligently cashed a forged check, purporting to be drawn upon another bank, and had upon its indorsement of such check received payment of the drawee bank, is liable for the amount paid by it upon discovery that the check is forged, and the fact that the indorser bank is unable to give the name of the person who presented the forged check, to whom it was paid, or to positively identify such person, is sufficient evidence of negligence to make it liable, and that the drawee bank will not be precluded from recovery by the fact that, relying upon the ⁶⁸ indorsement of the indorsing bank, it paid the check without investigation as to its genuineness.

If this case is not distinguishable from that in some essential feature, and that is affirmed as sound, it must be considered as determinative of the present case.

As an original proposition we would not assent to the correctness of *People's Bank v. Franklin Bank*, 88 Tenn. 299, 17 Am. St. Rep. 884, 12 S. W. 716, 6 L. R. A. 724, and think the great weight of authority is against it, and that it is contrary to one of the most important rules regulating the law of negotiable instruments, to wit, that the drawee of the check should be held to know the signature of its customers, and to pay only such paper as has a genuine signature.

But we think there are two important distinctions between *People's Bank v. Franklin Bank*, 88 Tenn. 299, 17 Am. St. Rep. 884, 12 S. W. 716, 6 L. R. A. 724, and the present case.

The first is that in that case the payment was made direct by the drawee bank to the bank that negligently cashed the check, and, after indorsing it, put it in circulation, and, as against the indorsing bank, there was no consideration received by the drawee bank, while in the present case the check had passed through a number of hands, and had been paid, not to the alleged negligent bank, but to the Nashville bank.

In the present case the drawee bank is not suing the Nashville bank, from which it received the check, and to whom it paid the money, but is suing a remote indorser, with whom it had no transaction, except as a remote indorser.

⁶⁹ In other words, the Rutherford bank received none of the money of the complainant bank, but it received the amount of the check from the Jackson Banking Company. It is the Nashville bank which has received the money of the complainant bank for the worthless paper cashed by it.

In addition, the check in *People's Bank v. Franklin Bank*, 88 Tenn. 299, 17 Am. St. Rep. 884, 12 S. W. 716, 6 L. R. A. 724, was payable to the order of Morgan, and was indorsed in the name of Morgan, the indorsement being also a forgery. In order to cash this check, it was necessary that it be indorsed by Morgan, and that he should be identified; and it was incumbent on the bank, when it cashed it, to see that the indorsement was made, and that it was genuine.

But in the present case the check was payable to Freeman, or bearer. It was not necessary to be indorsed at all, and was indorsed, as the proof shows, simply as a compliance with the custom of the Rutherford bank. It was not only not necessary that it should be indorsed, but it was not

necessary that Freeman, the holder, should be identified, and hence it was not negligence in the bank to fail to have him identified, and it was a bona fide holder, if it paid to bearer, with or without indorsement.

In *People's Bank v. Franklin Bank*, 88 Tenn. 299, 17 Am. St. Rep. 884, 12 S. W. 716, 6 L. R. A. 724, identification and a genuine indorsement were not only material but absolutely necessary, and a failure to require them was negligence. In the present case neither indorsement ⁷⁰ nor identification was necessary, and a failure to require them was not negligence.

Liability in *People's Bank v. Franklin Bank*, 88 Tenn. 299, 17 Am. St. Rep. 884, 12 S. W. 716, 6 L. R. A. 724, is predicated upon negligence which does not exist in the present case.

On an examination of the record we are not able to find any negligence on the part of the Rutherford bank, while that of the complainant bank is apparent and glaring; and, if a comparison is allowable, the negligence of the drawee bank was much the greater.

The mercantile company was its customer, and had been for years. Its place of business was next door to the complainant bank. Its signature was well known to complainant bank. The cashier says he did not examine the signature closely, or he would have easily have detected the forgery.

On the other hand, there was nothing to excite the suspicion of the Rutherford bank. It was a common cotton check, such as was usual and common in every-day transactions; and, being payable to bearer, it was not necessary to identify the holder when it was cashed.

We are of opinion that the indorser of negotiable paper does not warrant to the drawee the genuineness of the signature of the maker, but such warranty only extends to subsequent holders in due course of trade. The drawee of the check is the party to pass upon the genuineness of the signature of the drawer.

This is the rule, we think, by the law-merchant and by the negotiable instrument law. It is the rule laid ⁷¹ down in New York, upon whose statute our negotiable instrument law is based, and of which it is substantially a copy; and, in construing the negotiable instrument law, it has been said by this court in *Unaka Bank v. Butler*, 113 Tenn. 574,

83 S. W. 655, that great weight should be given to the decisions of New York.

In this case the complainant bank received and paid the check, thereby admitting the check to be correct, and held it for thirty days or more, and it is precluded and estopped to deny the genuineness of the signature, or to avoid the effect of its act in accepting the check and paying it.

The indorser of a check does warrant and guarantee the genuineness of the check to all subsequent holders in due course; but the drawee is not a holder in due course.

A holder in due course is defined in section 52, page 150, of the negotiable instrument act (Acts 1899, c. 94), and the definition does not embrace the case of a drawee.

A holder means a payee or indorsee who is in possession, or the bearer: Acts 1899, c. 94, p. 139.

The drawee, when he accepts the check, makes himself the guarantor thereof.

The liability of an indorser only arises when the necessary proceedings on dishonor are taken; but this feature of the law is not presented in this case.

Without commenting further upon the several points raised by counsel, we are of opinion that the complainant ⁷² bank has no right in law, or in equity and good conscience, to recover from the defendant bank the amount of this check, and the chancellor was in error; and his decree is reversed, and the suit is dismissed, at cost of complainant.

The Rights and Remedies of the several parties when a forged check has been paid are discussed in the monographic note to *People's Bank v. Franklin Bank*, 17 Am. St. Rep. 889-899. See, too, the recent case of *Land Title etc. Co. v. Northwestern Nat. Bank*, 211 Pa. St. 211, 107 Am. St. Rep. 565, and cases cited in the cross-reference note thereto. The liability of one who receives payment of a check on a forged indorsement is discussed in the note to *First Nat. Bank v. City Nat. Bank*, 94 Am. St. Rep. 641-650.

BROGAN v. BARNARD.

[115 Tenn. 260, 90 S. W. 858.]

HOLOGRAPHIC WILL—Finding Among Valuable Papers.—A writing is not found among the "valuable papers" of a decedent, as those words are used in a statute defining a holographic will, when it is found in a box in which he kept stamps and stationery belonging to a postoffice of which he had charge, while he kept his deeds, notes and the like in a trunk at his residence some distance away. (p. 824.)

Hughes & Hughes, for Brogan et al.

G. W. Montgomery and Jesse L. Rodgers, for Barnard et al.

261 SHIELDS, J. This is a contested will case. The paper writing propounded for probate is alleged to be the holographic will of James H. Fugate, deceased. The decedent was a small merchant and country postmaster, and kept his office in his store. The paper in question was found after his death in a box in which he kept postage stamps and stationery belonging to the postoffice, there being at the time therein sixty-five dollars in stamps and a package of blanks for receipts for registered letters, which, while in his possession, were the property of the federal government. There were no other papers in or near the box. He had valuable papers consisting of deeds and notes, but they were kept and found in a locked trunk in his residence, some fifty yards distant from the store. There was verdict and judgment in favor of the will, and the defendants prosecute an appeal in the nature of a writ of error to this court.

The sole question here presented is whether the postage stamps and blanks for receipts, with which the paper alleged to be the will of James Fugate was found, are valuable papers within the meaning of our statute **262** providing for the execution and probate of holographic wills.

The statute (Code 1858, section 2163; Shannon's Code, section 3896) is in these words: "But a paper writing, appearing to be the will of a deceased person, written by him, having his name subscribed to it, or inserted in some part of it, and found, after his death, among his valuable papers, or lodged in the hands of another for safekeeping, shall be good and sufficient to give and convey lands, if the handwriting is generally known by his acquaintances, and it is

proved by at least three credible witnesses that they verily believe the writing, and every part of it, to be in his hand."

The requirements of this statute are all equally important and necessary to be proven to sustain a holographic will. It is conceded in this case that all of them are proven save the finding of the paper writing among the valuable papers of the decedent after his death. This is denied. It is necessary to determine, in the first place, what are valuable papers within the sense of this statute. The case of *Marr v. Marr*, 2 Head, 303, is perhaps the leading case upon this subject. It is there said: "What is meant by valuable papers? No better definition, perhaps, can be given than that they consist of such as are regarded by the testator as worthy of preservation, and, therefore, in his estimation, of some value. It is not confined to deeds for land or slaves, obligations for money, or certificates of stock. Any others which are kept and considered worthy of being taken care of by ²⁶³ the particular person must be regarded as embraced in that description. This requirement is only intended as an indication on the part of the writer that it is his intention to preserve and perpetuate the paper in question as a disposition of his property; that he regards it as valuable."

Mr. Pritchard, in his valuable work on Wills and Administration, says: "Valuable papers, within the meaning of the statute, are such papers as are kept and considered worthy of being taken care of by the particular person, having regard to his condition, business and habits of preserving papers. They do not necessarily mean the most valuable papers of the decedent even, and are not confined to papers having a money value, or to deeds for lands, obligations for the payment of money, or certificates of stock. The requirement is only intended as an indication on the part of the writer that it is his intention to preserve and perpetuate the paper as a disposition of his property, and that he regards it as valuable; consequently the sufficiency of the place of deposit to meet the requirement of the statute will depend largely upon the condition and arrangement of the testator."

This is a clear and correct composite statement of all the decisions of this court construing and defining the provision of the statute under consideration, but it does not cover the exact question here presented. It has not heretofore been passed upon by this court. The contention of the

plaintiffs in error is that the valuable papers ²⁶⁴ contemplated by the legislature are documentary papers—papers having contents on account of which they are deemed valuable and worthy of preservation by the owner, as records, belonging to the alleged testator; and that the stamps and blank receipts with which this will was found, while papers, are mere articles of merchandise belonging to the United States, kept by the decedent for sale and use alone in the discharge of his duties as postmaster.

We think this contention is sound. It is evident that the legislature, in providing that the will must be shown to have been found after the death of the decedent among his valuable papers, or lodged in the hands of another for safekeeping, referred to papers which the decedent considered valuable and worthy of preservation as records of the facts purported to be stated and perpetuated in them, and in which he had an interest of some nature. A will is this character of a paper. It is only valuable and worthy of preservation on account of its contents. The postage stamps and blanks with which the paper in question was found were in the possession of the decedent, but they were not his property nor valuable as records of their contents. They were the property of the United States, in his hands as agent, for sale and use when they were called for by the patrons of the office or required in the discharge of his duties.

It is not sufficient that a will be found deposited among the valuable effects of the decedent. In the original statute of North Carolina (Acts 1784, c. 10, sec. 5), from ²⁶⁵ which the section of the code providing for holographic wills was taken, it was sufficient if the alleged will was found amongst the valuable papers or "effects" of the deceased. But in codifying this statute the word "effects" was omitted, and this requirement narrowed to "valuable papers." This modification of the original statute strongly supports the construction and interpretation we have here given of the phrase "valuable papers."

It is also evident that the decedent did not consider the stamps and receipts his valuable papers or the box where he kept them a place for deposit of such papers, since he kept his deed, notes, etc., in a locked trunk in his residence some distance from his store. This is a most pertinent fact tending to show the intention of the deceased in relation to the paper now offered as his will. .

The assignments of error of the plaintiff in error are sustained, the judgment reversed, and the case remanded for a new trial.

Holographic Wills are discussed at length in the recent monographic note to Estate of Fay, 104 Am. St. Rep. 22-34.

STATE v. CHILHOWIE WOOLEN MILLS COMPANY.

[115 Tenn. 266, 89 S. W. 741.]

CORPORATIONS—Right of Majority to Dissolve.—If, before a corporation has progressed further than to effect a temporary organization, an older corporation, in order to prevent the new one from going into active business, proposes to enlarge its plant, increase its capital stock, and let in the members of the new concern on terms of equality, a majority of the stockholders of the new company, acting in good faith, are entitled, over the objections of the minority, to dissolve the corporation, and have a court decree such dissolution in order to avoid future complications and liabilities. (p. 831.)

Burkett, Mansfield & Miller, for the complainants.

Pritchard & Sizer, Allen & Ivens and E. B. Madison, for the defendants.

268 WILKES, J. This is a bill in the name of the state, on the relation of the majority of the stockholders in the Chilhowie Woolen Mills Company, against the corporation, and the minority of its stockholders, to have the court adjudicate and decree that the corporation has surrendered and forfeited its charter rights, and that it be dissolved. The corporation is a domestic one, the amount of stock subscribed for being forty-eight thousand six hundred dollars, or four hundred and eighty-six shares. Of these, complainants own two hundred and seventy-two and the defendants one hundred and eighty-four shares.

Defendants resist the right of complainants to enforce the surrender of the charter and a dissolution of the corporation.

The chancellor held that complainants were not entitled to the relief sought, and dismissed their bill, the court of chancery appeals reversed the decree of the chancellor and

declared the corporation dissolved and its charter rights surrendered, and defendants have appealed to this court.

The material facts found by the court of chancery appeals are: That the corporation was chartered and organized in April, 1904, under the general incorporation acts of the state of Tennessee, to engage in the business of manufacturing woolen, cotton and mixed fabrics. The capital stock was fixed at fifty thousand dollars, but bona fide subscriptions were obtained to only the amount of forty-eight thousand six hundred dollars. The stockholders held a meeting, organized and elected a board of seven directors, to serve for a term of twelve ²⁶⁹ months, and the directors were instructed to proceed as expeditiously as possible to carry on the business for which the corporation was chartered. The election of permanent directors was delayed until the stockholders should adopt a code of by-laws. Steps were taken to procure real estate for a site and suitable machinery, and a call of ten per cent upon the stock was made. Such was the status of the new corporation on April 1, 1904.

It appears that previous to this time there was a corporation known as the Athens Woolen Mills, which had had a very prosperous history, and declared large dividends and accumulated quite a surplus. The managers of this corporation made overtures to the principal promoters in the new enterprise, the object of which was to prevent the new corporation from going into active business. The scheme was to increase the capital stock of the old corporation, enlarge its plant, and let in the members of the new corporation upon certain terms.

The court of chancery appeals reports that this proposition was to be open to all the stockholders of the new corporation, with no special privileges to any of them, so far as the taking of stock was concerned, and that it was submitted to the stockholders of the new concern, and a majority of them were willing and anxious to accept it, but a minority were not. The stockholders in the new concern thereupon became divided, and considerable bad feeling was engendered. Whereupon by a majority vote the stockholders of the new corporation passed a resolution ²⁷⁰ that the new corporation be abandoned and dissolved, to which action the minority protested.

The board of directors passed a similar resolution to dissolve the corporation, to set aside subscriptions to its capi-

tal stock, and to annul the call that had been made for any payment to the subscription to the stock, and this was also passed by a majority vote and over the protest of the minority.

The court reports that it was evidently the purpose of the people who owned and controlled the Athens Woolen Mills to stop further proceedings of the new enterprise, and specially to secure and retain the services of Messrs. Blizzard and Mahary, to whom was due in a very large extent the success of the old company, with that company. These gentlemen did decide to go with the old company and abandon the enterprise.

So far as the motives of the two factions are concerned, the court of chancery appeals reports that each was actuated by what it considered to be its best interest pecuniarily, that the old concern was a very profitable one, and that the prospect of the new was very good, and that the chief object of the Athens Woolen Mill Company, in its opposition to the new enterprise, was that it might retain the services of Messrs. Blizzard and Mahary. Both parties seemed to have viewed the matter from their pecuniary interests.

Our statutes provide for the dissolution of a corporation by the following, among other, provisions: Shannon's Code, section 5165, is in this language: ²⁷¹ "An action lies under the provisions of this chapter in the name of the state against a person or corporation offending in the following cases: . . . (4) or, if being incorporated, they do or omit acts which amount to a surrender or forfeiture of their rights and privileges of a corporation; (5) or exercise powers not conferred by law; (6) or fail to exercise powers conferred by law and essential to corporate existence."

Section 5181 provides: "That if it be adjudged that a defendant corporation has by neglect, nonuser, abuse or surrender forfeited its corporate rights, judgment will be rendered that the defendant be altogether excluded from such rights and be dissolved."

These sections appear to refer more particularly to involuntary proceedings against a corporation arising out of some abuse, neglect or dereliction of duty, but they are broad enough to embrace also cases of voluntary surrender of a charter by the stockholders, and this was so held in the case of *Parker v. Bethel Hotel Co.*, 96 Tenn. 252, 34 S. W. 209, 31 L. R. A. 706. In this case we have a deliberate

and formal surrender of the charter under a resolution passed by a majority of the stockholders, a similar resolution passed by a majority of the directors, all ratified and affirmed in the bringing of this bill.

If the application in this case was made on behalf of all the stockholders to have the charter surrendered and the corporation dissolved, we think that there can be no ²⁷² doubt that the relief would be granted, and the question remains whether it should be done by a majority of the stockholders, over the wish of the minority, where no business has been done by the corporation and no debts or obligations have been incurred and no liabilities have accrued.

It would seem to be an anomaly that the minority of the stockholders, under such circumstances and under such a status of affairs, could compel the majority to go forward with the organization and operation of the corporation, when the majority were opposed to such action, and could, if they saw proper, block and prevent the success of the enterprise. This, of course, relates alone to private corporations, and not to public or quasi public corporations, nor to charitable or eleemosynary corporations, in which the public has an interest.

The court, we think, could not, under such circumstances, take charge of the corporation and manage it through a receiver or otherwise, nor can it grant the power to the minority to control the majority.

We do not mean to hold that a majority of the stockholders can, in bad faith, put an end to the existence of a corporation, and dissolve it, to the prejudice of the property rights of the minority.

We think there can be no doubt that the majority of the stockholders have the right to control the corporation, provided they act in good faith; that is, without ²⁷³ any attempt to take advantage of the minority for the benefit of the majority.

The true rule, as we understand it, is laid down in Cook on Corporations, sections 629 and 670. In section 629 it is said: "It is an unquestioned rule that stockholders by unanimous consent may effect a dissolution of a corporation by a surrender of the corporate franchise. Greater difficulty is found in determining whether a majority of the stockholders may dissolve the corporation. It has been held that the majority in interest in a corporation may dissolve it by

a voluntary surrender of its franchises, even though a minority of the stockholders are opposed to its dissolution"; citing *Treadwell v. Salisbury Mfg. Co.*, 7 Gray, 393, 66 Am. Dec. 490; *Hancock v. Holbrook*, 4 Woods, 52, 9 Fed. 353, and other cases.

He states, however, a number of instances in which this cannot be done, but he states the general principle to be that a majority of the stockholders may, where it can be done without bad faith to the minority, seek and obtain a dissolution of the corporation.

In all his excepted cases we find, however, some element of bad faith or want of good faith, or the fact of an established business or existing liabilities, where the dissolution would be practically a fraud upon the dissenting minority stockholders.

The doctrine which we approve has been virtually announced by this court heretofore in the case of *Parker v. Bethel Hotel Co.*, 96 Tenn. 252, 34 S. W. 209, 31 L. R. A. 706, where it is said by Special Judge Bradford: "An ordinary business corporation, where its charter specifies no definite time for its continuance, may sell its property and wind up its affairs whenever a majority of the stockholders may deem it advisable"; citing cases.

In the case of *Treadwell v. Salisbury Mfg. Co.*, 7 Gray, 393, 66 Am. Dec. 490, the supreme court of Massachusetts says: "We entertain no doubt of the right of a corporation, established solely for trading and manufacturing purposes, by a vote of a majority of its stockholders, to wind up its affairs and close its business, if, in the exercise of sound discretion, they deem it expedient so to do."

At common law, the right of corporations, acting by a majority of their stockholders, to sell their property is absolute and it is not limited as to object, circumstances or quantity. He proceeds to state that there are many exceptions to the rule, as in cases of quasi public corporations and charitable and religious corporations, in which the community has some interest.

To the same effect, see *Trisconi v. Winship*, 43 La. Ann. 45, 26 Am. St. Rep. 175, 9 South. 29, and *Slee v. Bloom*, 19 Johns. 456, 10 Am. Dec. 273.

Thompson on Corporations, volume 5, section 6686, says, after commenting on public and quasi public corporations and corporations of an ideal kind, that "the same reasons

do not apply in case of a corporation of a purely private nature, as in its business the state has no special ²⁷⁵ interest. It is accordingly held that corporations of a private nature, established solely for trading or manufacturing purposes, may by a vote of a majority of their members, against the protest of the minority, wind up their affairs and close their business, if, in the exercise of sound discretion, they deem it expedient to do so, and may sell the whole of their property to a new corporation, taking payment in shares of the new corporation, to be distributed among the stockholders of the old corporation who are willing to take them."

The same author says (section 6694): "When we consider that it is not only competent for a majority of the stockholders, but also for a quorum of the directors, to assign all property of the corporation to a trustee for the payment of its debts, an act which in itself is substantially a dissolution of the corporation and a winding up of its affairs, the conclusion that it is within the power of the majority to take action to wind up any business corporation, in the absence of a statutory prohibition, seems unavoidable."

To the same effect, see *Hitch v. Hawley*, 132 N. Y. 12, 30 N. E. 404, where it is said: "We think that when the interests of the corporation are so discordant as to prevent efficient management, and a large majority of both trustees and members wish to wind up its affairs, a dissolution thereof would be beneficial to the interests of its stockholders, because the object of its corporate existence cannot be attained."

While this is a general rule which we think applicable ²⁷⁶ in all save the excepted cases which we have mentioned, it is peculiarly applicable under the facts of the present case, where the organization and operation of a corporation has not so far progressed that any of its stockholders would be materially prejudiced or financially injured by its dissolution and discontinuance, except as to prospective profits, which, at most, are speculative, and depend upon a harmonious and successful management of the business.

Here, it is true, there had been an incomplete organization, stock had been subscribed, temporary officers had been elected, and a scheme for future management, to some extent, had been devised, but no property had been bought, no liability had been incurred, except as between the stockholders, arising out of their subscription, no goodwill had

been created, and, in short, nothing tangible had been accomplished.

Under such a status of affairs the majority decided to abandon, to discontinue, and dissolve upon terms which they deemed advantageous, and which were offered alike to the majority and minority.

A difference arose between the majority and minority, and a sharp controversy and divergence of views took place, bitterness of feeling was engendered, so that even the future success of the enterprise became problematic, and this was rendered still more acute by the withdrawal of Blizzard and Mahary from the new organization.

While the majority acted as they evidently thought in their own interest, they did not intend thereby to prejudice ²⁷⁷ the rights of the minority, but tendered to them the same benefits which they themselves were to receive.

The court of chancery appeals finds that there was, in fact, no fraud or bad faith on the part of the majority toward the minority in discontinuing and abandoning the enterprise.

In such case, we think there can be no question of the right of the majority to dissolve the corporation, and to have the court decree such dissolution in order to avoid future complications and possible liabilities.

Nor do we think that the act of 1903 (Laws 1903, p. 268, c. 140) prohibits and renders void the acts of the majority in this case. That act simply declares unlawful and void all arrangements, contracts, agreements, trusts or combinations between persons or corporations made with the view to lessen, to tend to lessen, full and free competition in the manufacture or sale of articles of domestic raw material.

There was no arrangement here between the two corporations, but it is simply a case where a majority of the stockholders in a new enterprise decided to abandon what in their opinion it would not be wise and profitable for them to continue.

Again it is said that the surrender of the charter in this case was not valid, because a large number of the votes cast in favor of the proposition were cast by those holding proxies, and it is said that there is no law authorizing such votes.

It is said that at common law there was no right to ²⁷⁸ vote by proxy, and there is no general statute in this state authorizing such votes, and the right is not conferred by the charter of the particular corporation in question.

The charter does provide for an election of officers, by votes cast, either in person or by proxy, and we are aware that the practice and custom of voting shares of stock by proxy is in latter days, at least, almost universal, unless it is in some way expressly prohibited.

But whether this be so or not, the majority have ratified this action by joining in the present suit and making the request for a dissolution of the corporation, so that the point raised is a merely technical one.

It plainly appears that a majority of the stockholders are seeking and asking a dissolution and abandonment of this corporation, and we think that, under the facts, as found by the court of chancery appeals, they are entitled to have the relief they ask.

The decree of the court of chancery appeals is therefore affirmed, and the costs of the appeal will be paid by the defendant minority stockholders. The costs of the court below will be paid as adjudged by that court.

A Majority of the Stockholders in a corporation, acting within the scope of their authority, may wind up its affairs and dissolve it for reasons deemed by them sufficient: *Triseoni v. Winship*, 43 La. Ann. 45, 26 Am. St. Rep. 175; *Bartholomew v. Derby Rubber Co.*, 69 Conn. 521, 61 Am. St. Rep. 57. See, however, *Harding v. American Glucose Co.*, 182 Ill. 551, 74 Am. St. Rep. 189. And minority stockholders may maintain a bill for the distribution of its assets when the enterprise for which it was organized has been abandoned and the original scheme is impossible of consummation: *Noble v. Gadsden Land etc. Co.*, 123 Ala. 250, 91 Am. St. Rep. 27. The sale by a corporation of all its property and assets is discussed in the monographic note to *Tanner v. Lindell Ry. Co.*, 103 Am. St. Rep. 548-572. And suits by minority stockholders are discussed in the monographic note to *Johns v. McLester*, 97 Am. St. Rep. 29-52.

CONDON v. CALLAHAN.

[115 Tenn. 285, 89 S. W. 400.]

SURVIVING PARTNER—Right to Compensation.—The rule that a surviving partner is not entitled to compensation for his services in winding up the partnership, applies only to cases where the business is immediately put an end to and no further work is done, except to close up the matter of account between the partners, pay the debts, and distribute the surplus. (p. 836.)

SURVIVING PARTNER—Right to Compensation.—If a partnership enters into a contract to do construction work on a railroad, and one of the partners dies soon after the commencement of the undertaking, the surviving partner is entitled to compensation for his services in carrying out the contract and completing the work. (pp. 839, 840.)

SURVIVING PARTNER—Credit for Employment of Engineer. If partners undertake to do railroad construction work, and one of them, with the consent of the other and of his representatives after his death, employs an engineer of the railroad to perform services not in conflict with the duties owed by him to the railroad company, such company having knowledge of the employment, the surviving partner is entitled, upon completing the construction contract and winding up the business of the firm, to a credit for his expenditure for the engineer's services. (p. 842.)

PARTNERSHIP—Division of Profits.—Where a partnership contract to do railroad construction work provides that if one partner subcontracts work from the firm he shall be dealt with as other subcontractors, the partnership is entitled, as against a partner taking a subcontract from it, to the same average profit that it realizes on the work of other subcontractors. (p. 842.)

SURVIVING PARTNER—Liability for Interest.—A surviving partner is not liable for interest on partnership funds continued on deposit by him in a bank, awaiting a settlement of the affairs of the firm and not yielding him any profit. (p. 842.)

Webb, McClung & Baker, for the complainants.

Shields, Cates & Mountcastle, for the defendants.

287 WILKES, J. This is a bill by the executrix of M. J. Condon, deceased, to settle up the partnership that existed between M. J. Condon and the defendant, George W. Callahan. This partnership was entered into for the purpose of constructing certain railroad work, and there is no controversy about its terms nor the proportionate interests of the parties thereunder.

The partnership entered into an important and very expensive contract for railroad construction around Keogan Tunnel, near Harriman, Tennessee. Soon after the work was

commenced M. J. Condon was killed, and the work was carried on and the contract was completed by Callahan, as surviving partner, by the consent of the executrix.

²⁸⁸ It was one of the terms of the partnership that the services of each member of the firm should be compensated for by similar services of the other member of the firm, and there was no contract as to the status of the parties in the event either died.

The profits were from time to time divided, and when a final settlement was attempted to be made Callahan claimed certain items of expense which it was alleged were not in accord with the partnership contract. Thereupon this bill was filed to have the partnership of M. J. Condon and Callahan wound up and the rights of the parties determined.

The contract resulted in a profit of some \$67,000, and there was a fund of \$6,119.87 in the East Tennessee National Bank to the credit of M. J. Condon & Co., where it was originally deposited, and where it had ever since remained until paid into court.

The chancellor passed upon the rights of the parties, and declared the proportion in which they should share these funds, and adjudicated the costs. The complainants prayed a broad appeal, and the defendant Callahan prayed an appeal from so much of the decree as failed to charge the estate of M. J. Condon with twelve and one-half per cent profit upon the gross amount of work which was sublet by M. J. Condon & Co. to Ed L. Condon and M. J. Condon on a prior contract in South Carolina, and because he was refused proper salary as walking boss in connection with the work at Harriman, and for his services in completing the Harriman contract.

²⁸⁹ In the court of chancery appeals a number of assignments were made by both parties, and the decree of the chancellor was affirmed, except that the defendant Callahan was allowed an additional sum of \$903.73, on account of the South Carolina contract, and both parties have appealed to this court.

The first assignment made by the defendant Callahan is that the chancellor and the court of chancery appeals should have allowed him \$6,300 compensation for carrying out and completing the contract made by M. J. Condon & Co. to build the railroad around Keogan Tunnel, which resulted in a profit to the firm of about \$67,000. For this service he was actually

allowed by the chancellor and the court of chancery appeals the sum of \$2,700.

Upon this feature of the case the complainants assign as error that Callahan should not have been allowed any compensation whatever for his services after the death of his copartner, M. J. Condon.

We will consider these assignments of error together.

The court of chancery appeals report that it was a provision of the contract between the partners that each of them should devote his entire time to the business of the partnership and that the work of one partner should offset the work of the other.

That court reports that Callahan, in negotiating with Mrs. Condon and her son for a settlement, was willing to accept the \$2,700 for his services. They further report that she at first agreed to this allowance, but afterward repudiated her agreement.

²⁹⁰ That court says that, while the weight of the proof tends to show that Callahan performed double service, in addition to the service of a walking boss, and that his extra service, aside from his walking boss service, was worth the sum claimed by him, still that his own valuation of his services when the settlement was attempted between him and Mrs. Condon was the most reasonable basis to accept.

That court declined to allow Callahan \$150 per month for services as walking boss, because those services were rendered as surviving partner, in the prosecution and completion of the work; and the amount allowed him of \$2,700 was allowed him by that court presumably upon the idea that it was a proper compensation for his services in carrying out the contract, and these services were rendered as surviving partner.

So that, as we view the findings of the court of chancery appeals, the \$2,700 allowed to Callahan by that court was for his services as surviving partner, and not simply as walking boss.

The question presented, then, is whether, under the contract between the partners and the facts developed in this record, the defendant Callahan should be allowed anything for his services as surviving partner, and, if so, how much.

As we construe the contract, it is not that neither partner should receive anything for his services, but that the work of the one should offset the work of the other. In other words, it was contemplated that the services of ²⁹¹ each would be

worth the same, and that each should receive his share of the compensation in the services of the other.

On account of the death of M. J. Condon, he was unable to comply with his part of the contract and do his part of the service.

We think the law in such case would imply that the partner doing the whole of the work should have reasonable compensation for that part of it which would have been done by the deceased partner if he had lived; or, in other words, he was entitled to compensation for that part of his work which his deceased partner would have contributed.

Now, the general rule is that, as between partners, the surviving partner is entitled to make no charge for his services in winding up the partnership. Still this rule does not apply in all cases, but only to cases where the business is immediately put an end to and no further work is done, except to close up the matter of account as between the partners, pay the debts, and distribute the surplus, if any.

In the case of *Godfrey v. Templeton*, 86 Tenn. 167, 6 S. W. 49, it is said: "It is well settled that surviving partners will not generally be allowed compensation for services rendered in winding up and settling the business of the firm; but that is not this case. The business of the firm was continued for the sake of profit, and the object was accomplished, resulting beneficially alike to the surviving partners and ²⁹² the estate of the deceased partner; the continuance of the business even for a longer time being expressly authorized by the will of the deceased partner, and with the knowledge and consent of the administrator with the will annexed."

In the present case the contract was continued by Callahan, as surviving partner, with the express consent of the executrix and sole legatee. It was necessary that it should be so continued, in order to realize the benefits of the existing contract by completing it and to prevent loss by abandoning it; and it did result in a profit of about \$50,000 to the representatives of M. J. Condon and about \$17,000 to Callahan.

Bates on Partnership states the rule as follows: "The principle applies to the burden of winding up after death, and the surviving partner can claim no extra compensation for it, the death of a copartner being one of the risks necessarily incurred by each; but the rule applies merely to the simple and immediate winding up by collecting the assets, paying the

debts, and accounting for the surplus, as is necessarily involved in the creation of the partnership and implied in the contract. But for time, skill and trouble expended beyond this, and inuring to the general benefit, the reason of the rule fails, as where, after dissolution, a partner successfully continues the business of the firm, using the original capital, goodwill or other assets, and a benefit is received from his efforts, he is allowed to deduct from the profits a compensation, varying according to ²⁹³ the state of the account, the nature of the business, the difficulty and results of the undertaking, and, perhaps, its necessity or desirability.

"The most usual application of this limitation of the principle is the case of a surviving partner continuing the firm business or completing the enterprise of the partners.

"In *Brown v. De Tastet*, 1 Jac. 284, where the surviving partner continued the business with the original capital and was required to account for the profits, allowances were ordered to be made to him, not necessarily as wages, but such as the master should find proper.

"In *Cameron v. Francisco*, 26 Ohio St. 190, where the surviving partner, without being under contract to do so, continued the business (the publication of a newspaper), and by thus being enabled to sell it as a going concern, preserved a valuable goodwill which would otherwise have been lost, and the personal representatives, on electing to share the profits, were required to deduct a reasonable compensation.

"In *Schenkl v. Dana*, 118 Mass. 236, the property of the firm consisted of patents for improvements in weapons of war and valuable contracts with the government, and a manufactory and stock for fulfilling them, and the surviving partner, having completed the contracts and entered on new ones, was held entitled to extra compensation for all services in excess of mere winding up.

"In *Griggs v. Clark*, 23 Cal. 427, where the value of the assets was enhanced by the labor and time of the ²⁹⁴ surviving partner to the extent of \$6,000, he was allowed \$1,400 out of the profit from the enhanced value.

"In *Newell v. Humphrey*, 37 Vt. 265, partners in the business of buying cattle on commission had canvassed the territory, and ascertained who would have cattle to sell, without contracting with them, and then one partner died. Much time and labor having been spent, the commissions on these inchoate transactions were held to be partnership assets, but

an allowance to the surviving partner for his time and expenses in completing them was held just and proper": Bates on Partnership, pp. 821-824, secs. 772, 773.

"The rule that a surviving partner is entitled to no extra compensation applies to his services in winding up the partnership. The winding up or settling of the partnership affairs after the death of one of the partners may be said to consist, as a general thing, in selling the property, receiving moneys due the firm, returning the capital contributed by each partner, paying the firm debts and advances of the partners, and dividing the profits. Where, however, the surviving partner renders services in excess of the mere winding up of the partnership affairs, he will, under certain circumstances, be entitled to compensation for such excess": 17 Am. & Eng. Ency. of Law, 1154, 1183; 2 Lindley on Partnership, 1046; Collyer on Partnership, sec. 328; Parsons on Partnership, sec. 346. It is said in Bates on the Law of Partnership, at section 773: "The rule applies merely to the simple and immediate winding up, by collecting ²⁹⁵ the assets, paying the debts, and accounting for the surplus, as is necessarily involved in the creation of the partnership and implied in the contract; but for time, skill, and labor expended beyond this, and inuring to the general benefit, the reason of the rule fails. The most usual cases, where the surviving partner is allowed compensation, are cases where he successfully continues the business of the firm, or successfully completes an enterprise in which the firm has been engaged, so that a substantial benefit is received from his efforts. The amount of compensation will vary according to the state of the accounts, the nature of the business, the difficulty and results of the undertaking, and its necessity or desirability": 2 Bates on Partnership, sec. 773; Am. & Eng. Ency. of Law, 1183. "If he performs such extra services with the consent of the representatives of the deceased partner, such consent is sometimes an important factor in determining the question whether he is entitled to compensation. His claim to compensation will, in connection with the circumstances mentioned, be looked upon with favor, if the representatives of the deceased partner elect to share in the profits realized from his services as surviving partner": Maynard v. Richards, 166 Ill. 466, 57 Am. St. Rep. 145, 46 N. E. 1138.

"The business may be of such a character that, on the dissolution of the partnership, it cannot be closed at once to ad-

vantage, and it is therefore continued with the expressed or implied assent of all the partners, and by a like assent is committed to the care and management ²⁹⁶ of some only of them. In such cases the partner or partners in possession of the assets and continuing the business will in equity be regarded as in some respects occupying the position of trustees, and as such entitled to be compensated for services in the management of the trust property; and whether or not any personal claim can be maintained therefor against the other partners, the value of the services may at least be deducted from accounting for profits realized from the business: *Mellerst v. Keen*, 27 Beav. 236; *Airey v. Borham*, 29 Beav. 620; *Newell v. Humphrey*, 37 Vt. 265; *Schenkl v. Dana*, 118 Mass. 236''; *Gilmore v. Ham*, 142 N. Y. 1, 40 Am. St. Rep. 554, 36 N. E. 826.

The cases of *Piper v. Smith*, 1 Head, 93, and of *Berry v. Jones*, 11 Heisk. 206, 27 Am. Rep. 742, are not in conflict with these authorities, or with the decisions of this court in the case of *Godfrey v. Templeton*, 86 Tenn. 161, 6 S. W. 47.

In the case of *Berry v. Jones*, 11 Heisk. 206, 27 Am. Rep. 742, a bill was filed to wind up a partnership, and one of the partners insisted upon his right as surviving partner to act as receiver in winding up the partnership affairs. This court simply held that the surviving partner was not entitled to compensation for his services in winding up the affairs of the partnership; that is, in selling the assets, collecting the moneys due the firm, paying its debts, and distributing the profits among the partners. This is the general rule as laid down by all the authorities.

The case of *Piper v. Smith*, 1 Head, 93, was also a ²⁹⁷ case of winding up a partnership. It is true the firm at the time of the death of one of the partners was building some houses for itself, which had to be completed for the benefit of the firm, and it was there said that the surviving partner was not entitled to compensation for his services in superintending the finishing of said buildings. The question of carrying out an enterprise with a third party was not involved in that suit.

We are of opinion that, under the law and the facts of this case, the defendant Callahan was entitled to reasonable compensation for his skill, services and labor in completing

the contract, and the allowance should be made in view of the results realized.

It is left a little indefinite by the finding of the court of chancery appeals and under the claim of Callahan what this amount should be, or, rather, the length of time he was engaged in completing the contract is differently stated—in some places at eighteen months, and at other places at twenty-three months; and the defendant Callahan claims that he is entitled to compensation at the rate of \$300 per month for the time thus employed.

The court of chancery appeals, in effect, reports that his services were worth all or more than he claims.

Upon the basis of eighteen months, the compensation would be \$5,400; upon the basis of twenty-three months, it would be \$6,900. The defendant makes claim in round numbers for \$6,300.

Under this state of the record, we think we should fix the amount at \$6,300.

²⁹⁸ The offer to take \$2,700 on the part of Callahan was one based upon his services as walking boss. It was not offered as compensation to carry out the contract. It may be, if the proposed settlement had been accepted, no claim would have been made for services as surviving partner. The offer, moreover, was tentative merely, in order to arrive at a settlement. When Callahan was put to his legal rights, he insisted upon reasonable compensation, and the court of chancery appeals report that \$6,300 is reasonable.

The complainant assigns as error that defendant Callahan should have been charged personally with \$3,100, which he claims to have paid to G. Bottinger, the engineer of the railroad company.

It is said that such payment, if made, was for the purpose of bribing and corrupting the engineer of the railroad company, and was immoral, and against public policy, and Callahan should not have compensation for the same. It appears that this man Bottinger was employed with the approval of M. J. Condon before he died; and the court of chancery appeals report that the work which he was employed to do, and which he did do, was not in conflict with his duty and work with the railroad company.

That court says that the evidence wholly fails to show any fraud or collusive purpose in the employment of this man to beat or defraud the railroad company or to contravene any

rule of sound public policy. No effort ²⁹⁹ was made to conceal his employment from the railroad company, and it does not appear that the railroad was ignorant of his employment or the nature of the services he was rendering to the defendant.

That court continues that, in addition to all this, it reasonably appears from the evidence that complainants knew that he was employed, or that such services as Bottinger rendered were being paid for as the work progressed and charged up to the general expense account; and, indeed, it does not appear that they ever objected to allowing the credit assailed.

Under this state of facts we think the credit of \$3,100 was properly allowed as a credit to Callahan, and the assignment of error complaining of the same is not well taken.

Complainants' fourth assignment of error is that the court of chancery appeals erred in charging M. J. Condon's estate with \$3,614.95, profits alleged to have been made on a subcontract with M. J. Condon and Ed L. Condon in South Carolina.

It appears that Callahan and M. J. Condon, previous to the contract now under consideration, had a contract to build eighty-one miles of track from Cheraw to Columbia, South Carolina, for the Seaboard Air Line. One of the provisions of that contract was that either member of the firm might subcontract enough work from the firm to give employment to any men and teams which either party might own or have individually, and which might not be sold to M. J. Condon & Co., and that, in the event that either ³⁰⁰ or both of said parties should subcontract for any part of said eighty-one miles, he or they should be dealt with as other subcontractors on said line of eighty-one miles.

M. J. Condon did sublet a part of this work to himself and Ed L. Condon at the same price that the company was to get from the railroad company.

The company made an average profit of twelve and one-half per cent on the aggregate amount of the work done under other subcontractors, and this rate of twelve and one-half per cent under the contract to the Condons would amount to \$3,614.95. Condon died before there was a settlement of the South Carolina business, as between himself and his partner, Callahan, and this matter was never adjusted between them.

The court of chancery appeals finds that, under the South Carolina contract, this sum belonged to the firm to be distributed in the proportion called for by that contract; that

is, three-fourths to Mrs. Condon, as executrix, and one-fourth to Callahan. This one-fourth would amount to \$903.73.

The court of chancery appeals reports that this sum should be allowed to Callahan in the adjustment of his account with the Condon estate, and that any delay in claiming the same was satisfactorily accounted for by the fact that there had never been any final settlement of the South Carolina business, and that Condon had died unexpectedly and suddenly, just as the firm was entering upon a new and important construction job,³⁰¹ and in addition the object of the bill was to wind up the partnership of Condon & Co., and this item, being unadjusted, legitimately came within the scope of the settlement.

Under these facts, we are of opinion that the court of chancery appeals was correct in allowing Callahan this credit of \$903.73.

The complainants' fifth assignment of error is because the court of chancery appeals refused to charge Callahan with interest on the money in his hands and under his control, belonging to the firm, after the 25th of January, 1902.

It appears that when the settlement was attempted between Callahan and Mrs. Condon, as executrix, there was in the East Tennessee National Bank, to the credit of Condon & Co., the sum of \$6,119.87. This account had been opened by M. J. Condon in his lifetime, and Callahan after his death continued to make deposits of all the firm money to the same account, and it had all the time remained in the bank to the credit of Condon & Co. Callahan never used this money in any way, and never realized any interest or profit upon the same. It stood to the credit of M. J. Condon & Co., awaiting settlement between the parties, upon the terms of which they could not agree.

We are of opinion that Callahan is not liable for any interest on this amount.

The sixth assignment of complainants, in reference to taxation of costs, is not well made.

³⁰² Under our view of the case, we are of opinion that complainant should pay all the costs of the appeal.

The decree of the court of chancery appeals is affirmed, except as to the item of compensation to be allowed Callahan for completing the contract and winding up the partnership, and as to that and the adjudication of costs it is modi-

fied, so as to allow Callahan compensation of \$6,300, instead of \$2,700, as fixed by the court of chancery appeals.

The costs of the appeal will be paid as heretofore indicated, the costs of the court below will be paid as adjudged by the chancellor, and the cause is remanded to the court below for further proceedings.

RIGHT OF SURVIVING PARTNER TO COMPENSATION.

I. In Case of Commercial Partnerships.

- a. For Winding Up Affairs of Firm, 843.
- b. For Continuing Business or Unusual Services, 843.
- c. For Administering on Firm Effects, 845.
- d. For Acting as Receiver, 845.

II. In Case of Nontrading Partnerships, 845.

I. In Case of Commercial Partnerships.

a. **For Winding Up Affairs of Firm.**—In the event of the death of one member of a firm, the surviving partner is not ordinarily entitled to compensation for his services in winding up and settling the partnership affairs, in the absence of an agreement therefor, or of special circumstances, for the law enjoins this duty upon him as an incident of the contract of partnership: *Griggs v. Clark*, 23 Cal. 427; *Tillotson v. Tillotson*, 34 Conn. 335; *Kimball v. Lincoln*, 5 Ill. App. 316; *Young v. Scoville*, 99 Iowa, 177, 68 N. W. 670; *Commonwealth v. Bracken's Heirs* (Ky.), 32 S. W. 609; *Coakley v. Hazelwood's Exr.* (Ky.), 49 S. W. 1067; *Smith v. Smith*, 51 La. Ann. 72, 24 South. 618; *Sangston v. Hack*, 52 Md. 173; *Loomis v. Armstrong*, 49 Mich. 521, 14 N. W. 505; *Porter v. Long*, 124 Mich. 584, 83 N. W. 601; *Gregory v. Menefee*, 83 Mo. 413; *Scudder v. Ames*, 89 Mo. 496, 14 S. W. 525; *Burgess v. Badger*, 82 Hun, 488, 31 N. Y. Supp. 614; *Slater v. Slater*, 78 App. Div. 449, 80 N. Y. Supp. 363; *Beatty v. Wray*, 19 Pa. St. 516, 57 Am. Dec. 677; *Piper v. Smith*, 38 Tenn. (1 Head) 93; *Patton's Exrs. v. Calhoun's Exrs.*, 4 Gratt. 138; note to *Shields v. Fuller*, 65 Am. Dec. 301. And a contract for compensation cannot be implied from an agreement existing between the partners whereby each drew a specified amount monthly from the firm, which amounted to no more than a division of profits, to that extent: *Smith v. Knight*, 88 Iowa, 257, 55 N. W. 189.

b. **For Continuing Business or Unusual Services.**—It does not follow, however, that a surviving partner will in all cases be denied the right to be compensated for services rendered in the interest of the firm's business. If he performs special or extraordinary services beyond merely winding up the affairs of the partnership, if he carries out and completes important firm contracts, if he carries on the business of the firm profitably for a considerable period of time, acting in good faith, and the exigencies of the case perhaps making such a course necessary, while the representatives of the

deceased acquiesce and elect to share in the resulting profits, then he may become entitled to demand compensation for his services so rendered: See the principal case, ante, p. 833; *Griggs v. Clark*, 23 Cal. 427; *Painter v. Painter* (Cal.), 36 Pac. 865; *Maynard v. Richards*, 166 Ill. 466, 57 Am. St. Rep. 145, 46 N. E. 1138; *Hite's Heirs v. Hite's Exrs.*, 40 Ky. (1 B. Mon.) 177; *Schenkl v. Dana*, 118 Mass. 236; *Royster v. Johnson*, 73 N. C. 474; *Cameron v. Francisco*, 26 Ohio St. 190; *Zell's Appeal*, 126 Pa. St. 329, 17 Atl. 647; *Godfrey v. Templeton*, 86 Tenn. 161, 6 S. W. 47; *Newell v. Humphrey*, 37 Vt. 265. Nevertheless, if he carries on the business only for a short time, or if, though carrying it on for a considerable period, he renders hardly any extra services beyond transacting what may be deemed his own business, he is not entitled to special remuneration therefor: *Hancock v. Hancock's Admr.*, 24 Ky. Law Rep. 664, 69 S. W. 757; *Evans v. Weatherhead*, 24 R. I. 394, 53 Atl. 286.

In *Robinson v. Simmons*, 146 Mass. 167, 4 Am. St. Rep. 299, 15 N. E. 558, it is held that a surviving partner is entitled to compensation for his skill and services out of profits earned by his deceased partner's capital which he continues to use in the business, with the consent of a majority of the heirs, in good faith, and with due regard to the interests of all concerned. "We think," said Chief Justice Morton, in delivering the opinion of the court, "a just rule to be deduced from the authorities is, that where there are no circumstances which render its application inequitable, the profits should be divided according to the capital, after deducting such share of them as is attributable to the skill and services of the surviving partner. When his good faith and fairness are not impeached, the most that the representatives of the deceased partner can justly demand is, that he should account to them for their capital, and, in addition, for whatever it has earned. This involves the necessity of inquiring how much of the profits is attributable to the services and skill of the surviving partners, and how much to the capital invested in the business. The latter portion of the profits shows what the capital has earned, and should rightfully be divided among the owners of the capital in proportion to their share of the capital." This case is approved in *Rowell v. Rowell*, 122 Wis. 1, 99 N. W. 473, where Justice Dodge said: "The court recognized the principle that while surviving partners, in closing up the affairs of the firm, are not entitled to compensation for services, yet, when those interested in the estate elect to demand not only the fair value of their interest, but also a share in the profits earned by the use of the whole property, a court of equity will inquire to what extent the profits of the business are attributable to the personal services of those conducting it, not entitled to salary, and, if some share or sum is proved so to be with reasonable certainty, will allow that, on the theory that those who seek equity must accord it; also that profits due to such services are not due to the property."

Probably no inflexible rules can be laid down to determine whether or not a surviving partner is entitled to compensation for services performed after the death of his copartner. "It is true, no doubt," to quote from the opinion of Justice Holmes in *Thayer v. Badger*, 171 Mass. 279, 50 N. E. 541, "that there is a disinclination to allow pay to a surviving partner for winding up: *Dunlap v. Watson*, 124 Mass. 305; but the tendency is to deal with such questions on their particular circumstances, rather than by absolute rules: *Turnbull v. Pomeroy*, 140 Mass. 117, 3 N. E. 15; *Robinson v. Simmons*, 146 Mass. 167," 4 Am. St. Rep. 299, 15 N. E. 558.

c. For Administering on Firm Effects.—A surviving partner who is the executor of the will of his deceased partner is not entitled to compensation, in the latter capacity, for his services performed in winding up the firm business: *Matter of Harris*, 4 Dem. (N. Y.) 463. To the same effect is *Terrell v. Rowland*, 86 Ky. 67, 4 S. W. 825. But while a surviving partner may not be entitled to commissions for administering upon the partnership estate, at the common law, this rule has been changed by statute in some jurisdictions: *Scudder v. Ames*, 89 Mo. 496, 14 S. W. 525; *Estate of Tutt*, 41 Mo. App. 662; *Roberts v. Hendrickson*, 75 Mo. App. 484. When a will authorizes the testator's son, partner and executor to continue the business of the firm, he cannot, as executor, obtain, either for winding up the business or continuing it if he so elects, compensation beyond his commissions and his legal share of the profits: *Matter of Dummett*, 38 Misc. Rep. 477, 77 N. Y. Supp. 1118.

The executors of a surviving partner are not, as a matter of law, precluded from receiving compensation out of the partnership funds for services performed in settling the affairs of the firm: *Dayton v. Bartlett*, 38 Ohio St. 357.

The executor of a deceased partner cannot employ the surviving partner to wind up the affairs of the firm at a fixed compensation, unless he is expressly authorized to do so by his testator's will: *Brown v. McFarland's Exrs.*, 41 Pa. St. 129, 80 Am. Dec. 589.

d. For Acting as Receiver.—A surviving partner appointed receiver of the partnership affairs at his own instance is not, according to *Berry v. Jones*, 58 Tenn. (11 Heisk.) 206, 27 Am. Rep. 742, entitled to compensation as such receiver. It is probable, however, that a surviving partner, acting as receiver may, under special circumstances, have a right to remuneration for his services: *Slater v. Slater*, 78 App. Div. 449, 80 N. Y. Supp. 363.

II. In Case of Nontrading Partnerships.

It has been suggested, and possibly with good reason, that the rule that a surviving partner is not entitled to compensation should not be applied to partnerships between attorneys and other professional men where the firm profits are the result solely of pro-

fessional skill and labor: *Sterne v. Goep*, 20 Hun, 396. The adjudicated cases, however, seem to make no distinction, in respect to the right of a surviving partner to compensation, between trading and nontrading partnerships: *Denver v. Roane*, 99 U. S. 355, 25 L. ed. 476. Thus, it has been affirmed that the surviving partner of a firm of attorneys is entitled to no compensation for services rendered in suing to collect claims due the firm: *Starr v. Case*, 59 Iowa, 491, 13 N. W. 645; and that it is his duty to complete all business undertaken or agreed to be done by the firm in the lifetime of the deceased partner, without charge to the partnership for the services rendered in so doing: *Little v. Caldwell*, 101 Cal. 553, 40 Am. St. Rep. 89, 36 Pac. 107. If one member of a firm of attorneys dies at a time when the firm has only partially fulfilled a contract of general employment with a client, it becomes the duty of the survivor to hold himself in readiness to perform the services called for, and the representatives of the deceased are entitled to an equitable participation in the compensation accruing by the subsequent performance of the contract by the survivor: *Clifton v. Clark*, 83 Miss. 446, 102 Am. St. Rep. 458, 36 South. 251, 66 L. R. A. 821.

GOSSETT v. SOUTHERN RAILWAY COMPANY.

[115 Tenn. 376, 89 S. W. 737.]

BLASTING—Liability of Railroad—Absence of Negligence.—A railroad company is liable to adjacent property owners for injuries thereto caused by blasting in the construction of its road, although the blasting is necessary and is done without negligence. (p. 851.)

BLASTING—Liability of Railroad—Personal Discomfort.—A railroad company is not liable for the noise and vibration occasioned by necessary and skillful blasting in the construction of its road, which merely causes an adjacent owner disquietude and alarm unaccompanied by sickness or physical injuries, but it is liable if such noise and vibration lessen the usable or rental value of his home to such an extent that the law will award damages therefor. (p. 854.)

ACCORD AND SATISFACTION—Manner of Pleading.—The defense of accord and satisfaction cannot be set up under the general issue of plea of not guilty. (p. 855.)

BLASTING—Joint Liability of Railroad and Contractor.—If a cause of action for damages accrues to an adjacent property owner from blasting in the construction of a railroad, the liability of the contractor and the railroad company is joint, and there is no primary and secondary liability. (p. 855.)

Pickle, Turner & Kenerly and E. F. Mynatt, for the plaintiff.

Jourolmon, Welcker & Hudson and Templeton, Lindsay & Templeton, for the defendants.

378 WILKES, J. These three causes were consolidated and heard together in the court below against the Southern Railway Company, W. J. Oliver, and S. P. Condon for damages resulting from blasting near the premises and home of the plaintiffs.

379 Some wordy controversy is had as to whether it is an action for a nuisance or an action on the case, with which we need not concern ourselves. The action is plainly one on the facts of the case; and the facts set out in the declaration, so far as necessary to be stated, are that plaintiff C. C. Gossett owned and occupied as a residence a certain house and lot near Knoxville. His wife and minor child, about two years old, resided with him and constituted his family. The defendant railroad located, graded and constructed its line immediately adjoining the home and premises of the plaintiffs and within a few feet of their lot and residence house. Large quantities of dynamite and high explosives were used day and night for a long time in blasting and loosening earth and rock in the construction of the road by the railroad, and by Oliver and Condon, as contractors, causing great noises and explosions, shocks and concussions of the earth and the air near and at the home of the plaintiff, and greatly alarming and frightening the plaintiffs Carrie and Calvin Gossett, so as to deprive them of the necessary sleep, rest and repose, and it is claimed, impairing the health of the said Carrie, and alarming and terrorizing said Calvin, until they both became sick and disordered in body and mind, nervous and otherwise injured, driving them away from home, at great trouble and expense, for several months.

To the declaration in each case the defendants plead not guilty.

It appears that the railroad was constructing its line **380** in front of the plaintiffs' premises, and had a force of from eighty to one hundred men employed at it, working day and night, for twenty hours per day. They blasted rock during the day and during the night, using both deep blasts and surface or adobe blasts. This was done in a cut about fifteen feet from plaintiffs' property and thirty feet from their house.

The house was struck by flying stones, and the weatherboarding was shattered. The concussions were so great that the windows in the house were smashed, and crockery, china,

fruit jars, clocks, pictures, and other personalty were broken, shattered and otherwise injured. Carpets, mattings and curtains were likewise injured by the dust. The work was continued from August, 1903, to June, 1904, and as a consequence of the nervous strain and fright, the wife and child were rendered very nervous, and deprived of rest and sleep during the night; and about January, 1904, they were compelled to leave their home and seek refuge and temporary rest in another locality. Gossett was put to extra expense in maintaining his family away from home and at the same time looking after his property at home.

It appears that defendants repaired plaintiffs' house, so far as physical damage was done to it by the explosions; and for these and the injury to personal property no recovery is sought, but only for the injury, physical and mental, done to the plaintiff and his wife and child, and rendering the house uncomfortable and less valuable as a residence. At the conclusion of the evidence the defendants ³⁸¹ moved the court for peremptory instructions that there could be no recovery by the wife and child, on the ground that no physical injury had been shown to them, and therefore no recovery could be had in their behalf.

The court sustained this motion, and directed a verdict in favor of the defendants in these two cases, to which action the plaintiffs excepted. He then charged the jury in the third case of C. C. Gossett against the defendants, and under that charge the jury rendered a verdict in favor of the defendants, and the plaintiffs have all appealed to this court.

It is assigned as error that the court improperly instructed the jury to render a verdict in favor of the defendants against the wife and child, and, also, that he erred in his charge to the jury in regard to the liability of the defendants to C. C. Gossett, and that he refused to give in charge to the jury certain requests made by the plaintiffs. It is also assigned as error that there is no evidence to support the verdict.

Without attempting to dispose of the assignments of error as they are made, we proceed at once to consider the several interesting and difficult questions which are presented by the record and the assignments of error, premising that we think that they have all been virtually settled by former adjudications of this court, most of which are quite recent.

In the first place the fact that the defendant is a quasi public corporation, authorized by the legislature to condemn, ³⁸² take and use land for railroad purposes and works of public improvement, cannot, under the authority conferred upon it by the legislature, exempt it from liability, even if the work can be done without negligence.

We think the true doctrine is aptly expressed in the case of *Cogswell v. New York etc. R. R.*, 103 N. Y. 10, 57 Am. Rep. 701, 8 N. E. 537: "The powers granted to such railroad corporations are to be construed as privileges conferred, but upon the understanding that they shall be exercised in strict conformity to private rights, and under the same responsibility as though the act were done by an individual in the exercise of such powers": See, also, case of *Garvey v. Long Island R. R. Co.*, 159 N. Y. 323, 70 Am. St. Rep. 550, 54 N. E. 57.

The court proceeded upon the idea, and charged the jury upon the theory that the railroad company and its contractors in constructing the railroad were engaged in what might be termed "governmental functions," delegated, first, to the railroad company by the state, and by the railroad company to its agents employed to do the work, and that if no other damage and injury were done to the plaintiffs than what was necessary to be occasioned in the prosecution of such work, then the defendants would not be liable. In other words, if the work was authorized and legitimate, then the defendants could only be made liable for the negligent prosecution of it. This is contrary to the holdings of this court; and, as we think, to the great weight of authority, though there are ³⁸³ cases, a few of which have been cited to us by counsel, holding that, if the work is legitimate, then the only damage that can accrue to the company prosecuting the work must arise out of its negligent execution. In the case of *Madison v. Ducktown Copper Co.*, 113 Tenn. 331, 83 S. W. 658, it was held that the defendants were conducting a lawful business in a lawful way, and by the most scientific and approved methods, and had made every effort known to science and experience to avoid injury to the plaintiff, but injury had resulted as a necessary consequence of the work itself; and the court further held that there was no other place to which the hurtful operations could be transferred. Still the court said that a judgment for dam-

ages in this class of cases is a matter of absolute right, where injury is shown.

This was a case where injury was inflicted by noxious fumes and smoke spreading from the furnace property over adjoining property, so as to create a nuisance and injure the adjoining property.

In the case of *Cumberland Teleph. Co. v. United Electric Ry.*, 93 Tenn. 492, 29 S. W. 104, 27 L. R. A. 236, it was held, in substance, that a person, even in the prosecution of a lawful trade or business upon his own land, cannot gather there by artificial means a natural current, like electricity, and discharge it upon his neighbor with such force and to such an extent as to break up his business or impair the value of his property, without being responsible for the resulting injury.

³⁸⁴ The Fifth Baptist Church case (108 U. S. 317, 2 Sup. Ct. Rep. 719, 27 L. ed. 739), is a leading case upon this question; and it was there held, among other pertinent matters, that grants of privileges or powers to corporate bodies, like railroads, conferred no license to use them in disregard of the private rights of others, and with immunity for their invasion. It was there said: "The great principle of the common law, which is equally the teaching of the Christian morality, so to use one's property as not to injure others, forbids any other application or use of the right and power conferred."

In the same case it is said: "The acts that a legislature may authorize, which without such authorization would constitute nuisances, are those which affect public highways or public streams, or matters in which the public have an interest and over which the public have control. The legislative authorization exempts only from liability to suits, civil or criminal, at the instance of the state. It does not affect any claim of a private citizen for damages for any special inconvenience or discomfort not experienced by the public at large": See case of *Baltimore etc. R. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. Rep. 719, 27 L. ed. 739.

In the case of *Terminal Co. v. Jacobs*, 109 Tenn. 727, 72 S. W. 954, 61 L. R. A. 188, it is said: "To claim exemption from liability resting upon a charter right, the answer may properly be made that the state has not authorized the wrong complained of; and in locating its roundhouse so that

the injury necessarily ³⁸⁵ resulted to the adjacent land owner, it did so at its peril."

And again it is said: "Grants of powers to corporate bodies like these can give no license to use them in disregard of the rights of others, and with immunity for their invasion."

To the same effect, see the case of *Swain v. Tennessee Copper Co.*, 111 Tenn. 430, 78 S. W. 93. All of these cases have been cited, analyzed and commented upon in the case of *Louisville etc. Terminal Co. v. Lelleyett*, 114 Tenn. 368, 85 S. W. 881, 1 L. R. A., N. S., 49 et seq., and many other cases are there referred to. The gist of these decisions, so far as applicable to the facts of the present case and the questions here involved, is that a railroad company, in constructing its road, although it may be guilty of no negligence and exercise proper care and caution, will still be liable to adjacent property owners, if the work done, although necessary to be done, and in fact skillfully constructed, shall result in injury to such property. Most of the cases cited by counsel holding a contrary doctrine are cases in which the work was being done under government directions and control; and so far as they do not rest upon this feature of government regulation and control, they are not in accord with the holdings of this court, nor, as we think, with the weight of authority. nor are they in accord with sound reason and legal justice.

It remains to be considered whether the injuries complained ³⁸⁶ of in these cases were injuries for which liability arises.

In *Fitzsimmons & Connell Co. v. Braun & Fitts*, 199 Ill. 390, 65 N. E. 249, 59 L. R. A. 421, it was held that one who uses high explosives in excavating so near the property of another that the natural and probable result of an explosion will be injury to such property is liable for injuries caused even by the vibration of earth or air, however high a degree of care he may have exercised in their use. To the same effect is *Longtin v. Persell*, 30 Mont. 308, 104 Am. St. Rep. 723, 76 Pac. 699, 65 L. R. A. 655; *Colton v. Onderdonk*, 69 Cal. 155, 58 Am. Rep. 556, 10 Pac. 395; *City of Tiffin v. McCormack*, 34 Ohio St. 638, 32 Am. Rep. 408; *Scott v. Bay*, 3 Md. 431.

Mr. Thompson, in his work on Negligence, section 772, uses this language: "The subordinate courts of the state of New York, following the analogy of early decisions in that state,

have held that a railroad company is liable to an adjoining property owner for injuries which are the direct and necessary result of blasting rock by such company for the purpose of leveling its right of way, although such blasting is done without negligence, and although no rock or dirt is thrown upon the adjoining premises. But the court of appeals of that state have more recently held otherwise. In one of these decisions, the action was against a contractor executing public work under the United States, and the decision proceeded partly upon the ground that he was acting in virtue of the sovereignty ³⁸⁷ of the United States, and could no more be called to answer in damage than the government could. But the other case holds that a railroad company, in grading its right of way, can shake a dwelling-house to pieces by the concussions produced by the frequent firing of blasts without being liable to pay any damages therefor, provided it is made to appear that the blasting is necessary and that it is done without negligence. This decision, though concurred in by the whole court, is directly opposed to principles laid down by the same court in early cases. It manifests such gross insensibility to justice that, although concurred in by the whole court, it scarcely deserves respectful mention."

Mr. Thompson, in his notes, cites the various cases referred to, most, if not all, of which are relied on by counsel in this case. His own opinion of the law proceeds upon the view that the carrying on of an employment so dangerous near the land of another, thereby keeping him in continual danger and alarm, is a nuisance per se; so that, if any damage happens to him thereby, he may recover, irrespective of the question of diligence or negligence in carrying on the dangerous work. And he says: "If it is a nuisance per se, and the existence of negligence is necessary to support an action for the damage, it is for the same reason negligence per se."

Most of the cases to which we have been referred and which we have been able to find, involving damages by blasting, proceed upon the idea of a trespass upon the ³⁸⁸ adjoining property, where dirt or rock or other material is actually thrown upon it, as where the buildings and improvements are damaged and shaken; and the right of recovery in such cases seems to be clear, as it is also where water is illegally thrown upon a man's land, but the present case goes further than this. All these physical damages to the property

caused by the blasting, it is shown, have been settled for and satisfactorily adjusted. The present action is for rendering the home uncomfortable, insecure and unpleasant, and for virtually compelling the occupants to vacate the premises during the time when the work was being prosecuted; and it is said that the noise and discomfort from the repeated concussions and loud noises was so great as to affect the comfort and health of the family. It is not shown that any of them were made sick; but they were inconvenienced, frightened and made restless, so that the home was no longer a place of refuge and quiet, and it became untenable as a home for several months, and it is for this class of damages that the suit is brought; and the argument is made that there is liability for noise which creates discomfort and nervous disturbance, just as there is for gas and smoke, solids and liquids, which affect the comfort and health of the tenant. Our courts have recognized the right to damages in cases of nuisances arising from foul odors, smoke and gas; and there is no good reason why the same doctrine would not apply to loud noises, and unusual and unpleasant concussions in the air. In support of this ³⁸⁹ doctrine we are referred to Knoxville v. Klasing, 111 Tenn. 134, 76 S. W. 814; Kolb v. Knoxville, 111 Tenn. 311, 76 S. W. 823; Swain v. Tennessee Copper Co., 111 Tenn. 430, 78 S. W. 93; Ducktown Copper Co. v. Barnes (Tenn.), 60 S. W. 593; Madison v. Ducktown Copper Co., 113 Tenn. 336, 83 S. W. 658.

Bearing upon this feature of the case, it is said that in Louisville etc. Terminal Co. v. Lellyett, 114 Tenn. 368, 85 S. W. 881, 1 L. R. A., N. S., 49: "It is not every inconvenience or discomfort that will entitle a property holder to damages, even though it be material or considerable, and especially as against a public or quasi public enterprise. The noise of paved streets and street-cars is a material discomfort to abutting owners. The smoke from factories, hotels and manufacturing establishments may form a material annoyance and discomfort to persons living near by; but these are discomforts and annoyances which the individual must bear in deference to the convenience and comfort of the public. The noise of trains passing through the country districts and the dust of vehicles passing along public highways may be great annoyances to persons living along the line of such highways, and the rumbling of carriages of belated revelers and early market wagons along

the paved highways may disturb the slumbers and harass the nerves of persons who desire to sleep in the cities; but is not for such annoyances and discomforts that the law allows redress, but only where the discomfort and inconvenience proceeds to such an extent as to injure the usable and rental or permanent value of ³⁹⁰ the property that the law will award damages. It must amount, to some extent, to the taking of the value of the property, either temporary or permanent, and depriving the owner thereof: See *Railroad v. Bingham*, 87 Tenn. 522, 11 S. W. 705."

In such case it is a nuisance and actionable. And this is the rule that prevails in all cases, whether it be an individual, a private corporation, or a quasi public corporation. In all such cases the maxim *sic utere tuo* applies, and no matter how lawful or necessary the improvement may be, nor skillfully it may be constructed, nor carefully it may be operated, if it results in injury to the adjoining property owner, the party causing it is liable in damages, either recurring or permanent, dependent upon whether the nuisance is abated or not.

Under the rules which we have laid down in the cases we have cited and commented upon, we are of opinion that there could be no damages, or rather no liability, to the wife and child in this case.

There is no evidence that they were physically injured nor that their healths were impaired. The most that is proven is that they were disquieted and kept in a state of alarm and apprehension, but this is not shown to have resulted in any sickness or physical injuries.

We think, therefore, that the trial judge was not in error in instructing the jury that these parties had no right of action.

The question which should have been submitted to the jury, in our opinion, is whether the injuries complained ³⁹¹ of in this case amounted to a nuisance, and whether the usable or rental value of the homestead was destroyed or lessened temporarily to such an extent that the law will award damages therefor.

It is not claimed that there were any permanent damages to the freehold. We think the case should have been submitted to the jury upon this theory, and, in not doing so, the trial judge committed error. If the plaintiff was driven from his home by the blasting and other operations

carried on by the defendants, or his comfort was so interfered with as to lessen the desirability and usable value of his home during the time the work was being prosecuted, for these things the plaintiff should be entitled to recover.

The trial judge instructed the jury that they might find an accord and satisfaction of the plaintiff's claim for damages, if the facts should so justify.

We think this was error, as there was no plea of accord and satisfaction, and that defense could not be set up under the general issue or plea of not guilty.

We think that, if there is any liability for damages under the facts of this case, it is a joint liability upon the part of the railroad and the contractors, and in such case we do not understand that there is such a thing as primary and secondary liability.

For the reasons which we have indicated, the judgment of the court below in the case of C. C. Gossett v. Southern Ry. Co. et al. is reversed, and the cause is remanded for a new trial, and the defendants ³⁹² will pay the costs of the appeal; and the judgments in the cases of C. C. Gossett and Wife, and Calvin Gossett, by Next Friend v. Southern Ry. Co., are affirmed, and these causes are dismissed, at the cost of the plaintiffs herein.

Blasting Operations carried on continuously for more than one year on premises platted for city purposes constitute a nuisance, prima facie, irrespective of the degree of care exercised, and recovery may be had for injury to neighboring property, arising from concussions of the air: Longtin v. Persell, 30 Mont. 306, 104 Am. St. Rep. 723, and see the cases cited in the cross-reference note thereto.

FRAZIER v. EAST TENNESSEE TELEPHONE COMPANY.

[115 Tenn. 416, 90 S. W. 620.]

ADDITIONAL SERVITUDE—Telephone Poles.—Poles erected in a public street and the wires strung thereon for use in the operation of a public telephone system do not constitute an additional servitude on the fee to the soil for which compensation to the owners must be made. (p. 860.)

Burkett, Miller & Mansfield, for the complainants.

Watkins & Thompson and W. L. Granbery, for the defendant.

416 NEIL, J. The question to be determined in this case arises upon the following statement of facts, which we adopt from the findings of the court of chancery appeals, viz.:

417 “Some twenty or more years ago complainants, husband and wife, bought a tract of some seventy acres of land on the north side of the Tennessee river opposite Chattanooga. The title to this land was taken in them jointly. They platted a portion of this land into blocks, streets and alleys, and called the land so platted and divided into streets, ‘Frazier Addition.’ This plat was made a matter of public record.

“Two of the main streets in said addition are called and known as Forest avenue and Frazier avenue.

“Complainants sold some lots in said addition with reference to its streets, and they built a residence for themselves abutting on Frazier avenue, in which they have lived.

“The defendant is a telephone company, chartered under the laws of Kentucky, and organized to furnish telephone service to the public. It has, and has had, for years, a telephone exchange in Chattanooga, and through and by the use of its equipment it gives local and long distance telephone service to the public. As a means of furnishing this service, it erects poles planted in the ground, to which it attaches wires reaching the points and patrons calling for its service.

“Some years ago, but after complainants platted their land as aforesaid, the county of Hamilton, in which is situated Chattanooga, constructed a bridge across the Tennessee river for the use of the public.

"The northern terminus of this bridge, or its northern end, extends, after crossing the bed of the river, some ⁴¹⁸ distance up Forest avenue. This location of said end of the bridge on a part of said avenue was with the assent of complainants.

"As this bridge blocked to a great extent the south end of said avenue for the distance it extends along it, complainants widened said avenue along the east side of the bridge, so as to allow free access to the river and to their bottom land immediately adjacent to the river at that point.

"The defendant, with its wires, crossed the river along said bridge, and, on reaching the north bank of the river, erected its poles on the passageway opened as aforesaid by complainants on the east side of said bridge and strung its wires thereon. It also erected its poles and strung its wires along or on Forest and Frazier avenues to reach and serve its patrons on that side of the river.

"The poles thus erected by it had cross-arms fastened to them, to which its wires were attached, and some of them were braced by stay poles.

"The complainants, in platting their land into lots, streets, etc., retained the fee to the land covered by the streets, and simply dedicated them to the public use as an easement way of travel.

"Under the evidence in the record the defendant planted its telephone poles along Frazier and Forest avenues and attached its telephone wires to cross-arms fastened to said poles, and used and is using them in the operation of its business."

⁴¹⁹ Section 1830 of Shannon's Code provides, among other things, that telephone companies may construct and maintain lines over the public highways and streets of the state.

The question arising on the foregoing facts is whether telephone poles and wires constitute an additional burden upon complainants' fee for which they are entitled to compensation.

In support of the liability, the following cases and text-writers are cited by complainants' counsel, viz.: *Eels v. American Tel. Co.*, 143 N. Y. 133, 38 N. E. 202, 25 L. R. A. 640; *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 507, 47 Am. Rep. 453; *Postal Tel. Co. v. Eaton*, 170 Ill. 513, 62 Am. St. Rep. 390, 49 N. E. 365, 39 L. R. A. 722; *Daily v. State*,

51 Ohio St. 348, 46 Am. St. Rep. 578, 37 N. E. 710, 24 L. R. A. 724; Callen v. Electric Light Co., 66 Ohio St. 166, 64 N. E. 141, 58 L. R. A. 782; Western Union Tel. Co. v. Williams, 86 Va. 696, 19 Am. St. Rep. 908, 11 S. E. 106, 8 L. R. A. 429; Krueger v. Wisconsin Tel. Co., 106 Wis. 96, 81 N. W. 1041, 50 L. R. A. 298; Stowers v. Postal Tel. Co., 68 Miss. 559, 24 Am. St. Rep. 290, 9 South. ⁴²⁰ 356, 12 L. R. A. 864; Chesapeake Tel. Co. v. McKenzie, 74 Md. 36, 28 Am. St. Rep. 219, 21 Atl. 690; Nicoll v. New York etc. Tel. Co., 62 N. J. L. 733, 72 Am. St. Rep. 666, 42 Atl. 583; Donovan v. Allert, 11 N. Dak. 289, 95 Am. St. Rep. 720, 91 N. W. 441, 58 L. R. A. 775; City of Spokane v. Colby, 16 Wash. 610, 48 Pac. 248; Bronson v. Albion Tel. Co., 67 Neb. 111, 93 N. W. 201, 60 L. R. A. 426; Pacific Postal Tel. Cable Co. v. Irvine (C. C.), 49 Fed. 113; Postal Tel. Cable Co. v. Southern Ry. Co. (C. C.), 89 Fed. 190; Kester v. Western Union Tel. Co. (C. C.), 108 Fed. 926; Joyce on Electrical Law, sec. 321; 2 Dillon on Municipal Corporations, 5th ed., sec. 698a; Elliott on Roads and Streets, 534; Lewis on Eminent Domain, sec. 131; Crosswell on Electricity, sec. 110; Randolph on Eminent Domain, sec. 407.

For the defendant the following authorities are cited, viz.: McCann v. Johnson County Tel. Co., 69 Kan. 210, 76 Pac. 870, 66 L. R. A. 171; Magee v. Overshiner, 150 Ind. 127, 65 Am. St. Rep. 358, 49 N. E. 951, 40 L. R. A. 370; Coburn v. New Tel. Co., 156 Ind. 90, 59 N. E. 324, 52 L. R. A. 671; Irwin v. Great Southern Tel. Co., 37 La. Ann. 63; Pierce v. Drew, 136 Mass. 75, 49 Am. Rep. 7; People v. Eaton, 100 Mich. 208, 59 N. W. 145, 24 L. R. A. 721; Cater v. Northwestern Tel. Co., 60 Minn. 539, 51 Am. St. Rep. 543, 63 N. W. 111, 28 L. R. A. 310; Julia etc. Assn. v. Bell Tel. Co., 88 Mo. 258, 57 Am. Rep. 398; Hershfield v. Rocky Mt. Tel. Co., 12 Mont. 102, 29 Pac. 883; York Tel. Co. v. Keeseey, 5 Pa. Dist. R. 366; Lockhart v. Craig St. R. R., 139 Pa. St. 419, 21 Atl. 26; Kirby v. Citizens' Tel. Co., 17 S. Dak. 362, 97 N. W. 3; Southern Bell Tel. Co. v. ⁴²¹ Francis, 109 Ala. 224, 55 Am. St. Rep. 930, 19 South. 1, 31 L. R. A. 193; Cumberland T. & T. Co. v. Avritt (Ky.), 85 S. W. 204; Lowther v. Bridgeman, 56 W. Va. 306, 50 S. E. 410.

Some other cases upon both sides of the question may be found in the citations contained in the opinions of the judges in the cases above referred to, and in the footnotes, and also in the notes to 27 American and English Encyclopedia of Law, pages 1008, 1009; but in those which we have cited

will be found a full and satisfactory presentation of every consideration properly entering into the inquiry.

It is obvious upon a mere casual inspection, even, that the numerical weight of authority supports the complainants' contention. The question is to be determined, however, not by numbers merely, but upon what shall appear to us the best reasons.

The case is of first impression here. It has been held by this court that steam railways, both the ordinary commercial (Railroad v. Bingham, 87 Tenn. 522, 11 S. W. 705; Smith v. Railroad, 87 Tenn. 626, 11 S. W. 709) and dummy lines (Street Ry. Co. v. Doyle, 88 Tenn. 747, 17 Am. St. Rep. 933, 13 S. W. 936, 9 L. R. A. 100), constitute an additional burden, but that street railways (Smith v. Street R. R., 87 Tenn. 626, 11 S. W. 709; Telegraph etc. Co. v. United Elec. Ry. Co., 93 Tenn. 492, 503, 29 S. W. 104) do not; and it is held generally in the courts of the country that electric light poles and wires, gas pipes, and lamp-posts for highway purposes, sewer pipes, and water pipes, do not.

⁴²² On one side, the theory is that a proper street purpose can only be something connected with the use of the street as a passway, for moving objects, people, animals, and vehicles, or with the maintenance of ingress and egress to and from the houses upon the street, and the passage of light and air. Under this theory it is admitted that the use of the street cannot be confined to merely old and accustomed forms of transit, but that all new forms and methods of conveyance may be employed, not inconsistent with the reasonably comfortable and safe use of the street by all; commercial railways and dummy lines being excluded from classification for street purposes, on the ground of their noise, bulk and danger, and the unavoidable inconvenience and interruption to other kinds of use, that their presence produces. Bicycles and automobiles are of course permitted as constituting improved modes of convenience. Street-cars are permitted for the same reason, and their poles and wires as necessary adjuncts; electric light lines, and gas pipes and lampposts, because they are used in lighting the street, and so, in making it comfortable and safe for passage at night; sewer pipes, because they are useful in draining the street of surplus water, and so preserving it, and likewise making it more convenient for use; water pipes, because the water must be used for sprinkling the street in dry weather, and also for

cleansing it. It is said that the telephone does not fall within any of the foregoing classifications, but that it is an entirely new and foreign use, and so constitutes an additional burden.

⁴²³ On the other side, it is said that in the widest, and, likewise, the most correct sense, a street is a means of intercommunication between the people of a city, for traffic, and for the conduct of personal and social intercourse, and also for the convenient use of dwellings and business houses abutting thereon; that its primary purpose is for passage, it is true, but that such passage need not be alone that of people, animals, or wheeled conveyances, or of things that run upon the ground; that a message sent through the air upon electric wires, over the street, takes the place of one sent by a man or boy walking, or upon horseback, or conveyed by a vehicle, along the street; that not only is the same service performed by the telephone, but in a manner far better and more quickly; that if the thousands of messages which go over such wires in a single day had to be conveyed by men or vehicles, or both, the streets would be far more thronged than they now are, and hence rendered less comfortable and less safe for use, and that in the course of a few months, or a year's time, the difference in the wear and tear of the streets would be very perceptible, because of such increased use; that the telephone is therefore but an improved method of subjecting the streets of a city to an old use, and that the poles and wires are just as necessary adjuncts to this new method as are the poles and wires of a street railway or an electric light plant, erected in substantially the same manner, and no more obstruction.

To this latter view, it is replied that the same course ⁴²⁴ of reasoning would justify the erection of a Marconi wireless plant in a city street, since this also transmits intelligence; but to this suggestion it is returned that the bulk of such a plant, and the noises necessarily attendant upon its operation would make its use impossible in such a situation, in addition to the cardinal fact that wireless messages are not used by the people of a city in communicating with each other within the city, but that such instruments are only for long distance communication.

We are of the opinion that the second view is the sounder one.

When land has been dedicated or condemned for street purposes, the city has the right not only to use the surface of the ground, but also may go beneath the surface, or above it, so far as may be necessary to adapt to its proper use the land so devoted to the service of the public. We approve the authorities which hold that the chief purpose of a street is that of intercommunication between the inhabitants or denizens of a city or town, and that the telephone is but a new and improved method of affecting this purpose, and hence not a new burden upon the fee of the abutting owner. If this instrument of a larger and more generous civilization were destroyed, not only would social intercourse be very greatly restricted, but the progress of all business would be retarded and its development confined within much narrower limits than now. Friends desiring to converse with each other, whether in near or remote ⁴²⁵ parts of the city, would find it necessary to leave their own houses, and proceed along one or more streets to the home of the person with whom they desired to talk, and thus consume an hour or hours in doing what may now be accomplished within a few minutes. So of the housewife in sending orders, or directing orders, to merchants for the purchase of goods necessary for the daily conduct of the home; and so in a larger way of the countless affairs of business, by men of business, in the daily life of the world. Houses are built upon streets, and people live in them and work in them, and the telephone must go along the street, and must enter these houses from the street in order to be of any use at all. It must follow the street with more regularity than even sewer pipes or water pipes, and, like these, must go into houses from the street in order to serve the purpose for which it was designed. It is thus distinctly an apparatus for the street, and from the street enters the houses and places of business of the denizens of a city, and as truly unites its people as do the streets themselves; and, indeed, in a more real, or at least more intimate way, since it renders possible an almost instant mental contact, so to speak, between all the people who make the aggregate of the city's population, its wires being, as it were, the city's nerves.

For the reasons stated, we are of the opinion that the court of chancery appeals erred in rendering a decree in favor of the complainants.

The decree of that court must therefore be reversed; ⁴²⁶ but the cause will be remanded to that court to the end that it may make a suitable finding upon the matters embraced in complainants' request for additional findings of fact upon the subject of an unreasonable use by the defendant of its right to place its poles and wires upon the streets, etc., referred to, and any other facts that will throw light upon this inquiry, and to the end that that court may dispose of this branch of the case, after eliminating from its consideration the question above discussed and settled.

SHIELDS, J., is of the opinion that the authorities first cited present the sounder view that the telephone poles and wires do constitute an additional burden upon the fee, and he therefore dissents.

Telephone and Telegraph Poles, as constituting additional servitudes in streets and highways, are discussed in the recent monographic note to *Nordhurst v. Ft. Wayne etc. Traction Co.*, 106 Am. St. Rep. 260-264.

PACIFIC MUTUAL LIFE INSURANCE COMPANY v. GALBRAITH.

[115 Tenn. 471, 91 S. W. 204.]

LIFE INSURANCE—Lapse and Reinstatement of Policy.—The failure of an insured to comply with the conditions of his policy as to the payment of premiums ipso facto forfeits all his rights thereunder, so that if the policy is subsequently reinstated with the consent of the insurer, it becomes a new contract as if then for the first time issued. (p. 866.)

LIFE INSURANCE—Lapse and Reinstatement of Policy.—If a life insurance policy, which provides that it shall be incontestable after two years from the date of its issue, is forfeited by reason of a default in the payment of premiums, but subsequently the insured obtains a reinstatement upon false warranties, the insurer may take advantage of such misrepresentations at any time within two years after the reinstatement. (p. 867.)

LIFE INSURANCE—Construction in Favor of Insured.—A policy of insurance is to be liberally construed in favor of the insured; and when words are used which may, without violence, be given two interpretations, that which will sustain the claim or cover the loss should be adopted. (p. 869.)

J. O. Phillips, for the plaintiff in error.

S. F. Powell and Susong & Biddle, for the defendant in error.

⁴⁷² BEARD, C. J. This suit was brought by defendant in error, as assignee, to recover on an insurance policy issued by plaintiff ⁴⁷³ in error on the life of one Harry M. Johnson for the sum of two thousand dollars. The policy bears date the 1st of January, 1902, and the assured died on the 14th of February, 1904.

The declaration, after setting out the issuance of the policy and the death of the assured, alleges that at the time of the death the policy was in full force and effect. To this declaration the insurance company filed three pleas. The first of these raised the general issue. The second averred that the policy was issued pursuant to a written application made by Johnson to the company, which application, by the terms of the policy, was made a part thereof, wherein he made certain representations and guaranties with regard to his occupation, habits and health, all of which were material to the risk, and were at the same time false and fraudulent in fact.

The third plea averred that it was a part of the contract that the annual premium provided for in the policy should be paid on the first day of January in each year, and on failure to make prompt payment of any such premium the policy should lapse; that on January 1, 1903, this being the day on which the second annual premium was due, Johnson failed to pay the same as stipulated, and thereby the policy became lapsed and of no effect; that on January 10, 1903, Johnson, in order to procure reinstatement and revival of the policy, furnished to the plaintiff in error a certificate containing a warranty of present good health; that relying upon the truthfulness of this certificate, and without any knowledge ⁴⁷⁴ of its falsity, the plaintiff in error accepted the premium then overdue and reinstated the policy. It is then averred that the warranty contained in this certificate was false, in this: "That the said Johnson was not at its date . . . in all respects in good, sound and unimpaired condition," but, on the contrary, he was then greatly impaired in health, suffering with the disease known as "tuberculosis" or "consumption," complicated with Bright's disease, from which he died on February 14, 1904. Wherefore it was averred that, the reinstatement having been procured by this false and fraudulent statement, the plaintiff in error was not bound on the policy.

To the third plea the defendant in error filed a replication, in which it was said that it was not true that Johnson made false representations and warranties in the certificate furnished by him for the reinstatement of the policy. Again, and for additional replication, it was averred that it was expressly stipulated in the policy sued on that it should be indisputable, for any reason, after two years from its date of issuance, and that the policy was issued January 1, 1902, and two years had elapsed at the date of the death of the assured, and, this being so, the defendant in error relied upon and pleaded as a bar to the contest attempted by the plaintiff in error.

A demurrer was interposed to the second plea, the grounds of which it is unnecessary to state.

To the third replication set out above the plaintiff in ⁴⁷⁵ error filed a demurrer, in which it was insisted that the "two years incontestable clause referred to therein had no application to the certificate of good health made by Johnson for the purpose of procuring a reinstatement of the policy then lapsed, . . . because it appears from the declaration and defendants' plea, to which the third replication is responsive, that the certificate of good health in question was made on January 10, 1903, and that the assured died on February 14, 1904; wherefore, it appears that the period of two years from the date of making the certificate and reinstatement of the policy had not expired at the time of the death of the assured, and defendant is not, therefore, debarred from showing fraud in the making of the certificate and contesting the policy because thereof."

The demurrer to the defendant's second plea, and also the demurrer to the plaintiff's third replication, were overruled, and thereupon, by way of replication to the second plea, the plaintiff averred in substance the same as had been replied by him to the third plea; that is again he interposed as a bar to the contest bound to be made with regard to the alleged fraudulent statement of the assured, upon which the policy was reinstated, the two years incontestable stipulation of the policy, insisting that this period ran from the date of the policy, and not from the date of the reinstatement.

The plaintiff in error then confessing it could no further go by way of rejoinder to the second replication to the second plea, or to third replication to the third plea, ⁴⁷⁶ these

replications were therefore taken for confessed, and the circuit judge, sitting without the aid of the jury, then proceeded to hear the cause, and upon the pleading and the evidence adduced adjudged that the defendant in error, as assignee, was entitled to recover the full face of the policy, with interest from the death of the assured, and the cost of the cause.

The case being now before us for review, it is insisted by the defendant in error that the judgment should be sustained, first, because there was in fact, as appears upon the face of the record, no lapse at the time this certificate was made by the assured on the 10th of January, 1903, or at the time he paid his annual premium on that day, and, this being so, the certificate was of no force or effect on the relations of the parties growing out of the issuance of the policy; and, second, that, conceding a lapse, the trial judge was right in his ruling that the incontestable clause was operative from the date of the policy, rather than from that of the reinstatement.

The first of these contentions is rested on the ground that, while the policy bears date 1st of January, 1902, yet it is assumed to be apparent from the record that the policy in fact was not issued until the 15th of that month and that year, and counting from this later date there was no lapse at the time the certificate was issued on which the reinstatement was based. In the face of the pleading of the defendant in error this contention cannot be maintained. In the replication to the second and third pleas, it is distinctly stated "that said policy ⁴⁷⁷ was issued on the 1st of January, 1903." This contention, therefore, may be dismissed without discussion of the cases cited in its support.

This leaves open for determination the real question presented in the record as to the soundness of the holding of the trial judge that by the stipulation in question, the policy was incontestable from its date, and as the assured died more than two years from that time, the company was liable, notwithstanding a lapse and the reinstatement through the false warranty of the assured within that period.

The policy was issued in consideration of an advance payment of an annual premium which might, at the option of the assured, be made in semi-annual or quarterly installments, with the conditions found in the application for the policy, which by the terms of the letter was made a

part thereof, that "the policy shall lapse and be void if any premium or installment thereon is not paid, as therein provided, and then all previous payments shall be forfeited to the company."

The incontestable clause, upon which turns the present controversy, is as follows: "This policy shall be indisputable after two years of its date of issue for the amount due provided the premiums are duly paid."

It is well settled that a policy is forfeited by its terms if the premium (or any note given for it) is not paid at maturity: *Thompson v. Life Ins. Co.*, 104 U. S. 252, 26 L. ed. 765; *Ressler v. Fidelity Mut. Life Ins. Co.*, 110 Tenn. 411, 75 S. W. 735.

⁴⁷⁸ The effect of nonpayment of the premium is made clear by the policy itself. As is said in *Lantz v. Vermont Life Ins. Co.*, 139 Pa. St. 546, 23 Am. St. Rep. 202, 21 Atl. 81, 10 L. R. A. 577: "It declares that, if not paid on the days named and in the lifetime of the insured, the policy shall cease and determine. . . . It ceases to bind the company and to protect the assured, and this without any act or declaration on the part of the former. It does not require a formal forfeiture. . . . As to him [the assured] it is a dead policy. It is true that it may be restored to life by the subsequent payment of the premium and its acceptance by the company. This, however, is a new contract, by which the company agrees in consideration of the premium to continue in force a policy which had previously expired; in other words, it is a new assurance, though under the former policy."

This, it seems to us, is a clear statement of the want of relationship of the parties during the lapse of a policy like the one in question, and of the character of the new relations which grow out of its reinstatement. While in a state of absolute collapse, the former owner of the policy has neither a legal nor an equitable claim on the company. By his failure to comply with the condition upon which it could be kept alive he has ipso facto forfeited all rights under the policy. As to him, it is as if it had never been written. If any benefit is to accrue to him therefrom, it must be revitalized, and this can only be done with the consent of the company. When it is done, then it becomes a new assurance—a new contract ⁴⁷⁹—as if the policy then was for the first time issued. If this be its nature, then

it must operate in the future from the date of its reinstatement, and whatever might be its original date, or howsoever long it may have run, yet it would seem, by the force of necessary logic, to follow that the incontestable clause would begin its new life with the date of the new contract. And it would seem also to be as certainly true that if the assured obtained the reinstatement by fraud, or by false warranties material to the risk, during the period reserved for contest, the company should be allowed to protect itself against such unfair dealing.

In *Bottomley v. Metropolitan Life Ins. Co.*, 170 Mass. 274, 49 N. E. 438, it is said that a revived policy of life insurance does not go into effect if a declaration or warranty contained in the application therefor is untrue. This statement, however, must be taken with the modification that if the policy contains a time limit, beyond which it is incontestable, when that limit is passed, then, unless fraud is within the class excepted from the operation of the clause fixing the limit, it is no longer a defense, but the policy is then affected notwithstanding the fraud.

On the exact question now being considered few authorities have been found. However, in *Teeter v. United Life Assn.*, 159 N. Y. 411, 54 N. E. 72, a policy containing, in favor of the assured, a two year limitation clause lapsed, and was reinstated upon a health certificate. The death of the assured occurred more than four ⁴⁸⁰ years after that date. The company resisted recovery upon the ground that the statement contained in the certificate was false. To this the court said: "It seems to us after an examination of the contract that the defendant had two years after the reinstatement within which to investigate the conditions of Teeter's health at the time of the making of the reinstatement certificate, and that after that date the policy became indisputable." It was further said: "Turning to the facts of the case, we find that Teeter . . . duly made out the reinstatement certificate . . . and the defendant upon its receipt reinstated him. Thereupon the policy here was restored in full vigor as of that date, and by its very terms it was to become incontestable after two years."

In *Ash v. Fidelity Mut. etc. Assn.*, 26 Tex. Civ. App. 501, 63 S. W. 944, decided by the court of civil appeals of Texas, the question here presented was considered and determined. The court said: "The clause of the policy providing that

it should be incontestable especially excepts from its provision the agreement as to the payment of premiums, and nonpayment of any premium would, under the terms of the policy, forfeit it. After the forfeiture . . . it would be again subject to forfeiture on account of false statements made by the insured to obtain a reinstatement. In the renewal contract deceased not only made new statements, but also reiterated the statement in the original application, and agreed that the falsity of either . . . should render the policy null and void." It is insisted, however, by the defendant in ⁴⁸¹ error that a contrary holding is found in *Massachusetts Ben. Life Assn. v. Robinson*, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261. We have carefully examined the opinion in that case, and, while it is true that there are one or two paragraphs in it which seem to bear out that view, yet, taken as a whole, we do not think that the case supports the contention of the defendants in error. In the course of the opinion it is said that "if there was a lapse of the policy . . . growing out of the failure to pay the premiums, . . . and a reinstatement was necessary, . . . and such reinstatement was secured by a certificate furnished by the assured in which there was a statement that he was in good health, and such statement was false and so material that his conduct would amount to a fraud, then the effect of the fraud would be to render his reinstatement void, and the policy would remain lapsed."

It is true in the further course of the opinion the court says that, while it has been held that a reinstatement makes a new contract, the old contract is looked to for the terms, conditions, and stipulations of the new. The court then adds: "The old contract in the present case being that the policy should be incontestable after two years from its date upon the payment of three annual premiums, the new contract would be governed by the same terms, and the period of incontestability would be reached three years from the date of the original policy, notwithstanding . . . a lapse and reinstatement had taken place."

⁴⁸² This last statement was not necessary to the determination of the case, and, with proper deference to the learned court delivering the opinion, we think it hardly reconcilable with what had gone before. But whether or not a dictum, it seems to us the concession made in the paragraph to the effect that, upon the reinstatement, a new contract is made,

repels the conclusion that the period of incontestability begins with the date of the old contract—that is, the original policy. For if, as conceded, it was a new contract, while the old policy would be looked to for terms and stipulations, yet, we submit, these could only be operative from the day of the making of the new contract.

In *Goodwin v. Provident Sav. etc. Assn.*, 97 Iowa, 226, 59 Am. St. Rep. 411, 66 N. W. 157, 32 L. R. A. 473, it is said that reinstatement of a policy of insurance is not the making of a new contract, but simply the cancellation of a forfeiture whereby the original contract is restored. For this the court cites *Lindsey v. Western Mut. Aid Soc.*, 84 Iowa, 734, 50 N. W. 29, and *French v. Mutual etc. Assn.*, 111 N. C. 391, 32 Am. St. Rep. 803, 16 S. E. 427. We have not had the opportunity of seeing the first of these cases, but an examination of the last discloses it is not authority for the proposition. In addition, we think the weight of judicial opinion is against the holding of the Iowa court as to the effect of reinstatement. For this reason, as well as because we regard the proposition as unsound, we would not be disposed to follow it.

We concede the full force of the contention that a ⁴⁸³ policy of insurance is to be liberally construed in favor of the insured. This rule is applied in many of our cases involving life, accident and fire risks. And it is further conceded that, when words are used which may without violence be given two interpretations, that which will sustain the claim and cover the loss should be adopted: *Thompson v. Phenix Ins. Co.*, 136 U. S. 287, 10 Sup. Ct. Rep. 1019, 34 L. ed. 408; *National Bank v. Insurance Co.*, 95 U. S. 673, 24 L. ed. 563.

But we see no rule for the application of this rule when it is once assumed, as we think must be done, that there is a new contract dating with the reinstatement. This being so, we think, beyond cavil, there can be no two interpretations of the incontestable clause in this policy.

It follows that the circuit judge was in error in ruling on this point. Falling into this error, he improperly excluded from consideration evidence tending to show the falsity of the statements of the assured in the health certificate furnished by him for a reinstatement, and the testimony of the witness Harris, general agent of the company, that the premium due on the policy on the 1st of January, 1903, was not paid at maturity, and thereafter the company

refused to accept payment of the same until the health certificate was furnished, and that the acceptance of this premium was on the company's faith in the truth of the warranty contained therein, and without knowledge of its falsity.

The judgment of the court below is therefore reversed, and the cause remanded for a new trial.

A Reinstatement of an Insured Person after a forfeiture of his policy is not the making of a new contract, where no different terms are agreed upon: *Goodwin v. Provident Sav. etc. Assn.*, 97 Iowa, 226, 59 Am. St. Rep. 411; note to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 577.

As to the Effect of Incontestable Clauses in life insurance policies, see *Sun Life Ins. Co. v. Taylor*, 108 Ky. 408, 94 Am. St. Rep. 383; *Insurance Co. v. Fox*, 106 Tenn. 347, 82 Am. St. Rep. 885. Such clauses are valid and are liberally construed in favor of the insured: *Royal Circle v. Achterrath*, 204 Ill. 549, 98 Am. St. Rep. 224.

HALL v. NATIONAL FIRE INSURANCE COMPANY.

[115 Tenn. 513, 92 S. W. 402.]

FIRE INSURANCE—Explosion During Fire.—An explosion which occurs in an insured building during the progress of a fire therein is regarded as a mere incident of the preceding fire, and the whole loss is within the risk assumed, although the policy excludes liability for loss by explosion. (p. 872.)

FIRE INSURANCE—Explosion During Fire.—If, while a building is burning, an explosion occurs therein which injures neighboring property without igniting it, a policy of fire insurance on the latter property which excludes liability for loss by explosion does not cover such injuries. (p. 877.)

John W. Green, for the complainants.

Webb, McClung & Baker and McCornick, Wright & Frantz, for the defendant.

514 NEIL, J. Complainants' bill states the following case:

On the sixth day of September, 1904, the defendant company issued to the complainants a policy containing, among other things, the following provisions: "The 515 National Fire Insurance Company of Hartford, Connecticut, in consideration of the stipulations herein named, and of nineteen dollars and thirty-eight cents premium, does insure Hall &

Hawkins, for the term of one year from the sixth day of September, 1904, at noon, to the sixth day of September, 1905, at noon, against all direct loss or damage by fire, except as herein provided, to an amount not exceeding one thousand dollars, on the following described property, located and contained as described herein (describing property). This company shall not be liable for loss occasioned directly or indirectly by invasion, insurrection, riot, civil war, or commotion, or military, or usurped power, or by order of any civil authority; or by theft, or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire, or when the property is endangered by fire in neighboring premises, or (unless fire ensues, and in that event for the damage by fire only) by explosion of any kind or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon."

The property insured consisted of a stock of furniture, house-furnishing goods, rugs, carpets, linoleum, oil-cloth, curtains and other merchandise which the complainants kept for sale in their place of business at Nos. 418 and 420 Gay street, Knoxville, Tennessee.

On November 12, 1904, between 2 and 3 o'clock in the morning, a fire, originating from an unknown cause, broke out in the second building south of complainants' storehouse on the same side of the street and ⁵¹⁶ between thirty and forty feet distant, occupied by the Woodruff Hardware Company. After this fire had been in progress for the space of one hour, and while it was raging fiercely and beyond control, a terrific explosion, following as an incident of the fire, and shaking the whole city and the country for miles around, occurred in the said storehouse of the Woodruff Hardware Company, this explosion having been caused by the fire igniting powder and dynamite stored in the building of the Woodruff Hardware Company. The fire itself did not reach the store occupied by complainants, but it produced the explosion, which resulted in breaking, injuring and damaging complainants' stock to the extent of more than five thousand dollars. The explosion referred to was wholly due to the preceding fire.

The other allegations of the bill need not be noticed, as they are not drawn in question.

The demurrer, so far as it is necessary to notice the defenses made therein, makes two points: Firstly, that the

facts stated in the bill fail to show any direct loss by fire; secondly that it is shown in the building that an explosion occurring in a building forty feet distant caused the injury to complainants' goods, and that no fire ensued upon the explosion, and that such loss was not within the terms of the policy.

The chancellor overruled the demurrer, whereupon the defendants, by leave of the court, prosecuted an appeal to this court, and have here assigned errors.

We shall not dispose of the two grounds of demurrer ⁵¹⁷ in the exact form in which they are stated, but shall consider, so far as may be necessary, the substance of each of them.

1. There is some controversy in the authorities upon the question whether, under a policy framed like the one in suit here, an explosion occurring during the progress of a fire should be treated as a mere incident of the fire, the latter being regarded as the efficient cause of the injury, or whether it should be excepted out of the operation of the policy.

The weight of authority is to the effect that where the fire occurs in the property insured, and an explosion takes place therein during the progress of the fire, the effects of which are covered by the policy, and such explosion is a mere incident of the preceding fire, the latter is treated as the efficient cause, and the whole loss is within the risk insured, although the policy in terms excludes liability for loss by explosion: *Mitchell v. Potomac Ins. Co.*, 183 U. S. 42, 22 Sup. Ct. Rep. 22, 46 L. ed. 74; *Waters v. Merchants' L. Ins. Co.*, 11 Pet. 213, 9 L. ed. 69; *American Steam Boiler Ins. Co. v. Chicago Sugar Refining Co.*, 57 Fed. 294, 6 C. C. A. 336, 21 L. R. A. 572; *Washburn v. Farmers' Ins. Co.*, 2 Fed. 304; *Washburn v. Miami Valley Ins. Co.*, 2 Flipp 664, 2 Fed. 633; *Washburn v. Western Ins. Co.*, Fed. Cas. No. 17,216; *Washburn v. Artisans' Ins. Co.*, Fed. Cas. No. 17,212; *Renshaw v. Firemen's Fund Ins. Co.*, 33 Mo. App. 394; *Renshaw v. Missouri etc. Ins. Co.*, 103 Mo. 595, 23 Am. St. Rep. 904, 15 S. W. 945; *Transatlantic F. Ins. Co. v. Dorsey*, 56 Md. 70, 40 Am. Rep. 403; *United Ins. Co. v. Foote*, 22 Ohio St. 340, 10 Am. Rep. 735; *Scripture v. Lowell Mut. Fire Ins. Co.*, ⁵¹⁸ 10 Cush. (Mass.) 356, 57 Am. Dec. 111; *La Force v. Williams City F. Ins. Co.*, 43 Mo. App. 518; and see *Lynn Gas etc. Co. v. Meriden Fire Ins. Co.*, 158 Mass. 570, 35 Am. St. Rep. 540, 33 N. E. 690: 20 L. R. A. 297.

In May on Insurance it is said: "Where the policy excluded liability 'for loss by lightning or explosion of any kind unless fire ensue, and then for damages by fire only,' it was held in a case where it appeared that vapor evolved from material in process of manufacture, coming in contact with a burning lamp, exploded, tearing off the roof, shattering the walls, and damaging the machinery, upon which a fire supervened, that the insurers were liable for the damage done by the fire, but not for that done by the explosion. If, under such a policy, fire precedes the explosion, the entire loss is to be attributed to the fire, though the explosion is destructive": 2 May on Insurance, 4th ed., p. 956. In a note upon the same page it is said: "If a fire occurs by a cause within the policy, and an explosion takes place as an incident to the fire so as to increase the loss, the whole damage is within the policy, although it contains an exemption from liability for the explosion": Transatlantic F. Ins. Co. v. Dorsey, 56 Md. 70, 40 Am. Rep. 403.

In Clements on Insurance it is said: "When explosions or explosive effects occur after the commencement of a fire or during its progress, and as an incident of a fire or a result of it, the whole loss is a loss by fire within the meaning and protection of the policy, notwithstanding the destructive effect of the explosion; it is ordinarily a question of fact. If the explosion precedes ⁵¹⁹ the fire, the company is liable for the damage by fire only, and not for that caused by the explosion": Clement on Insurance, 123.

In Elliott on Insurance it is said: "The standard form provides for liability for damage occasioned by fire which results from an explosion and exempts the insurer from liability for damages caused by the explosion itself. The loss by explosion must be distinguished from that caused by the subsequent fire. Under this provision the insurer is liable for the loss when the explosion is the result of an antecedent fire": Elliott on Insurance, 212.

In Joyce on Insurance it is said: "Insurers are liable upon a policy which contains a condition of this nature [i. e., excepting liability for damages by explosions of any kind], where fire originates in the insured premises and the fire produces an explosion which destroys the property, the entire loss in such a case is held to be loss by fire": 3 Joyce on Insurance, p. 2532, par. 2593.

Again, this author says: "If the combustion and explosion are inseparably connected, if a combustible substance in the process of combustion produces explosion also, and fire is the agent throughout, and there is a loss by both fire and explosion, it is held that the whole damage is covered by a policy insuring against loss by fire": 3 Joyce on Insurance, p. 2707, par. 2771.

It is insisted for defendant, following the case of *Hustace v. Phoenix Ins. Co.*, 175 N. Y. 292, 67 N. E. 592, 62 L. R. A. 651, that this view of the matter is erroneous, since it practically ⁵²⁰ nullifies the exception made in the policy against liability for losses occurring by explosions; that there would be no use in excepting losses caused by explosions, unless such explosions were understood to be those caused by fire, since the company would not in any event be liable under a fire policy for an explosion not produced by fire.

Thus stated, the objection is a very plausible one. However, the cases which we have cited go upon the theory that in order to satisfy the terms of a policy insuring against direct loss by fire, the latter must always be regarded as the efficient cause, where its effects are produced in direct sequence, though one of the incidents of that sequence may be an explosion, and that it could not have been intended to nullify such predominant cause. There is room for the exception in favor of losses produced by explosion, notwithstanding this construction, in view of the fact that explosions are frequently produced by flame, as by a lighted match, a gas jet, a lighted lamp, fire from a furnace, and the like, as shown in *United Ins. Co. v. Foote*, 22 Ohio St. 340, 10 Am. Rep. 735; *Heuer v. Northwestern Nat. Ins. Co.*, 144 Ill. 393, 33 N. E. 411, 19 L. R. A. 594; *Cohn v. National F. Ins. Co.*, 96 Mo. App. 315, 70 S. W. 259; *Heffron v. Kittanning Ins. Co.*, 132 Pa. St. 580, 20 Atl. 698, which, although in fact forms or manifestations of fire, yet do not fall within the meaning of the latter expressions, as used in the rule above stated. The foregoing instances and others had been the occasion ⁵²¹ of sufficient doubt to render necessary the introduction of the clause referred to.

2. It is insisted by counsel for complainants that since an explosion produced in progress of a precedent fire is held to be the result of the fire, and the loss by such explosion a loss by fire, damage produced thereby in neighboring buildings should be treated like damage by smoke and water,

destruction by the falling of buildings, or other injuries by fire agencies without actual ignition in their operation upon adjoining buildings, and that the element of distance is unimportant. Abstractly speaking, the deduction seems sound, but legal conclusions cannot always be safely reached by pressing the processes of logical illation to their ultimate results. The weight of authority is against complainants' contention: *Cabalero v. Home Mut. Ins. Co.*, 15 La. Ann. 217; *Germania Fire Ins. Co. v. Roost*, 55 Ohio St. 581, 60 Am. St. Rep. 711, 45 N. E. 1097, 36 L. R. A. 236; *Everett v. London Assur. Soc.*, 115 E. C., 19 Com. B., N. S., 126; *Clement on Fire Insurance*, 123; 3 *Joyce on Insurance*, secs. 2586, 2587.

In the case of *Cabalero v. Home Mut. Ins. Co.*, 15 La. Ann. 217, it appeared that the company had issued to the plaintiffs a fire policy, agreeing to make good to them all such loss or damage as should happen by fire to a building in Brownville, Texas, during the period of one year; that a fire broke out about one hundred and eighty or two hundred feet distant in a building containing a quantity of gunpowder, and in about thirty minutes ⁵²² the gunpowder exploded; that this explosion produced such concussion of the air as to crack the walls of the plaintiffs' building and brick arches, drive in the windows and blinds, loosen the plastering and slates, resulting in an injury of nine hundred and fifty dollars. The fire continued in the town for forty-eight hours, but did not reach the building in question, this being entirely unharmed except from the concussion. After stating these facts, and conceding that where a fire occurs upon the premises insured by which an explosion of gunpowder takes place, the insurer is responsible, on the ground that the loss is the direct consequence of the combustion, the court continues: "If, now, the question were to be asked anyone acquainted with the law of insurance whether an injury could be considered as occasioned by fire, where it had only been effected by the air put in motion by the explosion of gunpowder, and the fire itself had not touched the building, we think the answer would be 'No,' because the insurance company only bound itself to answer for damage done by the element of fire, and not by injury done by any other element. But it is replied by the jurist that the law looks upon the question in a different light. It seeks for the first effect, the cause of the loss, and that is

the *causa proxima*, however many other agencies may have intervened. Here there would have been no concussion of the air without the explosion of gunpowder, and the gunpowder would not have exploded without taking fire, and producing instantaneous explosion, ⁵²³ by which gases were evolved and expanded to set air in motion.

“Perhaps, after all, it might be safe here, as in other contracts, to inquire whether the loss was within the reasonable intendment of the parties when they made the contract. Did they intend by an insurance against fire to cover losses arising from the concussion of the air, produced by the explosion of gunpowder upon the premises of other persons than the insured? We think such an extraordinary result could not have been contemplated by the parties. We do not think insurance companies can be considered responsible for the consequences of the combustion of gunpowder unless that combustion has happened in the premises insured, or the gunpowder is itself, with other merchandise, covered by the policy.”

In the case of *Henry Roost* (55 Ohio St. 581, 60 Am. St. Rep. 711, 45 N. E. 1097, 36 L. R. A. 236), it appeared that the house which was the subject of the insurance stood on the west side of a street forty feet wide and twenty-one feet from the street; that on the east side of the street and opposite this house was located a powder-house; that neither plaintiff nor defendant had any interest in or control over this powder-house; that before the day on which the fire occurred, which was January 3, 1890, there were stored in the powder-house two tons of powder, and on January 3d the powder-house was struck by lightning, causing an explosion, which destroyed the property of Roost. The policy contained a clause insuring “against any loss or damage caused by lightning, ⁵²⁴ to the interest of the assured in the property described.” The policy also contained a provision that it did not “apply to or cover any loss occasioned by explosion, unless fire ensues, and then the loss or damage by fire only.” The question was whether the loss should be treated as one produced by lightning within the terms of the policy upon that subject, which we have quoted. After discussing the matter at some length and arriving at a conclusion adverse to the liability, the court continued: “The conclusions stated are sustained by abundant authority. True it is that cases are to be found which

declare principles of construction, which, if applied here, would make the company liable for this loss, if its liability were measured wholly by the lightning clause. But in no case which has come within our observation—and we have examined a great many—has a liability been found to attach where there was a provision excluding liability for loss by explosion, and the loss was caused by fire, or, as here, by lightning, taking effect in a distant building, the damage being wrought to the insured property by an explosion produced by the fire, or lightning, without either of the latter agencies coming in contact with the insured property.”

In Everett’s case it was held that no liability attached under the clause of a policy providing against “such loss or damage as shall or may be occasioned by fire to the property” insured, where it appeared that the damage which accrued to the premises of the plaintiff was occasioned by a concussion or disturbance of the atmosphere ⁵²⁵ by an explosion of a large quantity of gunpowder at a magazine about a half mile distant from them.

In Clement on Fire Insurance it is said: “Damage caused by a concussion of air resulting from an explosion in another building is not covered, even though such explosion was caused by fire, but the company may be liable for the damage by fire when fire ensues”: Clement on Fire Insurance, 123.

In Joyce on Insurance it is said: “If the company excepts a loss by explosion, it is not liable for any loss or damage which the insured premises may sustain, which is the mere result of the concussion of an explosion upon other premises than those insured”: 3 Joyce on Insurance, sec. 2587.

On the grounds stated, we are of the opinion that the chancellor was in error in overruling the demurrer. His decree must therefore be reversed, and the bill dismissed with costs.

For Authorities upon the question involved in the principal case, see Renshaw v. Missouri etc. Ins. Co., 103 Mo. 595, 23 Am. St. Rep. 904; German Fire Ins. Co. v. Roost, 55 Ohio St. 581, 60 Am. St. Rep. 711.

WILLIAMS v. COAL CREEK MINING AND MANUFACTURING COMPANY.

[115 Tenn. 578, 93 S. W. 572.]

EJECTMENT BY COTENANT—Extent of Recovery.—The recovery of a tenant in common in an action of ejectment against defendants, in without right, is confined, both in right and possession, to his undivided interest in the property. (pp. 880, 881.)

Pritchard & Sizer and J. M. King, for the complainants.

Lucky, Sanford & Fowler, for the defendants.

579 BEARD, C. J. This is an ejectment suit brought by a portion of the heirs of the grantee to recover possession of a five thousand acre tract lying in Morgan county. The court of chancery appeals heard the cause, and, sustaining the bill of complainants, among other things, decreed that as against defendants, who were in without right, the complainants, although owning fractional undivided parts, were entitled to the possession of the whole tract, to be held for themselves and such other parties as might be able to show thereafter they were tenants in common with them. At a former term of this court the cause was heard upon appeal and the decree of that court was in all things affirmed. A petition for rehearing, however, was filed by the defendants, asking for a rehearing on the point above indicated, it being insisted that as a matter of right, and upon authority, one tenant in common entitled to a fractional portion of an entire tract should not, as against a party in possession, be permitted to recover the whole.

It will be seen that the text-writers are not agreed on the question of practice in such cases. Mr. Freeman, in his work on Cotenancy and Partition, section 300, lays down the rule thus: "A tenant in common is, as against ⁵⁸⁰ every person but his cotenant, entitled to every part of the common land." On the other hand, Mr. Newell, in his work on Ejectment, 130, says: "If, by the common law, tenants in common present and co-operating cannot maintain a joint action of ejectment for the possession of the premises owned by them jointly, how is it that one of them suing alone can recover the whole of the joint premises as against a stranger, the judgment having the effect of a joint recovery? It

seems illogical to say that it can. The better rule seems to be that the recovery of a joint tenant, in the absence of statutory enactment to the contrary, must be limited to his right or interest in the premises. For it might well be that the other tenants in common may prefer the person in actual possession of the premises to the person seeking to recover it from him."

Upon examination it will be found that the same diversity of opinion on this subject exists among the courts. In California, beginning possibly with *Williams v. Sutton*, 43 Cal. 65, and certainly including, if not ending, with *Newman v. Bank of California*, 80 Cal. 368, 13 Am. St. Rep. 169, 22 Pac. 261, 5 L. R. A. 467, the uniform holding seems to be that one tenant in common may sue in ejectment and recover the entire premises against all persons save cotenants and those claiming under them. Upon the authority of these cases rests *Hardy v. Johnson*, 1 Wall. (U. S.) 371, 17 L. ed. 502. The same rule, in one form or another, is recognized in *Barrett v. French*, 1 Conn. 354, 6 Am. Dec. 241; *Hibbard* ⁵⁸¹ *v. Foster*, 24 Vt. 542; *Crook v. Vandervoort*, 13 Neb. 505, 14 N. W. 470; *Sowers v. Peterson*, 59 Tex. 216.

To the contrary, there are many courts of the highest respectability which limit the recovery of a tenant in common, who sues alone to a right of possession, corresponding in limit with the undivided interest which he establishes in the property, and letting him in to its enjoyment with the party in possession whether or not he be a stranger to the title. Among the cases recognizing this limitation are: *Dewey v. Brown*, 2 Pick. (Mass.) 387; *Moberley v. Bruner*, 59 Pa. St. 481, 98 Am. Dec. 360; *Gray v. Givens*, 26 Mo. 291; *Marshall v. Palmer*, 91 Va. 344, 50 Am. St. Rep. 838, 21 S. E. 672; *Overcash v. Kichie*, 89 N. C. 384; *King v. Hyatt*, 51 Kan. 504, 37 Am. St. Rep. 304, 32 Pac. 1105.

In a very elaborate note to the case of *Marshall v. Palmer*, 91 Va. 344, 50 Am. St. Rep. 838, 21 S. E. 672, in the fiftieth volume of the American State Reports, Mr. Freeman, the editor, while maintaining the logical soundness of the rule already cited from his work on Cotenancy and Partition, and that this rule is indorsed by the weight of American decisions, admits "that there is a growing inclination on the part of the courts to restrict the recovery by a tenant in common even as against a stranger to the title to the same extent that he would be if his recovery was against a coten-

ant; or, in other words, simply to enter a judgment entitling the plaintiff to be put in possession of the property, leaving him to share the possession with the defendant, as though he also were an owner of an undivided interest, ⁵⁸² and as such entitled to share in the possession of the premises."

As an indication of this tendency, the action of the supreme court of Nebraska may be referred to. In *Crook v. Vandervoort*, 13 Neb. 505, 14 N. W. 470, that court announced the rule which Mr. Freeman in his work regards as a sound and logical one. But in *Mathis v. Boggs*, 19 Neb. 698, 28 N. W. 325, that case was expressly overruled, and after an examination of the statutes of the state similar in essential particulars to those of Tennessee governing the action of ejectment, it was held that a tenant in common against one in possession without right, could recover possession only to the extent of his own title. This latter case has been expressly affirmed by that court in *Kirk v. Bowling*, 20 Neb. 260, 29 N. W. 928, and *Johnson v. Hardy*, 43 Neb. 368, 47 Am. St. Rep. 165, 61 N. W. 624.

It is well settled that at common law tenants in common could not join in a single demise. This was for the reason that their interests were several, and, though existing in the same property, they were distinct and different. The courts recognizing and enforcing the common-law rule have done so with the respect to the distinctness of these interests. So in *Moberly v. Bruner*, 59 Pa. St. 481, 98 Am. Dec. 360, the supreme court of Pennsylvania said: "The plaintiff in ejectment must recover on the strength of his own title, and his recovery must, consequently, be in accordance with his title. Tenants in common have several and distinct titles and estates independent of each other, so as to render the freehold several also. They are ⁵⁸³ separately seised and there is no privity of estate between them. If tenants in common are separately seised and there is no privity of estate between them, if they must sue separately or jointly, according to the circumstances of the case, the nature and the cause of the action, or the character of the injury to be redressed, it follows as a necessary corollary that one tenant in common cannot maintain ejectment or sue and recover in any form of action for the interest and benefit of the others."

We think this a correct statement of the relations of tenants in common, and that the limitation upon the right of such a tenant, who sues alone for his interest in property,

is logically deduced from this relationship. We are satisfied that while the common-law rule that tenants in common should not join in an action of ejectment has been modified in Tennessee, yet, from *Barrow's Lessee v. Navee*, 2 Yerg. 227, it has been the established practice to confine the recovery of a tenant in common both in right and possession to his undivided interest in the property in controversy, and we do not think that the sections of the code regulating actions of ejectment in any way affects this practice.

We are satisfied that the rule announced by Mr. Newell and already quoted from his work on Ejectment, is sound and logical.

The decree of the court of chancery appeals, therefore, holding otherwise is reversed, and the decree of the chancellor is in all things affirmed.

For Authorities upon the question decided in the principal case, see *Baber v. Henderson*, 156 Mo. 566, 79 Am. St. Rep. 540; *Brady v. Kreuger*, 8 S. Dak. 464, 59 Am. St. Rep. 771; *Johnson v. Hardy*, 43 Neb. 368, 47 Am. St. Rep. 765; note to *Marshall v. Palmer*, 50 Am. St. Rep. 842.

FOSTER-HERBERT CUT STONE COMPANY v. PUGH.

[115 Tenn. 688, 91 S. W. 199.]

EMPLOYER'S LIABILITY for Act of Driver in Inviting Child to Ride.—The owner of a wagon who places it in charge of a skillful driver is not liable for the death of a child who climbs on the vehicle at the invitation of the driver and is killed in alighting therefrom, if the driver is without authority to extend such invitation and his act is not within the scope of his employment or in furtherance of his employer's business. (p. 883.)

NEGLIGENCE—Wagon Attractive to Children.—A wagon constructed with the bed below the axles for use in hauling stone is not so dangerous and attractive to children as to require the owner to take special precautions for their protection in his use thereof. (pp. 885, 888.)

K. F. McConnico and W. H. Washington, for the plaintiff.

J. M. & Douglass Anderson, for the defendant.

⁶⁸⁹ BEARD, C. J. This action was brought to recover damages for the death of a boy about six years of age, resulting, as is alleged, from the actionable negligence of the

plaintiff in error. The facts are that the mother of the deceased was employed in a factory of Nashville, and on the day of the accident had left the boy at and in the care of a charitable institution located near the place of her employment, where a large number of children of tender years were cared for during the day and while their parents were absent from their homes at work. At that time some improvements were being made upon the building occupied by those in charge of the institution, ⁶⁹⁰ and the plaintiff in error contributed to the stone needed for that purpose, and sent its wagon under the charge of a careful driver to deliver the stone. The plaintiff in error had knowledge of the character of this institution and that daily a great many small children were assembled at it and cared for by its manager.

The wagon used upon this occasion was one constructed for and adapted to the purpose of receiving and delivering stone, and its only peculiarity was that its bed, instead of being raised above the axles, was below them, and so was nearer the ground than a bed of a farm or any other wagon in general use. At the time this delivery took place many children of various ages and sizes were playing on the premises of the institution. Upon the approach of the wagon a number of these children were attracted to it, and some of them as it entered climbed upon it, but under the direction of the driver at once dismounted.

After the wagon stopped, and while the stones were being unloaded, the children in considerable numbers gathered around and were eager to get upon it, but were forbidden by the driver, who said to them, however, "Wait until I am rid of this load, and then I will give you a ride." Immediately after the work of unloading was finished several of the children clambered upon the wagon, and the driver started upon his return trip. After riding a short distance they began one after another to dismount, and in undertaking to do likewise the deceased either fell or jumped to the ground between ⁶⁹¹ the wheels, and one of these, passing over his body, so badly injured him that he soon afterward died.

It is also in evidence that young Pugh called to the driver once, if not twice, to stop and let him get down, but, either disregarding the call, if heard, or else not hearing it, the driver did not stop, so that the boy, while undertaking to

leave the wagon still in motion, or falling received the injury complained of.

The declaration contains three counts. The case was rested for the plaintiff, however, upon the fourth count, embraced in an amended declaration, which in substance averred that the defendant sent upon the premises in question a wagon of such nature and description as to be both dangerous and attractive to children, great numbers of whom the defendant knew were left during the day by their parents; that the driver in charge of the wagon was incompetent and unfit; that the defendant failed to provide sufficient servants to deliver the stone, and negligently failed to provide any safeguard or protection while the wagon was being unloaded; and that when it was leaving the premises, its driver having negligently permitted the deceased to mount the wagon, the latter fell therefrom and was fatally injured.

Upon the trial of the issue made by a plea of not guilty, the testimony of the plaintiff disclosed the facts as set out in the beginning of this opinion. At its close the defendant demurred to the evidence, and, its demurrer being overruled, the case went to the jury to ascertain the damages sustained, whereupon a verdict was returned ⁶⁹² in favor of the plaintiff for two thousand five hundred dollars. From the judgment thereon the defendant has prosecuted an appeal in the nature of a writ of error.

From a careful examination of this record we are unable to discover any legal ground upon which the verdict and judgment can rest. The case made out is one where a skillful driver is placed in charge of his master's wagon, with direction that he deliver pieces of dressed stone at a place where they are to be used in making some improvement. Having arrived there and unloaded the stone, a number of children who were gathered about, in answer to his invitation got upon the wagon to enjoy a ride, and while riding away from the premises one of these children, either in falling or undertaking to jump from the wagon, is run over by one of its wheels and is so injured that death soon results. It is not claimed that the driver was either expressly or by implication authorized by his master to extend the invitation to the children to get upon the wagon, or that this act of the servant was in any sense or degree within the scope of his employment or in furtherance of his

master's business. Under these facts we think it is well settled the master cannot be called upon to respond in damages from the injury resulting from such unauthorized act: *Puryear v. Thompson*, 5 Humph. 397; *Cantrell v. Colwell*, 3 Head, 471; *Diehl v. Ottenville*, 14 Lea, 191.

These cases lay down the rule which we think controlling here, but many are to be found where the rule has been applied to acts very similar to those presented in ⁶⁹³ this record. In *Driscoll v. Scanlon*, 165 Mass. 348, 52 Am. St. Rep. 523, 43 N. E. 100, the facts were that a boy of nine accepted the invitation of the driver of a dump-cart, belonging to the defendant, to get upon the cart and take a ride, during which the boy was injured.

In an action against the master to recover for the injury, in sustaining the ruling of the trial court that on these facts there could be no recovery, the supreme court said: "It was not within the scope of the employment of the driver of the dump-cart to invite persons to ride upon it for their pleasure"; citing *Bowler v. O'Connell*, 162 Mass. 319, 44 Am. St. Rep. 359, 38 N. E. 498, 27 L. R. A. 173; *Powers v. Boston etc. R. R. Co.*, 153 Mass. 188, 26 N. E. 446. In *Morris v. Brown*, 111 N. Y. 318, 7 Am. St. Rep. 751, 18 N. E. 722, it is said: "Where a servant is employed to manage a dump-cart hauling stone and other material out of a tunnel, he has no authority to assent to a third person riding in his car, and his permitting such person so to ride is not equivalent to an invitation by his master and cannot make him answerable for acts or omission in the management of the car from which the person so riding is killed or suffers substantial injuries." So in *Cook v. Houston etc. Nav. Co.*, 76 Tex. 353, 18 Am. St. Rep. 52, 13 S. W. 475, it was held that where a minor child was drowned, through having been invited on the tugboat by the servants of the owner, which act was outside their authority and against orders, no recovery could be had. But, as has already been stated, the main reliance of the ⁶⁹⁴ defendant in error, in order to maintain the judgment in this case, is in the assumption that the wagon, on account of its peculiar construction, was so dangerously attractive to young children that the duty devolved upon the owner to exercise corresponding diligence to see that no injury resulted to them therefrom, and failing to do so in the present case, it is liable.

The record disclosed that the defendant in error is engaged in the stone business, and that this wagon was constructed for, and was adapted to use in, that business. Evidently with a view to this use it was built with a low bed for the easy hoisting of stone into it and of unloading stone from it. Its peculiarity consisted alone in this feature of its construction. It is true, thus built, it was more easily mounted by small children than if its bed had been placed above the axles. But can it be said that this increased facility to children in ascending to the bed made it so dangerous and attractive to children that the owner could not, without the peril of liability for injury to a thoughtless child, received while either mounting to or dismounting from it, send it out in the course of his business with a careful driver, unless he had at the same time one or more reliable guards along to warn such a one away? For it is to be observed that if the contention of the defendant in error that the owner of this wagon is liable for the killing of Pugh, because he sent this dangerous agency to the place in question, though under the charge of a prudent driver, then it would have been equally liable for a like accident occurring ⁶⁹⁵ in one of the thoroughfares of Nashville; for on these at all hours of the day it would be conceded that many children are in the habit of passing unattended by persons of sufficient discretion to keep them out of danger.

It is a matter of common observation which cannot be ignored by the court, that the instinct of a boy impels him to mount, where permitted to do so, and even in the absence of permission, a moving vehicle, whatever its construction or the purpose for which it is used. An ordinary farm wagon, a dump-cart, a carriage, or a buggy, equally invites him, yet it would hardly be argued that for an injury occurring like the one in question, and under conditions existing in this case on one of these vehicles, its owner would be liable. The case of *Whirley v. Whiteman*, 1 Head, 610, is no authority for the contention of the counsel for the defendant in error. In that case there was dangerous machinery in operation uninclosed and unguarded, with the knowledge of the owner that small children were in the habit of playing in dangerous proximity to it.

Lynch v. Nurdling, 1 Q. B. 29, referred to with approval in *Whirley's* case (1 Head, 610), equally fails to support this contention.

There the facts were that the defendant's servants left the master's horse and cart in a public street unattended while he was visiting in a neighboring house. In the meantime several children engaged in climbing into and out of the cart, and as the plaintiff was getting ⁶⁹⁶ down from it another boy caused the horse to move, in consequence of which the plaintiff fell and received the injury complained of. Lord Denman, in disposing of the motion for a rule nisi made by the defendant for a new trial on the ground of misdirection and that the verdict was against the evidence, said, "that upon the facts established the question of negligence was strictly within the province of a jury"; that "they would naturally inquire whether the horse was vicious or steady, and whether the occasion required the servant to be so long absent from his charge, and whether in that case no assistance could be procured to watch the horse, whether the street at that hour was likely to be clear or thronged with a multitude, and especially whether large parties of young children might be reasonably expected to resort to the spot. If this last-mentioned fact were probable, it would be hard to say that a case of gross negligence was not fully established."

Leaving a horse and cart in a public street unattended and loose, subject to natural observation and interference from children passing along the street might be held a proper question for a jury to say whether it was or was not negligence. But the facts of that case furnish no analogy to those of the present, where the owner has placed his wagon under the direction of a careful driver in the course of his business, and the injury occurs, not in the absence of the driver, but in his presence and as a result of his unauthorized act.

The case of *Burke v. Ellis*, 105 Tenn. 702, 58 S. W. ⁶⁹⁷ 855, is relied upon with much confidence as sustaining the present judgment.

In that case it seems the receiver of a railroad was held liable for the injury sustained by a child, who was permitted by those in charge of a car loaded with dirt to climb and ride upon it, and while doing so fell off and was run over. In the court below the trial judge said to the jury "that if the plaintiff was a child of only six or seven years of age, and was allowed by the receiver and employes to get upon and ride on the car loaded with dirt, and while so

riding he fell off and was injured by the car running over him, and this was the proximate cause of the injury, the receiver would be liable." To the criticism made upon this charge it was said by this court, speaking through Wilkes, J., that there was no error in it; the court adding: "It is negligence per se to permit a child of such tender years to climb on and ride upon a car loaded with loose earth that is liable to slip and throw the child off at any time An open car loaded with earth is such an inducement as would naturally lead children into danger, and it was negligence not to keep them away from the cars under such circumstances. There is proof tending to show that the child was not only permitted, but invited to ride by the railroad employés and with the knowledge of the superintendent."

The authority of this case must be confined within the narrow limits of its own facts and will not be extended to support a judgment resting on facts like those ⁶⁹⁸ presented in this record. In *Nashville etc. R. R. v. Starnes*, 56 Tenn. 52, 24 Am. Rep. 296, while recognizing the established doctrine of the common law that the master is not liable for the torts of his servant, committed not in the line of the master's service, or with his consent or ratification, yet it was held that a party injured as the result of the wanton blowing of an engineer of his whistle could recover against the railroad company because of the absolute necessity for more stringent care in the protection of life and property against the perils of the steam-engine with its capacity for mischief.

In addition the *Burke* case (105 Tenn. 702, 58 S. W. 855) shows that the invitation was extended to the child, whose injuries were there in question, by the railroad employés with the knowledge of the superintendent, who evidently was a superior officer of the company and might well be held *pro hac vice* to be the corporation itself.

The doctrine of an attractive nuisance—and this, after all, is at the bottom of the contention—while by no means having its beginning, at least found material support in the case of *Sioux City etc. R. R. Co. v. Stout*, 84 U. S. 657, 21 L. ed. 745. This was the first of what are called the "turntable cases." While this case has been followed by the supreme court of the United States in a number of subsequent cases, and by the courts of last resort of several of

the states, yet its authority has been partially or absolutely repudiated in others. Among the cases of the latter class are *Walsh v. Fitchburg* ⁶⁹⁹ R. R. Co., 145 N. Y. 301, 45 Am. St. Rep. 615, 39 N. E. 1068, 27 L. R. A. 724; *Daniels v. New York etc. R. Co.*, 154 Mass. 349, 26 Am. St. Rep. 253, 28 N. E. 283, 13 L. R. A. 248; *Frost v. E. R. R. Co.*, 64 N. H. 220, 10 Am. St. Rep. 396, 9 Atl. 790.

While the case of *Walsh v. Fitchburg R. R. Co.*, 145 N. Y. 301, 45 Am. St. Rep. 615, 39 N. E. 1068, 27 L. R. A. 724, and those following it are not mentioned in *Bates v. Railway Co.*, 90 Tenn. 36, 25 Am. St. Rep. 665, 15 S. W. 1069, yet the effect of the holding of this court in this latter case was to impose very much of a limitation upon the rule announced in the former. That was a case where a boy of nine was injured upon the turntable belonging to the defendant railroad company. His companions took out the bolt used to keep the turntable at rest and set it in motion, when the plaintiff, undertaking to mount it, was injured. There were two trials of the case, the first resulting in a verdict and judgment against the railroad company. There was a reversal in this court upon the ground that the circuit judge failed to charge as a matter of law, first, "that the defendant was not required to fasten or secure the turntable so that the injured boy could not displace such fastening and put the table in motion; second, that the defendant was not required to fasten the turntable any more securely than necessary to keep it securely in place." Upon the second trial, while following the direction of this court and giving in charge to the jury the special requests, for the refusal of which the reversal had been had, yet the trial judge by other paragraphs ⁷⁰⁰ in his charge so neutralized their effect that the case was again reversed. In *Cooper v. Overton*, 102 Tenn. 235, 73 Am. St. Rep. 864, 52 S. W. 183, 45 L. R. A. 591, it is said that the rule of the turntable cases was not applicable to a case involving such facts as were disclosed by the case then in hand, and that "it should not be carried beyond the class of cases to which it has been applied."

We think to apply it under such circumstances as are disclosed in this record would be in the face of sound principle and of all well-considered authority. The judgment of the lower court is therefore reversed, and the case is dismissed.

The Liability of an Employer for the acts of his employé is discussed in the monographic note to *Goodloe v. Memphis etc. R. R. Co.*, 54 Am. St. Rep. 71-93. The test of an employer's liability for the acts of his employé is not whether the employé is using his employer's property when he inflicts the injury, but whether he is then representing his employer in the act and scope of his employment: *Sullivan v. Louisville etc. R. R. Co.*, 115 Ky. 447, 103 Am. St. Rep. 330; *Fairbanks v. Boston Storage etc. Co.*, 189 Mass. 419, 109 Am. St. Rep. 646, and cases cited in the cross-reference note thereto. For authorities on this question as applied to facts similar to those involved in the principal case, see *Driscoll v. Scanlon*, 165 Mass. 523, 52 Am. St. Rep. 523, and cases cited in the cross-reference note thereto; *Bowler v. O'Connell*, 162 Mass. 319, 44 Am. St. Rep. 359.

CASES
IN THE
SUPREME COURT
OF
VERMONT.

STERN v. SAWYER.

[78 Vt. 5, 61 Atl. 6.]

LANDLORD AND TENANT, Respective Interests of.—The lessee is the absolute owner for the term granted, the landlord's rights being confined to his reversionary interest. (p. 893.)

LANDLORD AND TENANT, Effect of Sale by the Former.—Upon a conveyance by the lessor, his reversionary interest and his right to the rent pass to the purchaser, but the estate and rights of the lessee are not affected. (p. 893.)

SURETYSHIP.—A Surety for the Payment of Rent of leased premises is discharged by a sale of a part thereof by the lessor, the lessee remaining a tenant of the residue only, though the lease reserved the right of the lessor to sell the whole on six months' notice. (p. 897.)

SURETYSHIP for the Payment of Rent.—The Sale by the Lessor of Part of the Leased Premises and the Surrender Thereof to the Purchaser Discharges a Surety for the payment of rent, though the lessee retains the use of all that is of value to him. (p. 897.)

SURETYSHIP for the Payment of Rent, Lessee's Waiver Does not Bind Surety.—If a lessee takes possession of the leased property before the lessor repairs or furnishes it as covenanted for in the lease, and thereby waives the breach of the covenant, this waiver does not bind a surety for the payment of rent, but, on the contrary, releases him. (p. 897.)

Action of covenant against the sureties on a lease. The defendant pleaded non est factum and six special pleas in bar. The plaintiff demurred to the pleas. The demurrers were overruled, and the plaintiff excepted.

May & Hill and Young & Young, for the plaintiff.

Dunnett & Slack, for the defendant.

7 TYLER, J. On March 19, 1902, the plaintiff executed and delivered to F. N. Keeler a lease of the St. Johnsbury House, with its furniture and fixtures and a large lot of
(890)

land connected with the hotel, at a monthly rental of one hundred and twelve dollars and fifty cents. The plaintiff covenanted to put the hotel in good repair, to furnish it suitably and pay all the taxes and insurance. The term was to begin when the hotel was repaired and furnished and continued three or five years at the option of the lessee, ⁸ who was to quietly occupy and enjoy the property provided he kept his covenants.

The lessee covenanted that he would occupy the premises in a good husbandlike manner, pay his monthly rent and quietly surrender the premises to the lessor at the end of the term. There was a covenant that the lessor might sell the property during the term on six months' notice to the lessee, who should have the first chance to purchase; also a covenant for re-entry by the lessor for nonpayment of rent. The defendants on the same day executed upon the lease the following agreement under seal:

"In consideration of the letting of the premises above described and for the sum of one dollar, I do hereby become surety for the punctual payment of the rent and performance of the covenants in the above agreement mentioned, to be paid and performed by Frederick N. Keeler, and if any default shall be made therein, I do hereby promise and agree to pay unto Salmon Stern, or his assigns, such sum or sums of money as will be sufficient to make up such deficiency and fully satisfy the conditions of said agreement, without requiring any notice of nonpayment or proof of demand made."

The lessee took possession of the hotel before it was repaired and furnished, and on April 16, 1903, he executed and delivered to the lessor a writing under seal as follows:

"I, Frederick N. Keeler, of St. Johnsbury in the county of Caledonia, in consideration of one dollar paid to my full satisfaction by Salmon Stern, of Lyndon, in the county of Caledonia, do hereby freely grant permission to the said Salmon Stern to sell fifty-three feet and use six additional feet for a driveway off from the westerly part of the premises leased to me by said Salmon Stern, by his lease dated the nineteenth day of March, A. D. 1902; and the sale of said land and my permission hereby granted shall not in any way whatsoever ⁹ affect the validity of the said lease, and said lease shall hereafter have the same force and effect as if said land had not been sold."

The plaintiff immediately sold the land released to Gilman & Carr, who built a livery barn upon it. Upon the lessee's failure to pay his rent for several months the plaintiff brought this suit against the defendants upon their agreement. The declaration is in nine counts, which allege the taking possession of the hotel property by the lessor, under the lease, April 1, 1902, his continuing in possession until the bringing of the suit and his failure to pay the stipulated rent. The second count alleges that he had always been in the use and occupation of all the property leased that was of any material value. No question is made as to the sufficiency of the several counts.

The defendants filed seven pleas in bar of the plaintiff's right of recovery. The first denied that any part of the rent in the declaration mentioned was in arrear and unpaid and is in effect a traverse; the second alleged that the plaintiff failed to repair and furnish the hotel according to his covenant in the lease; the third, fourth and fifth set out in defense that the plaintiff, by means of the permission or release obtained from the lessee, sold and conveyed to Gilman & Carr, without notice to the defendants, the land described in said release and the use of the six additional feet for a driveway for two thousand two hundred and fifty dollars; that said purchasers immediately entered into possession of the land sold to them by the plaintiff; that they have ever since occupied the same and excluded the lessee therefrom; that offensive odors were carried from the livery barn to the hotel to its great injury. The third, fourth and fifth pleas differ from each other only in the allegations of injury to the defendants by said sale. They all allege the lessee's eviction from the land.

¹⁰ The seventh plea is non est factum, with a notice attached, pursuant to our statute. It states the same matters in defense that are alleged in the pleas. The plaintiff filed a general demurrer to each plea and moved to dismiss the notice. The question is whether any of the pleas are sufficient as against the demurrers.

The defendants contend that the release obtained by the plaintiff from the lessee without their consent or knowledge discharged them from their obligation; that they were discharged by the change in the contract by which the rent should continue the same for a part of the leased premises as it had been for the whole; that the injury that resulted to the hotel

property from the erection of the livery barn effected their discharge, and that the lessee took possession under a new and oral contract with the plaintiff.

The plaintiff contends that the lessor could sell a portion of the leased premises, and that the lessee's only remedy was an apportionment of the rent; but that is not the law of this case. It is true as a general proposition that a right to sell and convey is incident to the ownership of the land, but where the premises are under lease for a term of years an estate for that term has been, by the act of the lessor, carved out of the fee, and the lessor cannot, by a sale and conveyance, disturb the lessee in his possession and enjoyment of the premises during the term. The lessor can only convey his reversionary interest, and upon such conveyance the rent passes to the purchaser as an incident to the reversion. As some authorities state it, the lessee is absolute owner for the term granted, while the landlord's rights are confined to his reversionary interest.

No question arises here in respect to the right of the lessor, as between himself and the lessee, to sell and convey¹¹ his reversionary interest in a part of the leased premises, nor is any question presented about apportionment of rent, for the surrender of a part of the land was freely granted by the lessee to the lessor in the written release, which also contained a promise that the surrender should not affect the validity of the lease.

The only question is: How did the surrender and acceptance of a part of the demised premises from the terms of the lease affect the rights and obligations of the sureties under their covenant? Upon this subject the authorities are nearly uniform in support of the rule as laid down by Judge Story in *Miller v. Stewart*, 9 Wheat. 680, 6 L. ed. 189.

"Nothing can be clearer, both upon principle and authority, than the doctrine that liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent, and in the manner, and under the circumstances pointed out in his obligation he is bound, and no further. It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract, and if he does not assent to any variation of it, and a variation is made, it is fatal." In that case the bond of a collector of taxes, upon which the defendants were sureties, recited

his appointment for eight townships. Another township was interlined, and it was held that the interlineation discharged the surety for all the towns.

United States v. Böecker, 21 Wall. 652, 22 L. ed. 672, was a suit on a distiller's bond, and there was a misdescription of the place where the business was to be carried on. It was described as on the corner of Hudson street and East avenue, when it should have been corner of Hudson and Third streets in the same town. It was held that the party was not liable, and the doctrine in *Miller v. Stewart*, 9 Wheat. 680, 6 L. ed. 189, was approved. The reasoning ¹² of the court was that the premises having been specified in the notice, the surety, before signing the bond, might have examined and determined how far, in the event of liability by the principal, the property would be available as security for the government and indemnity for himself; that the surety had a right to rely upon the principal paying his rent out of the entire property; that the United States having a lien, the surety was entitled to the benefit of it: *Martin v. Thomas*, 24 How 315, 16 L. ed. 689; *Reese v. United States*, 9 Wall. 13, 19 L. ed. 541.

Warren v. Lyons, 152 Mass. 310, 25 N. E. 721, 9 L. R. A. 353, is a strong case and refers to *Miller v. Stewart*, 9 Wheat. 680, 6 L. ed. 189, as stating the settled rule of law upon this subject. It is also referred to as authority in the elaborate notes to *Griswold v. Hazard*, 141 U. S. 260, 11 Sup. Ct. Rep. 972, 999, 35 L. ed. 678: See cases there collected; *First Nat. Bank v. Gerke*, 68 Md. 449, 6 Am. St. Rep. 453, 13 Atl. 358.

In *Page v. Krekey*, 137 N. Y. 307, 33 Am. St. Rep. 731, 33 N. E. 311, 21 L. R. A. 409, it was held that the defendant's contract as guarantor was *strictissimi juris*, that he was discharged by any alteration of the contract to which his guaranty applied, whether material or not, and that the court would not inquire whether it was or was not to his injury.

In *Rees v. Berrington*, 2 Lead. Cas. Eq., Lord Loughborough remarked in substance that he could not inquire what mischief had been done—whether it produced inconvenience to anyone, for the rule that there should be no transaction with the principal debtor without acquainting the surety with it; that the surety only engages to make good the deficiency; that it is the clearest and most evident

equity not to carry on any transaction without the privity of him who must necessarily have a concern in every transaction with the principal debtor; that he cannot be bound without being consulted, ¹³ and that he must judge whether he will give that indulgence contrary to the nature of his engagement.

In *Rees v. United States*, 9 Wall. 13, 19 L. ed. 541, it was held that any change in the contract without the assent of the sureties discharged them. The court said: "Nor does it matter how trivial the change, or even that it may be of advantage to the sureties. They have a right to stand upon the very terms of their undertaking": See *Brandt on Suretyship*, 629; and cases there cited; 2 Cyc. 216; *Staver v. Locke*, 22 Or. 519, 29 Am. St. Rep. 621, 30 Pac. 497, 17 L. R. A. 652. See notes to this case and to *Gates v. McKee*, 13 N. Y. 232, 64 Am. Dec. 545.

In *Holme v. Brunskill*, L. R. 3 Q. B. D. 495, it was held that a surety for rent was discharged if the tenant surrendered part of the demised premises and the rent was thereby reduced. In *Polak v. Everett*, 1 Q. B. D. 669, Mellor, J., said that the question was one of contract, and the surety is entitled not to be affected by anything done by the creditor, who has no right to consider whether it might be to the advantage of the surety or not; that the surety is entitled to remain in the position in which he was at the time when the contract was entered into. Quain, J., said: "I agree with my brother Mellor, that it is a thoroughly sound and safe principle, that where the act is voluntary and deliberate the creditor altering the contract and rendering it impossible that it should be carried out, in its original form, should suffer. This is a sound doctrine which ought not to be impeached and cannot be impeached because it is established by authority."

Brandt in section 429 cites a case like the present one. A yard, shed and frame dwelling-house were rented for three hundred and seventy-five dollars a month, and a stranger guaranteed the rent. The lessor took back the dwelling-house, rented it to another, and reduced the rent for the remainder of the premises to three hundred dollars a month; held, that the ¹⁴ guarantor was thereby discharged: *Penn v. Collins*, 5 Rob. (La.) 213.

Brandt formulates this rule from cases cited in the note to section 427: "No principle of law is better settled at this

day than that the undertaking of the surety being one strictissimi juris, he cannot, either at law or in equity, be bound further or otherwise than he is by the very terms of his contract. . . . Neither is it of any consequence that the alteration in the contract is trivial, nor even that it is for the advantage of the surety. . . . He is not bound by the old contract for that has been abrogated by the new; neither is he bound by the new contract, because he is no party to it; neither can it be split into parts so as to be his contract to a certain extent and not for the residue; he is either in toto or not at all." Many cases are cited in the note to the paragraph in support of this rule, that is said to be so firmly imbedded in the law of principal and surety that no considerations of apparent equity are permitted to disturb it, however great the hardship may be which, in individual cases, appeals for a modification of the rule. Among the cases cited are *Polak v. Everett*, 1 Q. B. D. 669; *Holme v. Brunskill*, L. R. 3 Q. B. D. 495; also, *Prairie State Nat. Bank v. United States*, 164 U. S. 227, 17 Sup. Ct. Rep. 142, 41 L. ed. 412.

It is not necessary to consider further the decisions of other courts, for it was held in *Bank of St. Albans v. Smith*, 30 Vt. 148, that: "A change made in a contract of surety between the creditor and debtor, without the assent of the surety, whether prejudicial to him or not, discharges the surety." See, also, *Corlies v. Estes*, 31 Vt. 653, where the court said: "It is only fair and in accordance with well-understood principles, to presume that the defendant entered into his contract of guaranty in view of all the terms and provisions of the contract, and that he was becoming liable to the plaintiffs, only in respect to such rights as they might have in virtue ¹⁵ of a strict performance of their duties under the specific provisions of the contract, and of the failure of Davis and Rider to perform their correlative duties to the plaintiffs under the like provisions of the contract."

The plaintiff's reservation of a right to sell the entire hotel property on six months' notice to the lessee did not justify the sale of a part without the consent of the sureties. Their liability upon the lessee's covenants was based upon his occupation and use of the premises described in the lease. The lessor and lessee evidently did not have the sale of a part of the premises in contemplation when the lease was made, and it cannot reasonably be construed to have that effect. The plaintiff's evident intent was to reserve a right

to sell the entire hotel property, if he had an opportunity, during the term of the lease.

It is alleged in the second count in the declaration that the lessee had had the occupancy and use of all of the leased premises that were of any use or value to him and which he had ever had occasion to use from April 1, 1902, until the bringing of this suit. The third, fourth and fifth pleas set out the release from the lessee to the plaintiff and the subsequent sale of the land released for two thousand two hundred and fifty dollars, the truth of which allegations the demurrers admit. This brings the case within the rule stated and discharges the defendants from liability.

The lessor covenanted in the lease that he would furnish the hotel in all parts with good and suitable furniture, and put it in good repair by painting it outside and inside, papering, plumbing and making all other necessary repairs. The defendant pleads a breach of this covenant in defense of the action. The fact that the lessee took possession of the hotel without its being repaired and furnished according to the covenant and thereby waived the breach of it did not bind his sureties. It must be presumed that when the defendants became ¹⁶ sureties for the performance of the lessee's covenants they relied upon the plaintiff's performance of his covenant, which was obviously an important one for the success of the hotel and to enable the lessee to pay his rent. If the hotel had been well repaired and furnished, it is reasonable to suppose that it would have commanded a larger patronage and income than it would in a dilapidated and unfurnished condition. The lessee took possession of the hotel under a different contract than the one which the defendants guaranteed the performance of on his part, and we think that upon the authorities the defendants were thereby released. There is nothing in the case tending to show that the waiver by the lessee was with the defendant's consent or knowledge.

The pro forma judgment is affirmed, and cause remanded.

The Liability of a Surety is measured by his agreement, and is not to be extended by construction; his contract, however, is to be interpreted by the rules applicable to the interpretation of other contracts: *Blades v. Dewey*, 136 N. C. 176, 103 Am. St. Rep. 924; note to *Pearsell Mfg. Co. v. Jeffreys*, 105 Am. St. Rep. 520; *Fink v. Farmers' Bank*, 178 Pa. St. 154, 56 Am. St. Rep. 746. For authorities to the effect that sureties are not bound beyond the strict terms of their engagement, see *Salem v. McClintock*, 16 Ind. App. 656, 59

Am. St. Rep. 330; Grasser etc. Brewing Co. v. Rogers, 112 Mich. 112, 67 Am. St. Rep. 389.

On the Release of Sureties by a change in the contract of their principal, see Singer Mfg. Co. v. Boyette, 74 Ark. 600, 109 Am. St. Rep. 104; Phoenix Brewing Co. v. Rumbarger, 181 Pa. St. 251, 59 Am. St. Rep. 647; Cowdery v. Hahn, 105 Wis. 455, 76 Am. St. Rep. 923.

LAVALLEY v. RAVENNA.

[78 Vt. 152, 62 Atl. 47.]

EVIDENCE—Papers Treated as in Evidence but not so in Fact.—If, at the trial, a paper is not formally offered in evidence, but is submitted to the jury and used by the court as if it were a part of the case, it will, on appeal, be regarded as properly a part of the record. (p. 899.)

CONDITIONAL SALE, Right of Vendor to Recover for Property Destroyed Before Title Passes.—There may be a recovery by the vendor for property sold and delivered on condition that the title shall not pass till full payment is made, when without the fault of the purchaser the property is destroyed before the price falls due. (p. 900.)

Butler & Moloney, for the plaintiff.

Marvelle C. Webber, for the defendant.

154 POWERS, J. This is an action of general assumpsit for the recovery of a balance due on the purchase of certain personal property. The parties disagreed somewhat in regard to the precise terms of the contract, but it satisfactorily appears from the record that the plaintiff sold and delivered to the defendant a team consisting of a horse, buggy and harness, receiving in part payment therefor another horse, harness and wagon, and a certain sum of money, and taking as security for the unpaid balance of the price agreed upon a written lien on all the property so conveyed to the defendant. Soon after, and before any part of such unpaid balance came due, the horse covered by the lien died without the fault of the purchaser. The seller waited until the full amount of such balance fell due by the terms of the contract, and then brought this suit for its recovery. At the close of the evidence the defendant moved for a verdict on several grounds, which was overruled, to which he excepted.

It appears from the record that the written lien was not formally offered or received in evidence, but it was submitted

¹⁵⁵ to the jury and used by the court as though it was a part of the case; so we treat it as the parties treated it at the trial, and regard it as properly a part of the record. It is informal and crude, but the substantial recitals of it are that the property in question was conditionally sold and delivered to the defendant; that the title thereto was to remain in the plaintiff until the sums therein named were fully paid; that the plaintiff might repossess himself of the property on the defendant's default of payment, and that in such event all payments theretofore made by the defendant should be forfeited. Both parties signed the instrument, but it did not contain a note or other express agreement on the part of the defendant to pay the sum specified.

So the question presented, stated broadly, is this: Can there be a recovery for property sold and delivered on condition that the title shall not pass until full payment therefor has been made, when without the fault of the purchaser the property is destroyed before the price falls due? This question we answer in the affirmative. It is true that these contracts are sometimes spoken of as "executory," and the purchaser is termed a "bailee," as was done by this court in *French v. Osmer*, 67 Vt. 427, 32 Atl. 254, but these expressions have reference to the strict legal title to the property, and should not determine the present question which is one pertaining to an absolute promise to pay. And the defendant's promise to pay was absolute, and was made upon a sufficient consideration; for he got just what he bargained for—the use, possession and enjoyment of the property with the right to acquire the absolute title upon payment of the stipulated price; and this was the consideration for his promise. The seller had done all that he was to do to or with the property, by the terms of the contract—all that he was to do at all, except ¹⁵⁶ to receive the price. And upon that, the title passed without further action on the part of either party. The defendant's promise was in no sense conditioned on the seller's ability to deliver the title. He could not return the property to the seller and thereby avoid further liability: *Appleton v. Norwalk Library Corp.*, 53 Conn. 4, 22 Atl. 681; *Smith v. Aldrich*, 180 Mass. 367.

The authorities are not in harmony on the question herein decided. *Tufts v. Griffin*, 107 N. C. 47, 22 Am. St. Rep. 863, 12 S. E. 68, 10 L. R. A. 526, *American Soda Fountain v. Vaughn*, 69 N. J. L. 582, 55 Atl. 54, *Burnley v. Tufts*, 66

Miss. 48, 14 Am. St. Rep. 540, 5 South. 627, Tufts v. Wynne, 45 Mo. App. 42, Cooper v. Chicago C. Organ Co., 58 Ill. App. 248, and Hintermister v. Lane, 27 Hun, 497, are among the cases in full accord with the views herein expressed. While to the contrary are Bishop v. Minderhout, 128 Ala. 162, 86 Am. St. Rep. 134, 29 South. 11, 52 L. R. A. 395; Cobb v. Tufts, 2 Tex. App. C. C., sec. 152; Swallow v. Emery, 111 Mass. 355.

The result is that we hold that the defendant is liable for the unpaid balance, notwithstanding the death of the horse included in the sale.

Judgment affirmed.

Conditional Sales are discussed in the monographic notes to Fleet v. Hertz, 94 Am. St. Rep. 234; Andrews v. Colorado Sav. Bank, 46 Am. St. Rep. 295; Palmer v. Howard, 1 Am. St. Rep. 63. Consult, also, the recent cases of Studebaker Bros. Co. v. Mau, 13 Wyo. 358, 110 Am. St. Rep. 1001; Freed Furniture etc. Co. v. Sorensen, 28 Utah, 419, 107 Am. St. Rep. 731. It has been decided that when personal property is sold and delivered under an agreement that the title is to remain in the vendor until payment, and it is destroyed without fault of the vendee, the loss falls on the vendor: Bishop v. Minderhout, 128 Ala. 162, 86 Am. St. Rep. 134; but see the cases cited in the cross-reference note thereto.

LYNDON SAVINGS BANK v. INTERNATIONAL COMPANY.

[78 Vt. 169, 62 Atl. 50.]

NEGOTIABLE INSTRUMENTS—Signer on the Back of.—One not before a party to a note, who signs his name on the back of it, in blank, is prima facie a maker, and assumes the same obligations as if he wrote his name on the face of the instrument. It makes no difference that the signing is long after the making of the note and while it is in circulation. (p. 905.)

NEGOTIABLE INSTRUMENTS.—The Relation Assumed by Persons Who Sign Their Names on the Back of a Promissory Note after its delivery is a question of fact and not of law. (p. 905.)

NEGOTIABLE INSTRUMENTS—Indorsement Under the Name of an Indorser Who has Waived Demand and Notice.—It cannot be said as a matter of law that indorsers waive demand and notice by placing their names under that of a prior indorser who, when it was executed, signed it as indorser and waived demand and notice. (p. 905.)

NEGOTIABLE INSTRUMENTS.—The Relation to a Promissory Note of Persons Who Indorse It Long After Its Execution is to

be determined by the agreement made between them and the holder of the note when they so indorse it. (p. 906.)

NEGOTIABLE INSTRUMENTS—Persons Signing on Back of After Execution—When May be Held as Makers.—If, after a note has been executed, the holder or his agent approaches two persons and informs them that if they will fix the note so it will be lawful and safe in the judgment of the holder, the note may run so long as they keep the interest paid and he considers the security good, and they say that the estate of an indorser shall not be changed, and they will do anything required to make it all right without such indorser's name, and that they will put their names on the note, which they thereupon do, the jury is justified in finding that they signed such note as makers after execution, in consideration of an extension for the time of its payment. (pp. 906, 907.)

NEGOTIABLE INSTRUMENTS—Consideration.—An Agreement to Extend the Time of Payment of a promissory note is a sufficient consideration for signing it on the back as makers after the execution. (p. 907.)

CONSIDERATION Does not Depend Upon Whether the Thing Promised Results in a Benefit to the Promisee or a Detriment to the Promisor. It is enough that something is promised, or the exercise of a present right is forborne. (p. 907.)

ACCEPTANCE OF AGREEMENT, When Presumed.—If Persons Indorse Their Names on a Promissory Note After Its Execution in Consideration of an Extension of Time for Its Payment, the holder of the note may be presumed to have been satisfied with such names and to have assented to such extension if they continue to hold such note for several years without objection and without pressing for payment. (p. 907.)

CORPORATION, Ratification by.—A Corporation is Estopped from Denying Authority to Make an Agreement Extending the Time for the Payment of a Note if it receives the benefit of the forbearance and ratifies it by paying interest on the note. (p. 908.)

NEGOTIABLE INSTRUMENTS—Indorsers not Discharged When.—An agreement with one of the makers of a note to receive and apply thereon dividends from property assigned for the benefit of creditors followed by such receipt and application does not release other makers. (p. 908.)

LIMITATION OF ACTIONS—Agreement to Waive.—The makers of a promissory note may stipulate therein that they will waive the statute of limitations. (p. 909.)

NEGOTIABLE INSTRUMENTS, When not Payable on Demand.—An agreement extending the time for the payment of a promissory note, no definite time being named, the delay to be until the holder was dissatisfied with his security, does not leave the note payable on demand. (p. 909.)

SAVINGS BANK—An Agreement to Extend Time of Payment More Than a Year, What is not.—An agreement by a savings bank to extend the time of payment of a note as long as satisfied with the security if the interest is kept paid, does not violate a statute forbidding savings banks from making contracts to extend the time of payment of a loan for a longer time than one year. (p. 910.)

Action on a promissory note. The defendants severed in their defense and pleaded the general issue, with notice, the statute of limitations, the discharge of the International

Company by plaintiff, and payment. There were also replications, rejoinders and traverses, with various demurrers, and finally, a jury trial with special verdicts resulting in a judgment against the International Company and O. C. Miller for the amount of note, and they excepted; also a judgment in favor of G. H. Prouty for his costs, to which plaintiff excepted. The company was a corporation. The note, dated June 12, 1886, was for five thousand dollars, payable to plaintiff or order on demand, with interest semi-annually, and "waiving all right or claim to the statute of limitations," and was signed "International Co. J. A. Prouty, Pres. H. E. Folsom, Treas." Upon the back of the note the following indorsement appeared: "H. E. Folsom, O. C. Miller, G. H. Prouty."

Interest was paid by the company semi-annually down to July 1, 1898. The writ in the case was dated March 7, 1901, and was served on March 11th of the same year. J. A. Prouty, having died before suit brought, was not a party thereto. H. E. Folsom pleaded a discharge in insolvency in the fall of 1893, and a nonsuit was granted as to him. After he had been adjudged an insolvent, the plaintiff sent its agent to Newport to see G. H. Prouty, a son of J. A. Prouty, who was then a director of the International Company, and also O. C. Miller, about doing something on the note in suit. After an interview with O. C. Miller and G. H. Prouty, they wrote their names on the back of the note on December 19, 1893, O. C. Miller being at that time the manager of the International Company. In the fall of 1898 the company became financially embarrassed, and O. C. Miller wrote to each of its creditors, including the plaintiff, a letter signed by himself as manager, stating that the company was insolvent and calling a meeting of its creditors for September 30, 1898. In the letter sent to the plaintiff, among other matters, was included this sentence: "Although you have good backers on your note, if convenient should like to have you present at the meeting." The meeting was held accordingly, and the creditors elected a committee of three, whom they directed to take charge of the assets and realize thereon. J. W. Copeland, trustee and vice-president of the plaintiff, was present at the meeting, but did not vote. Before any vote was taken, he said to the meeting that he was there as the representative of the plaintiff to note the proceedings and report to plaintiff's trustees, but without instructions, and should not vote.

The stockholders of the International Company at a meeting held October 1, 1898, voted that the company was insolvent and that its assets be realized and disposed of as directed by the creditors' meeting. Afterward the company delivered to the creditors' committee all its assets, and each creditor, except the plaintiff, executed and delivered to the corporation a writing agreeing to accept in settlement of their claims such sums as might be their due, pro rata, from the proceeds realized from the assets of the company.

On October 3, 1898, the plaintiff's trustees voted "to give the assent of the Lyndon Savings Bank to the proposition that the property of the International Company be put in the hands of trustees to be sold to the best advantage, and the proceeds to be divided between the creditors pro rata, the bank reserving all rights to collect its debt from the indorsers of the note." On October 15, 1898, plaintiff wrote a letter to the International Company, which was received by O. C. Miller in due course of mail, giving notice of said vote of plaintiff's trustees. The defendants' evidence tended to show that about October 1, 1898, the International Company surrendered all its assets to the creditors' committee, which converted the same into cash and paid from the proceeds to creditors, including the plaintiff, a dividend of ten per cent on each of the following dates: November, 1898; March, 1899; June, 1900; November, 1900; and further dividends of five per cent each in May and August, 1901, December, 1902, and September, 1903; and from each ten per cent dividend plaintiff received five hundred and seven dollars and fifty cents, and on each five per cent dividend, two hundred and fifty-three dollars and seventy cents. O. C. Miller never paid anything on the note in suit. There was nothing except his letter of December, 1898, tending to show that since he wrote his name on the back of the note in 1893, he acknowledged any personal liability on the note or promise to pay it.

The jury found that G. H. Prouty and O. C. Miller were makers; that an agreement was made on December 19, 1893, between plaintiff and the International Company for an extension of the time of the payment of the note until plaintiff should be dissatisfied with the security, and on the same day plaintiff agreed with O. C. Miller and G. H. Prouty that the time of payment of the note should be extended if Prouty and Miller wrote their names on the back thereof, but no particular time for the payment of the note was stated; that

a reasonable time for the payment of the note after such agreement was until the payment was demanded or ordered; that it was doubtful if the note could have been collected of the International Company at any time from December 19, 1893, to January 1, 1898; that O. C. Miller and G. H. Prouty were not damaged by the plaintiff's omission to collect the note on such dates; that after October 1, 1898, the creditors' committee managed and disposed of the property and paid from the proceeds the dividends hereinbefore recited; that the plaintiff, by its conduct with reference to the property of the International Company and by accepting dividends from the committee of creditors, did not discharge the company from further liability; that O. C. Miller and G. H. Prouty did not sign their names on the back of the note in consideration that plaintiff would not prove the note against H. E. Folsom's insolvent estate unless compelled by law to do so.

Cook & Norton, for the plaintiff.

Young & Young, for the defendant.

177 TYLER, J. The note in controversy is described in the opinion in this case, reported in 75 Vt. 224, 54 Atl. 191. At the first trial in the county court a verdict was directed for the defendants, which action this court held was error, reversed the judgment and remanded the case for a new trial. We then held that:

"What relation Miller and Prouty assumed to the note by placing their names upon it was a question of fact, and not of law. If they became joint makers, no demand was necessary and this action was properly brought against them. If they were indorsers, it could not be held, as matter of law, that they waived demand and notice by placing their names under the name of Folsom, who, when the note was executed, signed it as indorser, waiving demand and notice; and if there was an agreement or understanding between the parties that the time of payment should, in consideration of their signing the note, be forborne, there being no time of forbearance specified, it would mean, in law, a reasonable time. What constituted a reasonable time, in the circumstances, was a question of fact for the jury, and as against Miller and Prouty, the statute of limitations would begin to run at the expiration of such reasonable time." Quoting further from that opinion:

“And it has generally been held by this court that one not before a party to the note, who signs his name upon the back of it, in blank, is *prima facie* a maker, and assumes the same obligations as if he wrote his name upon the face of the instrument. In *Sylvester v. Downer*, 20 Vt. 355, 49 Am. Dec. 786, the rule was extended and emphasized, for it is there declared that it makes no difference that the signing is ¹⁷⁸ long after the making of the note and while it is in circulation, for the reason, as stated by Judge Redfield, that if the signer consents to be thus bound, and induces others to take the note under that expectation, he will be estopped to deny that fact and will be treated the same as if he had signed the note at its inception. It was, however, held in that case, that the indorsement being in blank, the real obligation intended to be assumed—whether that of maker, guarantor or indorser—might be shown by parol evidence. In *National Bank of Bel lows Halls v. Dorset Marble Co.*, 61 Vt. 106, 17 Atl. 42, 2 L. R. A. 428, this rule was recognized and reaffirmed.”

At the last trial the jury found, by special verdicts submitted to them, that Miller and Prouty, by placing their names upon the note, became joint makers thereof; that an agreement was made December 19, 1893, between the plaintiff and the International Company for an extension of the time of payment, but for no definite time, and that a reasonable time to delay its collection was: “Until the plaintiff was dissatisfied with the security.” Another special finding was: “Until payment was demanded or offered.” There were special findings that the International Company turned over to a committee all its assets to be divided *pro rata* among its creditors, that the committee paid over the dividends, and that the company was not discharged from further liability.

The defendants, Miller and Prouty, objected and were allowed an exception to the submission to the jury of the question whether they signed the note as joint makers, and they claimed that there was no evidence that they were joint makers; they also excepted to the submission to the jury to find whether there was an extension of the time of payment of the note, and claimed that there was no evidence to sustain that finding.

¹⁷⁹ The defendants contend that this action was barred by the statute of limitations; that no new promise or acknowledgment was shown, and that the note had not matured when the action was commenced.

The case shows that no agreement was made at the time the money was loaned and the note was given that either Miller or Prouty should ever become parties to the note, and it appears that neither of them received any security or indemnity for placing their names upon the back of it. Down to that time the note had remained as it was when made by the International Company, with Folsom as indorser. The plaintiff seeks to hold Miller and Prouty liable by reason of their placing their names upon the note and claims that they thereby became makers. The defendants claim that they became indorsers or guarantors. The general rule of law is found in the opinion of Redfield, J., in *Sylvester v. Downer*, 20 Vt. 355, 49 Am. Dec. 786, "that he who writes his name upon the back of a note, if he were not before a party to it, assumes the same obligation as if he wrote his name upon the face of the instrument; and that, although he does this long after the making of the note, it shall make no difference." But the question of Miller and Prouty's liability is not to be determined by this rule of law, but by the agreement made between themselves and L. B. Harris, who went to see them and make an arrangement about the payment or an extension of the note.

It appeared that the note was overdue, that Folsom had been adjudged insolvent, that the plaintiff employed Harris to go to Newport and call upon Miller and Prouty "to do something about the note," and that as a result of the interview they wrote their names upon the instrument. The exceptions state that the evidence was very conflicting as to what was said between them, and it so appears by the record; but it is not the duty of this court to reconcile the evidence. As there ¹⁸⁰ was evidence tending to show that Miller and Prouty signed the note as makers, the submission of that question to the jury was not error. The weight that should be given to the testimony of the witnesses who testified upon this subject was a matter that rested with the jury. The testimony of Harris tended to show that after Folsom became insolvent the plaintiff sent him to see Miller and Prouty about the note; that he saw them at Newport and informed them that he came as a messenger from the plaintiff to collect the note, if collection could be made, and if not, to ascertain their wishes or obtain instruction about proving this, and another note which the plaintiff held against Folsom's estate; that he told them that Folsom had said that they—the Proutys and

Miller—were, practically, the company; that if they would fix the note so it would be lawful, and safe in the judgment of the bank, it could run as long as they kept the interest paid and the bank considered the security good; that Miller and Prouty both said that the estate of Folsom should not be charged with the loan and that they would do anything that he, Harris, or the plaintiff required in respect to fixing the note so as to make it all right without Folsom's name, that they would put their names upon the note, and that they did so after Harris had taken a little time to make inquiry as to their financial responsibility and expressed his willingness to accept their names. This evidence brings the case within the rule in *Sylvester v. Downer*. Miller, Prouty and Folsom disputed the testimony of Harris, but it was for the jury to decide as to the weight of evidence, and this court cannot disturb the verdict.

Upon the testimony of Harris the jury were warranted in finding that an agreement was made between the plaintiff and said company for an extension of the time of payment, which was a sufficient consideration for Miller's and Prouty's acts in view of their interest in the company. It is held that: ¹⁸¹ "Consideration does not necessarily depend upon whether the thing promised results in a benefit to the promisee, or a detriment to the promisor. It is enough that something is promised, or the exercise of a present right is forborne": *Ballard v. Burton*, 64 Vt. 387, 24 Atl. 769, 16 L. R. A. 664, and cases cited in the opinion.

The defendants contend that, upon the testimony of Harris, the alleged agreement made by him with Miller and Prouty was not operative until accepted by the plaintiff and approved by the inspector of finance. It may be presumed that Harris returned the note to the bank and that the bank officers were satisfied with the names upon it that Harris had obtained, for they continued to hold it for years thereafter without objection by them and apparently with the approval of the state official. They also received the interest upon it semi-annually down to July, 1898. Miller and Prouty might well have understood that the note had been accepted; that Miller did so understand it is shown by his note to the plaintiff written nearly five years later in which he said, "you have good backers on your note," which words must have referred to Mr. Prouty and himself.

The defendants also contend that the case shows no authority in Miller conferred upon him by the International Company to make the agreement through Harris with the plaintiff. It is true that no vote of the company was produced by the plaintiff showing that such authority was given Miller, but it appeared from defendant Miller's testimony that he was the general manager of the company at the time he signed his name to the note; that he held that position from 1886 until the fall of 1898, when all the assets of the company were placed in the hands of a committee, converted into money and the proceeds distributed pro rata among the creditors, ¹⁸² the plaintiff reserving the right to proceed against the indorsers upon its note.

It is unnecessary to hold as an abstract legal proposition that, as general manager of the corporation, Miller had power to borrow money to meet corporate debts in due course of business. He testified that he had charge of the funds of the company as general manager, and that it was his duty to pay a note when it came due, "or to look out for it." He evidently understood that he and Prouty had authority to sign this note, and the record shows no dissent by the other directors to his agreement for an extension; neither is there any evidence in the case that tends to contradict his testimony.

But assuming that Miller and Prouty had no authority to make the agreement, they and the company received the benefit for the forbearance, and the company ratified it by paying the interest upon the note for five years after the agreement was made. That the defendants were estopped from denying Miller and Prouty's authority was held in the former decision. *Town of Grand Isle v. Kinney*, 70 Vt. 381, 41 Atl. 130, is an authority upon this point.

It was said in the former opinion that it could not be held as a matter of law that the vote taken by the plaintiff, and its receipts of dividends from the committee of the International Company, discharged the company. The proposition of the company to its creditors was that they should accept, pro rata, such amounts as should be received from the company's assets in settlement of their respective claims. The plaintiff, by its resolution, assented to the proposition that the property be sold and the proceeds be divided among the creditors, with a reservation of the right to collect its debt from the indorsers of the note, and the company, through its committee, acted upon this acceptance and subsequently paid divi-

dends to the plaintiff with the other creditors. That the ¹⁸³ plaintiff should receive its dividends, reserving the right to collect the remainder of its debt from Miller and Prouty, whom the jury have found were joint makers of the note, was a matter of contract between the International Company, through its committee, and the plaintiff. Miller and Prouty were evidently regarded by the plaintiff as responsible, and it is not presumable that it would have released them upon receiving what could be got from the company's assets, which Miller had said in his notice to the creditors were insufficient to pay the debts in full. It is noticeable that the plaintiff's resolution omitted the word "settlement" which the committee's offer contained. There was no error in the refusal of the court to set aside the ninth special finding,

It is competent for the makers of a promissory note to stipulate therein that they will waive the statute of limitations: *State Trust Co. v. Sheldon*, 68 Vt. 259, 35 Atl. 177. The plaintiff contends that, as the jury have found that Miller and Prouty signed this note as joint makers, they become subject to the clause, "and agree to waive all right or claim to the statute of limitations." But it is unnecessary to decide this question, for the jury found that an agreement was made for an extension of the time of payment of the note; that no definite time was agreed upon, but that a reasonable time for such delay was, until the plaintiff was dissatisfied with the security—until payment was demanded or offered.

It cannot be maintained that these findings made this instrument a demand note in the ordinary legal meaning of the term, "payable on demand." The jury in effect found that a right of action did not accrue upon the note until the plaintiff was dissatisfied with the security and made an actual demand of payment, and this was the agreement according to Harris' testimony: *Stanton v. Stanton's Estate*, 37 Vt. 411; *Thrall* ¹⁸⁴ *v. Mead's Estate*, 40 Vt. 540; *Smith v. Town of Franklin*, 61 Vt. 385, 17 Atl. 838; *Lycoming F. Ins. Co. v. Batchelder*, 62 Vt. 148, 19 Atl. 982. The case shows that demand of payment was made of defendants Miller and Prouty on February 5 and February 19, 1901, and that the suit was brought March 7, 1901. The failure of the International Company in 1898 and the nonpayment of interest after that were sufficient causes for the plaintiff's dissatisfaction with the security.

The finding of the jury, that an extension of time of payment was agreed upon by the parties, is inconsistent with the defendants' contention that the other finding should be construed to mean that the note was payable immediately after the agreement was made. According to the testimony of Harris the note was to run along indefinitely, if the interest was kept paid, the only limitation being the time when the plaintiff should become dissatisfied with the security and call for payment. When demand was made the plaintiff's cause of action accrued against Miller and Prouty. This answers the defendants' suggestion in the brief of counsel that the agreement was in violation of Vermont Statutes, 4099, which provides that a savings bank shall not make a contract or agreement to loan or to extend the time of payment of a loan, on personal security, for a longer time than one year.

Upon the special findings judgment should have been rendered against both Miller and Prouty; therefore the judgment for defendant Prouty is reversed; the judgment against the International Company and Miller is reversed, *pro forma*, and judgment is rendered for the plaintiff against the three defendants, with costs.

The Authority of the President or other officer of a corporation to bind it in relation to negotiable paper is discussed in the recent cases of Iowa Nat. Bank v. Sherman, 17 S. Dak. 396, 106 Am. St. Rep. 778; Gould v. W. J. Gould Co., 134 Mich. 515, 104 Am. St. Rep. 624; Pelton v. Spider Lake etc. Co., 117 Wis. 569, 98 Am. St. Rep. 946. Although the officer was without authority to deal in respect to such paper, still if the corporation ratifies his act, it may thereby become estopped to escape liability in the matter: Curtin v. Salmon River etc. Ditch Co., 141 Cal. 308, 99 Am. St. Rep. 75, and cases cited in the cross-reference note thereto.

STANLEY v. PAYNE.

[78 Vt. 235, 62 Atl. 498.]

PROPERTY Forcibly Taken Possession of.—The owner of a parcel of personal property in the possession of another has no right to take possession thereof by force nor to commit an assault and battery for the purpose of doing so. (pp. 914, 916.)

PROPERTY, Right to Resist the Forcible Taking Possession of.—Though a tenant on surrendering possession leaves on the leased premises a box with the landlord's permission and under an agreement that it may be removed at any time, a subsequent lessee, on being told these facts, may refuse to surrender the box until the landlord can be consulted, and may lawfully resist the attempt of the owner to forcibly take possession of it. (p. 916.)

E. H. O'Brien, for the plaintiff.

Butler & Moloney, for the defendant.

237 TYLER, J. Trespass for assault and battery; pleas, general issue, self-defense and defense of property; replication, *de injuria*.

The defendant had been a tenant of a certain farm, and it appeared that prior to April 1, 1902, when his term expired, he and one Pratt, the owner of the farm, agreed that a certain grain-box that belonged to the defendant should remain in the barn during that spring and that the defendant might remove it at any time after that season. The plaintiff, who succeeded the defendant as tenant, knew nothing of this agreement nor of the defendant's ownership of the box beside what the defendant told him just before the assault.

In September, 1902, the defendant drove to the farm for his box, when an affray took place between him and the plaintiff of which they were the only witnesses, and their testimony concerning it materially differed.

The plaintiff testified that the defendant drove up and stopped in front of the barn doors and said there was a box in the barn that belonged to him, and that he was going in to get it; that the plaintiff told him not to go into the barn because the plaintiff did not know whether the box belonged to the defendant or to Pratt, that when Pratt came up the plaintiff would inquire, and if the box belonged to the defendant, the plaintiff would draw it down to him and they would have no trouble; that the defendant said, with an oath, that he should go into the barn; that the plaintiff went into the barn

and the defendant followed; that the plaintiff then told the defendant to leave the box where it was until Pratt came in, and if it was the defendant's he should have it; that the defendant took hold of the box and started to draw it toward the barn door, and at the same time the plaintiff seized hold of the opposite side of it and pulled it backward; that the defendant pulled it along and as he pulled it a little piece of it came off²³⁸ which the defendant threw down and again took hold of the box; that the defendant pulled it along two-thirds of the way across the barn floor, when the plaintiff told the defendant that he was not going to pull it any farther, but the defendant kept pulling it along, and the plaintiff said, "Now leave it alone," and then the defendant knocked him down and jumped upon him.

The defendant testified that upon coming into the barn he told the plaintiff that the box was his, that he had a right to it and that he proposed to take it, whereupon the plaintiff pulled it back and broke a board off of it, and that the defendant continued to draw it toward the door; that the plaintiff then assaulted him, seizing him by the neck and shoulder, and that he resisted this assault, seizing the plaintiff and throwing him down upon the floor of the barn and holding him there a short time, whereupon the plaintiff said he would cease fighting, and that the defendant then took the box and carried it home.

The defendant requested the court to charge as follows: "If the jury find that the box was the property of the defendant, and that it was left on the premises of Pratt for his accommodation, with the understanding and agreement that the defendant could go there and get it whenever he saw fit to do so, then he had the right to go into the barn and take it, and this would be so notwithstanding any protest or notice on the part of the plaintiff not to do so."

The court charged that neither the defendant's ownership of the box nor the plaintiff's occupancy of the barn was the controlling fact in the case; that a man who owned personal property and was in possession of it, might justify an assault to maintain his possession, but if the possession were in another person the owner could not justify an assault upon that²³⁹ person to enable the owner to obtain the possession. A more specific instruction was:

"The box being in the barn, which was in the occupancy of the plaintiff, was in the plaintiff's possession to start with,

and the defendant could not justify an assault to take it out of that possession thus arising from the fact that it was in the barn which was in the plaintiff's occupancy. But if the defendant entered the barn without opposition or resistance on the part of the plaintiff, and so being in the barn, obtained complete manual possession and control of the box without committing any assault upon the plaintiff, the box would then be in the possession of the defendant, although still within the plaintiff's barn, and the defendant could then justify an assault upon the plaintiff to keep possession of it, if the plaintiff then undertook to take it away from him." Further that: "If the defendant has failed to make out his justification, then the plaintiff will be entitled to a verdict, because of the fact, conceded by the defendant, that he laid hands upon the plaintiff. The real question is whether he was justified in doing this, because of the previous assault of the plaintiff, or for the protection of the personal property in his possession."

The defendant contends that there was error in the court's omission to charge as requested and in the charge as given.

The decisions upon the question here presented are somewhat at variance. In the notes to *Barnes v. Martin*, 82 Am. Dec. 670, Mr. Freeman says: "Whether the owner of personal property, or the one entitled to its possession, has the right under any or all circumstances to retake it, if it is wrongfully taken or detained from him, is an interesting question and one of some practical importance, but strange to say, it is one to which the law as yet gives no certain answer." It is apparent, however, that many of the decisions differ from each other²⁴⁰ only in applying the rules of law to the circumstances of given cases.

Yale v. Seeley, 15 Vt. 221, supports the defendant's contention. There the defendants went to the plaintiff's land with teams for the purpose of drawing away a quantity of poles lying upon the land. Both parties claimed to own the poles, but the decision went upon the ground that the defendants in fact owned them; and it was held that they had a legal right to enter upon the plaintiff's land to remove their property, and that if the plaintiff attempted to hinder them in the enjoyment of the right, the defendants were justified in using as much force as was necessary to overcome the hindrance. *Sterling v. Warden*, 51 N. H. 217, 12 Am. Rep. 80, is like

Yale v. Seeley, 15 Vt. 221, in its facts and sustains the same doctrine.

The defendant also claims *Richardson v. Anthony*, 12 Vt. 273, as an authority. In that case the defendant's cattle were in the plaintiff's close without the fault of either party. The plaintiff did not claim to hold them as estrays, and, as the court said, he did not and could not have owned them, yet he forbade the defendant's breaking the close to get them and claimed to own them himself; held, that the defendant was justified in breaking the close and in taking his property, but no force was used. Bennett, J., dissented, and Williams, C. J., remarked in the opinion that, "The right of the owner of personal chattels to enter on the possession of another to reclaim property may depend entirely on the manner in which the possession was obtained." Whether the court would have justified the defendant in using all necessary force to overcome the plaintiff's resistance, if he had resisted, or held that the defendant should have resorted to an action at law, is a matter of conjecture.

This question was before the court in *Kirby v. Foster*, 17 R. I. 437, 22 Atl. 1111, 14 L. R. A. 317, and *Stiness, J.*, said: "Unquestionably, ²⁴¹ if one takes another's property from his possession, without right and against his will, the owner or person in charge may protect his possession, or retake the property, by the use of necessary force. He is not bound to stand by and submit to wrongful dispossession or larceny when he can stop it, and he is not guilty of assault, in thus defending his right, by using force to prevent his property from being carried away. But this right of defense and recapture involves two things: 1. Possession by the owner; and 2. A purely wrongful taking or conversion, without a claim of right. If one has intrusted his property to another, who afterward, honestly, though erroneously, claims it as his own, the owner has no right to retake it by personal force. If he has, the actions of replevin and trover in many cases are of little use. The law does not permit parties to take the settlement of conflicting claims into their own hands. It gives the right of defense, but not of redress. The circumstances may be exasperating; the remedy at law may seem to be inadequate; but still the injured party cannot be arbiter of his own claim. Public order and the public peace are of greater consequence than a private right or an occasional hardship. Inadequacy of remedy is of frequent oc-

currence, but it cannot find its complement in personal violence."

The general rule is that a right of property merely, not joined with the possession, will not justify the owner in committing an assault and battery upon the person in possession, for the purpose of regaining possession, although the possession is wrongfully withheld: *Bliss v. Johnson*, 73 N. Y. 529; *Barnes v. Martin*, 15 Wis. 240, 82 Am. Dec. 670.

It was also held in *Churchill v. Hulbert*, 110 Mass. 42, 14 Am. Rep. 578, that though the defendant had an irrevocable license from the plaintiff to enter upon his land and remove certain personal ²⁴² property that belonged to the defendant, yet if the plaintiff resisted the entry, under a claim that the defendant had already removed all the property that was his, he had no right to use personal violence to overpower the plaintiff's resistance and enforce his claim.

In *Hodgden v. Hubbard*, 18 Vt. 504, 46 Am. Dec. 167, the plaintiff bought a stove of the defendant through false and fraudulent representations as to his solvency and means of paying for it; held, that he acquired no right either of property or possession in the stove and that the owner was justified in pursuing him and retaking the property in the highway and in using as much force as was necessary in overcoming the purchaser's resistance. In *Johnson v. Perry*, 56 Vt. 703, 48 Am. Rep. 826, where the plaintiff went into the defendant's millyard and, without right or license, loaded the defendant's slabs upon the plaintiff's sled, it was held that the defendant might use such force as was necessary to retake his property. Neither of these cases is authority for the defendant, for in each the taking was wrongful.

In the first trial of *Johnson v. Perry*, both parties claimed to own the wood, but the defendant admitted that the plaintiff had peaceably entered his, the defendant's, premises, and got possession of it by loading it upon his sled. This court correctly held in that case (54 Vt. 459) that if the slabs were the plaintiff's, he, having possession of them, "had the right to maintain that possession against the defendant and everyone else"; therefore that decision is not in point for the defendant. In both opinions in *Johnson v. Perry*, the court referred to *Yale v. Seeley*, 15 Vt. 221, and *Richardson v. Anthony*, 12 Vt. 273, as authorities, which, we think, was inadvertence, for the rule in these cases was applied to different facts from those that appeared in *Johnson v. Perry*; and went beyond

what was necessary for the decision of that case. Judge Redfield, in his opinion in *Dustin* ²⁴³ v. *Cowdry*, 23 Vt. 631, evidently doubted the soundness of the doctrine laid down in the two early cases above cited.

In the present case the plaintiff had not wrongfully taken nor wrongfully withheld the defendant's property when the latter undertook to recover it. The case does not even show a demand for it by the defendant and a refusal by the plaintiff to deliver it, but a declaration by the defendant that the box was his and that he should take it, which was not sufficient to place the plaintiff in the attitude of a wrongdoer and justify the defendant in the use of force and violence to get possession of the chattel. In the opinion of a majority of the court the rule stated in the Rhode Island case should be applied to the facts in the case at bar, rather than the rule in *Yale v. Seeley*, 15 Vt. 221.

The request to charge was properly denied and the charge as given was without error. *Yale v. Seeley*, 15 Vt. 221, so far as it conflicts with the views herein expressed, is no longer to be regarded as authority upon this subject.

Judgment affirmed.

Rowell, C. J., dissents.

The Right of the Owner of Property to retake possession thereof is discussed in the note to *Barnes v. Martin*, 82 Am. Dec. 676. It is held in *Commonwealth v. Donahue*, 148 Mass. 529, 12 Am. St. Rep. 591, that one whose personal property has been wrongfully taken from him by another may thereupon retake possession by the use of reasonable force, short of wounding or the employment of a dangerous weapon, and is not criminally liable for so doing.

STATE v. NILES.

[78 Vt. 266, 62 Atl. 795.]

GAME LAWS.—The Nonresident's Right to Hunt, except as otherwise provided by the act of 1904, must be taken to be a license to do so in conformity to the general game laws of the state. (p. 918.)

GAME LAWS—Statutes Applicable to Nonresident Hunters, Constitutionality of.—The regulations of the statutes of Vermont admitting nonresidents to hunt on paying a license fee are within the police power of the state. (p. 919.)

GAME.—No Person can Acquire an Absolute Property in Animals *Ferae Naturae*. The ownership of such animals is at most a qualified one. (p. 920.)

GAME—General Property of All the People of the State.—The qualified property which may exist in animals *ferae naturae* belongs to all the people in common, and may be restrained by positive laws enacted for reasons of state or for the supposed benefit of the community. (p. 920.)

CONSTITUTIONAL LAW—Game—Power of State to Grant or Deny Rights in.—The ownership of game being in the people of the state, the legislature, as the representative of the people, may withhold or grant to individuals the right to hunt and kill game, or qualify and restrain it, as, in the opinion of its members, will best subserve the public welfare. (p. 921.)

GAME.—The Right to Discriminate Between Resident and Nonresident Hunters is found in the fact that the former have and the latter have not a qualified property in all wild game within the state. (pp. 921, 922.)

Lee S. Tillotson, for the respondent.

Warren R. Austin, state's attorney, for the state.

268 **START, J.** The respondent demurs to the information wherein he is charged with the offense of having in his possession two wild deer during the closed season for hunting, and with taking wild deer, contrary to the provisions of No. 94 of the Acts of 1896 as amended by No. 108 of the Acts of 1898, and insists that by No. 128 of the Acts of 1904 nonresidents of this state are exempt from the penalties provided for by the Acts of 1896, and that he is thereby discriminated against in contravention of his rights under the fourteenth amendment to the constitution of the United States. He claims that, by No. 128 of the Acts of 1904, a resident of this state is unlawfully discriminated against, in that he is by the Act of 1896, as amended by No. 108 of the Acts of 1898, prohibited from killing or having in

his possession a deer during the closed season for hunting; that for killing or having in his possession, during the open season more than one deer he subjects himself to a fine of one hundred dollars; that he is prohibited from transporting a deer during the open season without its being open to view, tagged, and plainly labeled with the name of the owner thereof, and accompanied by him; that he is prohibited, during the open season, from hunting, destroying, or capturing deer with a dog or dog kind, by the aid or use of a jack or artificial light, by the method known as crusting, while the deer are yarded, or by the use or assistance of any snare, trap, or salt-lick; and that the possession of a deer, except in the open season, is presumptive evidence that he is guilty of a violation of the provisions of section 1 of the Act of 1896, while a nonresident is, by No. 128 of the Acts of 1904, exempt from all of these prohibitions and requirements. These claims, as a whole, are not sound.

269 Section 1 of the Act of 1896 provides that no person, except in the open season, shall pursue, take, or kill a wild deer, or have in his possession a wild deer or part thereof, so taken or killed, and that the possession of a deer or any part thereof, except in the open season, shall be presumptive evidence that the person having it in his possession is guilty of a violation of the provisions of the section. The Act of 1904 repeals only such acts and parts of acts as are inconsistent therewith. The Act of 1896, as amended by the Act of 1898, is still in force and binding upon a nonresident as well as a resident of this state, except as is otherwise provided by the Act of 1904.

There is nothing in the Act of 1904 that is inconsistent with the Act of 1896, except the provisions relating to the transporting of deer, the penalty for killing more than one deer, and the provision requiring a nonresident to procure a license. That part of the Act of 1896, as amended by the Act of 1898, which prohibits the killing or possession of a deer during the closed season for hunting, or, at any time, the hunting of deer with a dog or dog kind, by the aid or use of a jack or artificial light, by methods known as crusting, while deer are yarded, or by the use or assistance of any snare, trap, or salt-lick, remains in force; and for a violation of any of these provisions residents and non-residents are alike punishable under the Act of 1896.

A nonresident's license to hunt in this state, except as is otherwise provided by the Act of 1904, must be taken to be a license to do so in conformity to the general game laws of this state; and a nonresident who has in his possession, during the closed season, a deer, subjects himself to the penalty provided by the Act of 1896. A nonresident being punishable, under the Act of 1896, for having a deer in his possession during the ²⁷⁰ closed season, is not exempt from the presumption, therein provided for, which arises from such possession; and in prosecutions against him under the Act of 1896 for having such possession, he must overcome this presumption to the same extent that a resident is required to in a like case.

The Act of 1904 does not impose the same penalty upon a nonresident for killing more than one deer during the open season that is by the Act of 1896 imposed upon a resident for doing the same act; for that, a nonresident may be fined not less than twenty-five nor more than one hundred dollars, while a resident must pay a fine of one hundred dollars. Also, a nonresident may transport the carcass of one deer by having a coupon, furnished by the fish and game commissioners, attached thereto, while a resident to do so must have the carcass open to view, tagged, and plainly labeled with the name of the owner thereof, and accompanied by him. These regulations for admitting non-residents, on payment of a license fee, to this state for the purpose of hunting, which differ from those regulating hunting by residents of this state, who are not required to procure a license, are within the police power of the state, and do not render either act nonenforceable.

A resident is not by the acts denied his constitutional right to hunt deer under legislative regulations as to the time for doing so and the number of deer that may be killed by one person; and we cannot say that these regulations are oppressive or unreasonable. These regulations apply to a nonresident as well as a resident hunter. There is nothing in the Act of 1904, which provides for licensing of a nonresident hunter, that takes away the right of a resident to hunt. The regulations respecting the licensing of a nonresident hunter, which differ from those provided for a resident, relate to the license fee, the punishment, and the transportation of deer. If these ²⁷¹ dis-

criminate against a resident, they are discriminations which are within the police power of the legislature to make.

No person can acquire an absolute property in animals *ferae naturae*. The ownership in such animals is at most a qualified one. They belong to no persons in particular. As Blackstone says (2 Blackstone's Commentaries, 394): "A man may, lastly, have a qualified property in animals *ferae naturae* . . . ; that is, he may have the privilege of hunting, taking, and killing them, in exclusion of other persons. Here he has a transient property in these animals, usually called game, so long as they continue within his liberty; and may restrain any stranger from taking them therein; but the instant they depart into any other liberty, this qualified property ceases." It follows that this qualified property belongs to all the people of the state in common, and, as Blackstone further says, "that this natural right . . . may be restrained by positive laws enacted for reasons of state or for the supposed benefit of the community."

Mr. Justice White, in *Geer v. State of Connecticut*, 161 U. S. 519, 16 Sup. Ct. Rep. 600, 40 L. ed. 793, remarks that: "The right to preserve game flows from the undoubted existence in the state of a police power to that end; that in most of the states laws have been passed for the protection and preservation of game, and that the power of the state to so legislate has not been questioned." He further says, "that the power or control lodged in the state, resulting from this common ownership, is to be exercised like all other powers of government as a trust for the benefit of the people, and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good." He quotes from *Ex parte Maier*, 103 Cal. 476, 42 Am. St. Rep. 129, 37 Pac. 402, where it is held that the wild game within a state belongs to the people in their collective sovereign capacity. In ²⁷² *State v. Rodman*, 58 Minn. 393, 59 N. W. 1098, the court said in respect to the ownership of wild animals, that such ownership is in the state, not as proprietor, but in its sovereign capacity, as the representative and for the benefit of all its people in common. This is the doctrine of *American Express Co. v. People*, 133 Ill. 649, 23 Am. St. Rep. 641, 24 N. E. 758, 9 L. R. A. 138, where it is held that the ownership of game is in the people of the state and that the power to legislate

on this subject is part of the police power inherent in each state: See *Phelps v. Racey*, 60 N. Y. 10, 19 Am. Rep. 140; *Wheatley v. Harris*, 4 Sneed, 468, 70 Am. Dec. 259.

The law upon this subject is concisely stated in *Magner v. People*, 97 Ill. 320: "The ownership being in the people of the state—the repository of the sovereign authority—and no individual having any property rights to be affected, it necessarily results that the legislature, as the representative of the people of the state, may withhold or grant to individuals the right to hunt and kill game, or qualify and restrict it, as, in the opinion of its members, will best subserve the public welfare." This doctrine is fully stated in *Payne v. Sheets*, 75 Vt. 335, 55 Atl. 656.

In *State v. Norton*, 45 Vt. 258, the court said: "The numerous statutes which have been passed for the protection of game and fish have been deemed necessary to the beneficial enjoyment of the constitutional right, and the court will not hold such laws unconstitutional until it is clearly shown that they are so prohibitory as to virtually deprive the inhabitants of the right secured to them by the constitution." In *State v. Theriault*, 70 Vt. 617, 67 Am. St. Rep. 695, 41 Atl. 1030, 43 L. R. A. 290, a statute which authorized the fish and game commissioners, when they placed fish in a pond or stream, to prohibit fishing therein, or in specified portions thereof, for a term of years, and provided that waters when so stocked should be treated as public waters, etc., was ²⁷³ held not unconstitutional, but as a reasonable exercise of the police power of the state.

The granting of licenses by the fish and game commissioners to nonresident hunters to kill deer within this state is within the proper exercise of the police power of the state, provided it does not discriminate in their favor and against resident hunters, without classification. Classification is essential to discrimination, and there can be no classification unless there is some difference between resident and nonresident hunters that bears a just relation to the classification. In this case a difference is found in the fact that the resident hunter has a qualified property in the deer, while the nonresident has no property whatever therein.

There is a clear discrimination in the law, as has been shown, in favor of nonresidents in respect to having the carcass exposed to view, labeling, etc. But we think that

a nonresident person, having paid for and obtained a license and having killed a deer under his license, acquires such a property in the body of the animal that it may be removed from the state without its being open to view, tagged, labeled, etc. In this respect the act is not unconstitutional.

Judgment affirmed and cause remanded.

The Fish and Wild Game in a state belong to the people thereof in their sovereign capacity, who may permit or prohibit their taking. If the state permits the taking of fish and game, it has full authority to regulate such taking, and may impose such conditions, restrictions and limitations as it deems needful or proper: *State v. Snowman*, 94 Me. 99, 80 Am. St. Rep. 380; *Ex parte Kenneke*, 136 Cal. 527, 89 Am. St. Rep. 177; *Ex parte Fritz*, 86 Miss. 210, 109 Am. St. Rep. 700. For a general discussion of game laws, see the note to *Ex parte Maier*, 42 Am. St. Rep. 138-144.

STATE v. DUNCAN.

[78 Vt. 264, 63 Atl. 225.]

WITNESSES—Incrimatory Evidence.—The immunity of a witness to not answer incriminatory questions is a personal privilege, which may be and is waived if not seasonably asserted, and the testimony regarded as voluntary. (p. 925.)

WITNESS, Compulsory Giving of Incrimatory Evidence by, What Does not Show.—A plea that the accused was subpoenaed before a grand jury, and being without counsel and ignorant that any charge against him was being inquired into, was required and compelled to, and did, give his testimony and was fully interrogated as to such charge, and testified to facts material and necessary to sustain the indictment, and that upon his testimony and that of other witnesses the indictment was found, does not show that he was compelled to incriminate himself, because it does not state that he claimed his privilege or refused to answer any questions. (p. 926.)

WITNESS—Privilege, Presumption of Waiver of.—Whenever a witness testifies without objection, he is deemed to do so voluntarily. (p. 926.)

LAW, Presumed Knowledge of.—Everyone is presumed to know the law, and the grand jury has the right to act on the presumption that one called as a witness before it knows that he cannot be compelled to answer incriminatory questions. (p. 927.)

WITNESS, Persons Accused of Crime, When not a.—If, when a person is called as a witness, it appears that a crime has been committed and he is in custody as the supposed criminal, he is not regarded as a mere witness, but as a party accused, called before a tribunal vested with power temporarily to investigate the question of his guilt, and he is to be treated the same as though brought before a committing magistrate, and if his examination is not taken in con-

forfeiture to the statute, without oath and on advice of privilege, it cannot be used against him. The rule is otherwise if, when the witness is called and sworn, it has not been ascertained that a crime has been committed and no one has been arrested charged with the crime. (p. 927.)

WITNESS, Incriminatory Answers—When May be Used Against.—If an ordinary witness is on the stand and a self-criminatory act relative to the issue is desired to be shown by him, the question may be asked, and it is then for him to say whether he will answer or claim his privilege, and if he answers without claiming his privilege, his answer may be used against him. (p. 930.)

WITNESS—Criminatory Questions, Necessity of Warning.—If an ordinary witness is asked a criminatory question, it is not necessary to notify him of his privilege and warn him of the possible consequences of his answering, and if without such warning or notice he answers without objection, his answer may be used against him. (p. 930.)

WITNESS—Criminatory Answer—Ignorance of Rights.—The fact that a witness asked a criminatory question was wholly ignorant of his rights with respect to his privilege is not material. If he answers without objection, his answer may be used as evidence against him. (p. 931.)

CRIMINAL LAW.—An Indictment for Conspiracy charging that the defendant did conspire, confederate and agree together to prevent, hinder and deter by violence and threats and intimidation certain manufacturers of granite from further engaging in the business of manufacturing granite, is sufficient. (p. 932.)

Indictment against ten persons for conspiracy, five of whom, having been called before the grand jury, had given criminatory evidence against themselves. They pleaded this in abatement. These pleas were demurred to and the demurrers sustained. The indictment alleged that certain named persons were engaged at Hardwick in the business of manufacturing granite, and that the defendants, "with divers other evil-disposed persons to the said grand jurors unknown, did then and there unlawfully combine, conspire, confederate, and agree together to prevent, hinder, and deter by violence and threats and intimidation the said 'manufacturers of granite' from further engaging and continuing in the business of manufacturing granite, to the great damage of said manufacturers, and to the evil example of all men, and against the peace." etc. A demurrer to the indictment was overruled, and the defendants excepted.

Senter & Senter, Taylor & Dutton, D. G. Morse and Harland B. Howe, for the respondents.

Frank D. Thompson, state's attorney, W. W. Miles and David E. Porter, for the state.

³⁶⁸ ROWELL, C. J. This is an indictment against ten for conspiracy "to prevent, hinder, and deter" the several persons therein named, "by violence, threats, and intimidation, from further engaging and continuing in the business of manufacturing granite." Five of the prisoners were summoned before ³⁶⁹ the grand jury, and gave self-criminating evidence under oath, and they severally plead that in abatement. The other five jointly plead that in abatement, although they themselves were not called before the grand jury. The pleas are demurred to; but only McNaughton's several plea need be considered, as the others are essentially like it.

That plea alleges that while said indictment and the charges of conspiracy therein contained were pending before the grand jury, and while the grand jury was investigating and inquiring into said charges, and considering whether it would find said indictment, the prisoner appeared before the grand jury in obedience to a subpoena duly served upon him; that he did not then know that said indictment and charges were being investigated; that he was not permitted to have counsel, and was not advised in the premises; that he was sworn by the foreman of the grand jury to testify upon the subject matter of said charges, and was required and compelled to make oath as a witness, and then and there under oath, was required and compelled to give testimony touching said indictment and charges, and was fully interrogated as to them, and questioned as to each and every detail, fact, and circumstance of the same, and was then and there obliged and compelled to make, and then and there did make, answer thereto on his oath; that he was not then and there informed by the grand jury, the state's attorney, nor anyone else, and did not know that his own conduct and acts in reference to said charges were then and there in question and under consideration by the grand jury, and that he was not informed, and did not know, that he was then and there charged with any crime, and was not then and there warned nor advised of his right and privilege to refuse to give evidence against himself, and was wholly ignorant and uninformed of his rights in ³⁷⁰ that respect, and did then and there involuntarily and upon his oath answer all questions asked him concerning said charges, and was compelled to testify, and did testify, to facts that were material and neces-

sary to establish the truth of said charges against him and the other respondents; that his said testimony was considered and acted upon by the grand jury in finding and presenting said indictment; and that he was summoned before the grand jury as aforesaid for the purpose of obtaining evidence from him upon which to find said indictment against him and the other respondents.

It is objected that as the matter complained of does not go to the qualification of the grand jury, but only to the propriety of its proceedings, it cannot be taken advantage of by plea in abatement, but only, if at all, by suggestion to the court. But we pass over that question, and consider the plea on its merits.

Our constitution declares that no one can be compelled to give criminating evidence against himself. Such is the common law. *Nemo tenetur se ipsum accusare*. It is objected that the plea is bad because it does not show that the prisoner was compelled to give criminating evidence against himself. This immunity is a personal privilege, and may be waived, and is waived if not seasonably asserted, and the testimony regarded as voluntary: *Chamberlin v. Wilson*, 12 Vt. 491, 36 Am. Dec. 356. The plea does not show that the prisoner asserted his privilege. It alleges that he involuntarily testified. But that is subjective, signifying only his mental state, and means no more than unwillingly and reluctantly, and does not imply a disclosure of that mental state by objecting to answer nor otherwise; and until such disclosure was made in some way, there could have been no compulsion. True, the plea alleges compulsion; but that is only a conclusion, and is not warranted by the facts alleged.

³⁷¹ In *People v. Lauder*, 82 Mich. 109, 46 N. W. 956, the prisoner, who was indicted for bribery, pleaded in abatement that he appeared before the grand jury in obedience to a subpoena, and being ignorant of the fact that charges of bribery against him were being inquired into, and without counsel, or being advised in the premises, he was required and compelled to, and did, give his testimony, and was fully interrogated as to said charges, and testified to facts material and necessary to prove their truth and to sustain the indictment, and that upon his testimony and that of other witnesses the indictment was found. The court said that being subpoenaed and appearing before the

grand jury was not a violation of the prisoner's constitutional rights, nor being sworn before that body, nor testifying upon any matter that did not criminate him, for the law compelled him to do all that under pains and penalties; but that it did not compel him to criminate himself, and that in all cases where a personal privilege exists for a witness to testify or not, and he testifies without objection, he will be deemed to have done so voluntarily. The court went on to say that the prisoner did not say in his plea that he claimed his privilege, or refused to answer any question; that he averred that he was required and compelled to, and did, make answer to the questions put to him, but that that was a conclusion from the facts, whereas the rules of pleading in abatement required him to set forth the facts, and not his conclusions.

It is objected that that case is by a divided court, and stands alone; and *Boone v. People*, 148 Ill. 440, 36 N. E. 99, is much relied upon as holding a different doctrine. It is true that the Michigan case is by a divided court, but it does not stand alone, nor is the Illinois case opposed to it, for there, at the time of his examination before the grand jury, the prisoner was in custody in jail, charged with the very crime about which ³⁷² he was examined and for which he was indicted; and therefore he stood as a party and not as a mere witness, and the court specially noted that distinction. But in the Michigan case the prisoner was not in custody, charged with the offense, at the time he was examined, and therein lies a marked and fundamental difference between the cases.

State v. Comer, 157 Ind. 611, 62 N. E. 452, is practically like the Michigan case. There the prisoner was indicted for selling his vote in violation of the statute. He pleaded in abatement that for the purpose of obtaining evidence, and securing an indictment against him, the grand jury caused him to be summoned before them to answer such questions as might be propounded to him; that he appeared, and was sworn, and while under oath, was interrogated by the grand jury, and by them then and there compelled, forced, and caused involuntarily to testify to matters and facts concerning said crime; that he was not then and there informed by anyone, and did not know, that he had the legal right to refuse to testify or give to the grand jury any evidence concerning his supposed connection with, or com-

mission of, said crime, whereof the grand jury suspected him guilty; that if he had had such information and knowledge, he would not have testified about such facts, nor given the grand jury any evidence in relation thereto; and that the indictment was returned upon the testimony so given by him. The court said that being summoned and appearing before the grand jury and being sworn was not a violation of the prisoner's constitutional rights, and while before the grand jury he could be compelled to testify to any matter that would not criminate him, but could not be compelled to testify to any matter that would criminate him, and could claim his privilege or not, as he chose; but if he gave criminating evidence voluntarily, his constitutional rights were not thereby violated, for it is a general rule that when a personal privilege exists ³⁷³ for a witness to testify or not as he chooses, and he testifies without objection, he will be deemed to have done so voluntarily; that the allegation of the plea that the grand jury compelled and forced the prisoner involuntarily to testify to facts criminating himself was a mere conclusion, whereas facts, and not conclusions, should have been alleged; that the grand jury could not have compelled him, but only the court, and that the plea did not show compulsion; that as to the allegation that the prisoner was not informed, and did not know, of his right to refuse to testify, the statute did not require the grand jury to give him such information; that everybody is presumed to know the law, and that the grand jury had a right to act upon the presumption that the prisoner knew his rights in the premises; that he was not in custody nor under bonds to answer to a charge of selling his vote, and no such charge was pending against him.

The line is definitely drawn in New York between cases in which the testimony of a witness can be used against him, and those in which it cannot be. Thus, when a witness is called and sworn before a coroner's jury before it has been ascertained that a crime has been committed, or before anyone has been arrested, charged with the crime, the testimony of that witness, should he afterward be charged with the crime, may be used against him on his trial; and the mere fact that at the time of his examination he was aware that a crime was suspected, and that he was suspected of being the criminal, will not prevent his being

regarded as a mere witness whose testimony may be given in evidence against him, unless he claimed his privilege. But if, on the other hand, at the time of his examination, it appears that a crime has been committed, and that he is in custody as the supposed criminal, he is not regarded as a mere witness, but as a party accused, called before a tribunal vested with power temporarily to investigate ³⁷⁴ the question of his guilt, and he is to be treated the same as though brought before a committing magistrate, and if his examination is not taken in conformity with the statute, which requires his testimony to be taken without oath and on advice of privilege, it cannot be used against him. This is a judicial examination; that, an extrajudicial. *People v. Mondon*, 103 N. Y. 211, 57 Am. Rep. 709, 8 N. E. 496, is an example of the latter class, and *Hendrickson v. People*, 10 N. Y. 13, 61 Am. Dec. 721, of the former class, to which the case at bar belongs. There the prisoner's wife died suddenly in the morning, and in the evening of the same day a coroner's inquest was held, and the prisoner was called and sworn as a witness. At that time it did not appear that a crime had been committed, nor that the prisoner had been charged with any crime, nor even suspected, except as far as the nature of some of the questions asked him might indicate such suspicion. On his subsequent trial on an indictment for the murder of his wife, the statements made by him at the coroner's inquest were held admissible, on the ground that he was not examined as a party charged with a crime, but simply as a witness, and had testified without objection. The court said that it is only in judicial examinations, namely, in the case provided for by statute, when a prisoner is brought before a magistrate charged with crime, that the preliminaries required by statute are to be observed, and the examination taken without oath and on advice of privilege; that all other examinations are extrajudicial; that one is the examination of a witness, the other, of a party; that in all cases, as well before coroners' inquests as on the trial of issues in court, when the witness is not under arrest, nor before the tribunal, charged with crime, he stands on the same footing as any other witness; that he may refuse to answer, and that his answers are to be deemed to be voluntary unless he is compelled to answer after having refused

375 to do so, in which case only will they be deemed to be compulsory and be excluded.

The same thing was held in *Regina v. Coote*, 12 Cox C. C. 557, which went up from the court of queen's bench for the Province of Quebec on a case reserved. There certain officers called "fire marshals" were appointed under a statute, with power to inquire into the origin of fires in Montreal and Quebec, and for that purpose to compel the attendance of witnesses and examine them on oath, and to commit to prison any witness refusing to answer without just cause. On an inquiry held in pursuance of that statute as to the origin of a fire in a warehouse occupied by the prisoner, he was examined on oath as a witness. At the time of such examination there was no charge against the prisoner nor anyone else, and he was not cautioned that his evidence might be used against him. Subsequently the prisoner was tried for arson of said warehouse, and his depositions made at said inquest were admitted in evidence against him, and properly so, it was held. After reviewing the cases, their lordships gave it as their opinion that the depositions on oath of a witness legally taken, are evidence against him should he be subsequently tried on a criminal charge, except so much of them as consist of answers to questions to which he has objected as tending to criminate him, but which he has been improperly compelled to answer; that the exception depends upon the principle, *nemo tenetur se ipsum accusare*, but does not apply to answers given without objection, which are to be deemed to be voluntary. To the objection that the prisoner should have been cautioned as prisoners accused before magistrates are required to be by statute, their lordships said that the statute applied only to accused persons, and not to a mere witness, as the prisoner was.

376 In *Cloggett's Case*, Dears. C. C. 656, the court said that the test is, not whether the witness could discriminate between matters to which he was bound to testify and those to which he was not, but whether he might have objected; that if he might have and did not, he voluntarily submits to testify.

It is unnecessary to inquire whether the conditions and circumstances of a case may not be such as to speak for the witness, and, of themselves, constitute compulsion, for the

plea does not present a state of facts calling for such inquiry.

But the privilege is an option of refusal, not a prohibition of inquiry. Hence, when an ordinary witness is on the stand, and a self-criminating act relevant to the issue is desired to be shown by him, the question may be asked, and then it is for the witness to say whether he will answer it or claim his privilege, for it cannot be known beforehand which he will do: 3 Wigmore on Evidence, sec. 2268; Rapalje's Law of Witnesses, sec. 265; *Short v. State*, 4 Harr. (Del.) 568. A witness must obey a subpoena, and be sworn; then he may claim his privilege: *In re Eckstein*, 148 Pa. St. 509, 24 Atl. 63; *United States v. Kimball*, 117 Fed. 156; *Boyce v. Wiseman*, 10 Ex. 647.

Some of the cases already referred to relate to the question of notifying the ordinary witness of his privilege, and warning him of possible consequences, and such used to be the English practice. Mr. Erskine once said that he conceived it to be of all things the most idle, to recognize the privilege as a principle of law, and not at the same time warn the witness that his answer might criminate him. But in Lord Eldon's time the practice had come to be otherwise, he said, and he would not suppress an interrogatory in chancery allowed by the master, but let it be put, assuming that the witness would claim his privilege if he wanted to: *Paxton v. Douglas*, 16 ³⁷⁷ Ves. 239. Parke, B., said in *Attorney General v. Radloff*, 10 Ex. 84, that he thought the witness ought to make the objection himself, though he understood that in Lord Cardigan's case, Lord Denman interposed to prevent a witness from answering a question having a tendency to elicit self-criminating evidence. It seems clear, upon the authorities, that the old practice has disappeared in England, as far, at least, as any general rule is concerned.

But in this country, Mr. Wigmore says, both the rule and the trial custom vary in different jurisdictions; that no doubt a capable and an impartial judge will give the warning when need appears; but that there is no reason for letting a wholesome custom degenerate into a technical rule: 3 Wigmore on Evidence, sec. 2269. In this state the law does not require the warning, though ordinarily it is given, either by counsel, or by the court on its own motion or at the suggestion of counsel. But the privilege is the witness',

and he alone must claim it: *Chamberlin v. Wilson*, 12 Vt. 491, 36 Am. Dec. 356. In Massachusetts it is within the discretion of the court, and the usual practice, to advise a witness that he is not bound to criminate himself, when it appears necessary to protect his rights: *Mayo v. Mayo*, 119 Mass. 290. So in *Janvrin v. Scammon*, 29 N. H. 280, it is held that as the privilege is personal to the witness, it is for him to say in the first place whether he will answer; but that the court will frequently interpose, and inform him of his privilege when it sees that his answer might tend to criminate him. This seems to be the general practice in this country; but in some of the states it is otherwise. Thus, in Virginia it is held that as a general rule the witness should be warned of his privilege before he can be held to have waived it by answering: *Cullen v. Commonwealth*, 24 Gratt. 624.

³⁷⁸ Thus it appears that the allegations of the plea that the prisoner did not know what was going on before the grand jury, and was not advised of his privilege, are immaterial, for it is not shown that at the time he testified before that body it had been ascertained that a crime had been committed, nor that he was in custody, charged with the crime, nor even suspected of it, and therefore he stood as an ordinary witness, and not at all as a party.

Nor is the allegation that he was "wholly ignorant" of his rights in respect of his privilege, material, for he is to be treated just as if he knew them, for ignorance of the law excuses no one. Coote's case (12 Cox C. C. 557), above referred to, is in point here. There the chief justice of the court below suggested that Coote might have been ignorant of the law enabling him to decline to answer criminating questions, and that if he had been acquainted with it, he might have withheld some of the answers he gave. Their lordships said that as a matter of fact it would appear that he was acquainted with so much of the law; but whether he was or not, it was obvious that to institute an inquiry in each case as to the extent of the prisoner's knowledge of the law, and to speculate whether, if he had known more he would or would not have refused to answer certain questions, would be to involve a plain rule in endless confusion; and their lordships saw no reason to introduce, with reference to this subject, an exception to the rule, recognized as essential to the administration of the criminal law, *ignorantia legis non excusat*.

The plea, therefore, is held bad, and the other pleas must fall with it.

The indictment is demurred to for that it does not charge the offense with the requisite certainty. It is claimed that although it is in this respect almost identical in language with 379 the indictments in *State v. Stewart*, 59 Vt. 273, 59 Am. Rep. 710, 9 Atl. 559, and *State v. Dyer*, 67 Vt. 690, 32 Atl. 814, which were held good, yet that those cases are not authority for holding this indictment good, because there the conspiracy related to the preventing, hindering, and deterring of workmen from accepting, undertaking, and prosecuting the work of stone cutting, which was made criminal by statute. But the statute is directed more to the means of accomplishing the object of the conspiracy than to the conspiracy itself, and it was held in both of those cases that the indictment charged a conspiracy to do an act unlawful at common law, by means unlawful by statute. Tested by those cases, to which we refer for the law of the subject, it is clear that this indictment charges a conspiracy to do an act unlawful at common law, and therefore is good, without more.

Judgment affirmed and cause remanded.

The Privilege of a Witness as to incriminating testimony is the subject of a monographic note to *Evans v. O'Connor*, 75 Am. St. Rep. 318-347. The right of a witness in a criminal trial to refuse to answer incriminating questions is a personal privilege which he may exercise or waive; if he chooses to answer them, neither he nor his counsel can legally object: *State v. Shockley*, 29 Utah, 25, 110 Am. St. Rep. 639.

HARRISON'S ADMINISTRATOR v. NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY.

[78 Vt. 473, 63 Atl. 321.]

INSURANCE—Policy Procured for and Assigned to Another. A policy procured by a man on his own life, in which he has an insurable interest, for the benefit of one named therein who has not such interest and who makes no outlay in the matter, is not a wager, and such policy, though assigned without consideration to such person, is no wager. (p. 933.)

ASSIGNMENT Equitable, as a Defense.—A plaintiff who has a legal interest may be defeated by an equitable assignment, because a judgment against the defendant will not protect him from the equitable owner. (pp. 933, 934.)

Butler & Moloney and F. S. Platt, for the plaintiff.

Lawrence & Lawrence, for the defendant.

⁴⁷⁶ ROWELL, C. J. This is assumpsit on a policy of insurance procured by the intestate on his own life, payable to his executors, administrators or assigns.

As the case is presented, it must be taken that the intestate procured the policy for the purpose on his part of immediately assigning it without consideration to Mary A. Gleason, then of Rutland, but now of New York, who had no insurable interest in his life; that the policy was assigned accordingly in duplicate under seal, executed by both of the parties, for an expressed valuable consideration, and the policy and one of the assignments delivered to the assignee, who has ever since kept the same, the other assignment being sent to ⁴⁷⁷ the defendant company; that the intestate paid all the renewal premiums during his life, and that the assignee paid the last renewal premium; that since this suit was commenced, the assignee has properly brought suit on the policy in her own name as assignee in New York, which suit is still pending; and that the suit at bar was not brought at her request nor for her benefit, but against her will and interest, on the ground and claim that the assignment is void, and that therefore she has no interest in the avails of the policy.

This is not a wagering policy, as claimed by the defendant, for by the law of this state, as shown by *Fairchild v. Northeastern Mut. Life Assn.*, 51 Vt. 613, a policy procured by a man on his own life, in which he has an insurable interest, for the benefit of one named therein who has no such interest, and who makes no outlay in the matter, is not a wager; and by parity of reason, such a policy assigned to such a person, though taken out for that purpose, is no wager.

But the defendant says that though the policy is valid, the plaintiff ought not to be allowed to recover upon it if the assignment is good, for then he would have no right to the money if recovered, and no right to sue for it without the consent and against the will and interest of the assignee, and that therefore the defendant has a right to contest the plaintiff's title, and to show the assignment good, and thereby to defeat the action, in order to protect itself from the danger of having to pay twice.

It is true as a general proposition, that in a suit at the common law, a plaintiff who has the legal interest in the

subject matter of the litigation, cannot be defeated by showing an equitable ownership of the entire subject matter in a third person. This proposition is based upon the ground that ⁴⁷⁸ a judgment against the defendant will protect him against the claim of the equitable owner. But when it will not protect him, he may contest the plaintiff's right to sue by setting up the equitable ownership in defense. This is expressly recognized in *Hackett v. Kendall*, 23 Vt. 275. That was an action by the bearer, on a promissory note, the equitable interest in which was in the assignee in bankruptcy of one who was the equitable owner of the note when it was given, and who sold and delivered it to the plaintiff before suit brought, without the knowledge or consent of the assignee, who never knew of the existence of the note till the trial below. The court said that the defendant could question the right of the plaintiff to sue, for the purpose of protecting himself from a subsequent suit in the name of some one having a better right, and who had not acquiesced in that suit; but that he could not go beyond that. But in the circumstances of that case, the court thought the defendant was in no danger from the assignee, and the plaintiff had judgment.

The same principle is recognized in *Fletcher v. Fletcher*, 29 Vt. 98. That was also an action by the bearers, on a promissory note. The defendant claimed that the plaintiffs had no right to the note, and consequently no right to sue upon it. The court said that as the defendant did not deny that he owed the note and should pay it to somebody, it was immaterial to him to whom he paid, or who recovered upon it, provided that when paid or recovered upon, it would bar any further claim by others; that to that extent and for that purpose, but no farther, it was competent for him to contest the plaintiffs' title and their right to sue.

Sanford v. Huxley, 18 Vt. 170, was assumpsit on a note payable to the plaintiff or bearer in neat stock. The defendant pleaded equitable ownership in one Gibson. But the court ⁴⁷⁹ said that as the note was payable to the plaintiff and not negotiable, the right of action was in him; and as it was not claimed that the action was prosecuted without the privity and against the will of Gibson, the plea was no defense.

So in New York under the code, an assignee, in order to recover, must have a title that will protect the defendant against the assignor: *Hays v. Hathorn*, 74 N. Y. 486.

The principle of these cases applies here, and necessitates a reversal, unless we can say, as the plaintiff claims, that the assignment is void for want of consideration. But we cannot say that, for if it was a gift, as it may have been, a consideration is not essential to its validity: *Watson v. Watson*, 69 Vt. 243, 39 Atl. 201.

We take no note of the plaintiff's offer to show revocation, for if the assignment is revocable, as to which we say nothing, it cannot, as the case is presented, be taken to have been revoked.

Reversed and remanded.

The Assignment of Life Insurance Policies is the subject of a monographic note to *Chamberlain v. Butler*, 87 Am. St. Rep. 484-519. Such an assignment may be made without a valuable consideration (*Opitz v. Karel*, 118 Wis. 527, 99 Am. St. Rep. 1004), and, according to the better opinion, to a person having no insurable interest in the life of the assured: *Mechanic's Nat. Bank v. Comins*, 72 N. H. 12, 101 Am. St. Rep. 650. But see *Hinton v. Mutual Reserve etc. Assn.*, 135 N. C. 314, 102 Am. St. Rep. 545.

CASES
IN THE
SUPREME COURT
OF
WEST VIRGINIA.

CHARLESTON GAS COMPANY v. KANAWHA GAS COMPANY.

[58 W. Va. 22, 50 S. E. 876.]

MONOPOLIES—Trade Combinations.—If corporations supplying gas to the same community make an agreement to parcel out between them the territory supplied, giving to each the exclusive right to sell gas in certain territory, fixing prices and prohibiting a change thereof except by mutual consent, binding one corporation to use for public consumption only gas produced by the other, and prohibiting any one of the corporations from producing from that section of the country in which the other produces gas, such agreement tends to create a monopoly, is void, and cannot be enforced. (p. 940.)

MONOPOLIES.—Trade Combinations, the object of which are to obtain control of a particular branch of business, are conspiracies, and all contracts for the accomplishment of such end are void, regardless of the extent of such combinations. (p. 940.)

MONOPOLIES—Trade Combinations.—Any combination of competing corporations, the necessary consequence of which is the controlling of prices, or limiting production, or suppressing competition, in such a way as to create a monopoly, is contrary to public policy and void. An agreement tending to prevent competition and create a monopoly is void as against public policy. (p. 941.)

Brown, Jackson & Knight, Simms & Enslow and Weiland Thorp, for the appellant.

Hagar & Stewart, Chilton, MacCorkle & Chilton, Ram & Hurd, Mollohan, McClintock & Mathews, McComas & Northcott and Holt & Duncan, for the appellees.

23 BRANNON, P. The Charleston Natural Gas Company is a corporation chartered to furnish natural gas, having a supply field in Boone county, from which it piped

gas for consumption in Charleston. The Kanawha Natural Gas, Light and Fuel Company is also a corporation for the production and sale of natural gas. It had a supply field in a territory partly in Roane county, partly in Kanawha county, and had laid pipes from that field to the city of Charleston, and was about to lay pipes in its streets to furnish gas for public use. The Charleston company already occupied the streets with its distributing pipes. The latter company had also leased some territory in Roane county, and its Boone county field furnishing a poor supply of gas. it was boring wells in Roane county and was about to run a pipe-line from its Roane county field to Charleston to aid its supply from Boone county. In this state of things, January 20, 1903, the two corporations made a written agreement. It gave the Charleston company "exclusive right to sell natural gas in" a certain section comprising the main city of Charleston and a large area besides, and gave to the Kanawha company exclusive right to sell gas in another section adjoining Charleston, also quite a large area. The agreement contained these provisions: "Second. The parties hereto mutually agree that neither of them will, during the life of this agreement, sell or distribute gas in the territory hereby allotted to the other; nor will either party permit any other person or corporation to operate or sell gas under its ordinances in the territory of the other. Third. The Charleston company agrees that it will not operate for gas, drill wells or acquire territory for gas purposes within the territory now occupied by the Kanawha company, and described as follows: Big Sandy district of Kanawha county, West Virginia, and the Geary and Walton districts of Roane county, West Virginia, during the term of this agreement. Fourth. The Charleston company agrees to take all the gas required for its business under this agreement from the Kanawha company, at all times during the period of this ²⁴ agreement, provided the Kanawha company is able to support the same, under the terms of this agreement." The agreement also provides that the Kanawha company shall bring to Charleston gas from its field, and that when brought to Charleston to its regulator it shall be for joint use, the Kanawha company to supply and the Charleston company to accept from the Kanawha company the gas necessary to supply the customers of the Charleston company. The agreement divides the earnings in certain proportions be-

tween the two corporations. The agreement to last twenty years. This agreement was carried out, and business carried on under it. Recently a third company, the United States Gas Company, comes into the field. It is engaged in laying a gas pipe-line from the city of Huntington to the supply field of the Kanawha company in Roane and Kanawha counties to supply Huntington, and likely Portsmouth and Ironton, Ohio, and Ashland and Catlettsburg, Kentucky. The Kanawha company made an agreement to transfer and assign to the United States Gas Company its assets, leases and wells—its entire supply field in Roane and Kanawha counties, in consideration of stock and bonds of said United States Gas Company. The Charleston company filed its bill in the circuit court of Kanawha county, alleging that the Kanawha company proposed to surrender its charter and discontinue business after its property and assets should be transferred to the United States company; that the laying of a gas pipe-line into said supply field for the supply of gas to other cities and sections, especially the large pipe intended to be laid, will result in a speedy depletion in the supply of gas from said gas field, and end in its exhaustion within five years, and in irreparable damage to the Charleston company in leaving it without a supply of gas for its business—in violation of the duty and obligation of the Kanawha company under said contract to supply the Charleston company with gas. The bill asked an injunction enjoining the Kanawha company from transferring its assets and property, particularly said gas territory, to the United States company, and enjoining both companies from laying any gas line into said gas territory; asking that the said Kanawha company be enjoined from discontinuing business; and that said agreement be specifically enforced, and said territory be held by said Kanawha company to answer ²⁵ the end and purposes of said agreement. A preliminary injunction was granted, but was later dissolved, and the Kanawha company appeals.

The plaintiff's bill for relief rests on the contract between the two gas companies. That contract is challenged as void and not a valid ground of action in a court of justice, because an unlawful agreement contrary to public policy as creating a monopoly in an article necessary for public use for fuel and illumination and tending to suppress competi-

tion and impose on the public inordinate prices for it. At one time monopoly meant a grant from king or state of an exclusive right to manufacture or sell certain things; but now it means "any combination the tendency of which is to prevent competition, in its broad and general sense, and to control prices to the detriment of the public": 20 Am. & Eng. Ency. of Law, 2d ed., 846; 4 Blackstone's Commentaries, 159. In the days of Elizabeth monopoly grants were as numerous as flies: Hume's History of England, 335. When a list was being read in parliament a member exclaimed, "Is not bread in the number?" "Bread," said some one. "Yes, I assure you, if affairs go on at this rate, we shall have bread reduced to a monopoly before next parliament." It has come to that pass verily in our day. The courts have always condemned monopoly when brought before them. They must continue to do so. They are the bulwark of the public safety. Other branches of government may indulge monopolies; the courts cannot. They are leaning more and more against it in every form. These two corporations were chartered by the state for public service and benefit. "The supply of illuminating gas is a business of a public nature to meet a public necessity. It is not a business like that of an ordinary corporation engaged in the manufacture of articles that may be furnished by individual effort. Hence, while it is justly urged that those public rules which say that a given contract is against public policy, should not be arbitrarily extended so as to interfere with the freedom of contract, yet in the instance of business of such character that it presumably cannot be restrained to any extent whatever, without prejudice to the public interest, courts decline to enforce or sustain contracts imposing such restraint, however partial, because in contravention of public policy. The subject is much considered and the authorities ²⁶ cited in West Virginia Tr. Co. v. Ohio River Pipe Line Co., 22 W. Va. 600; Chicago Gas L. Co. v. People's Gas etc. Co., 121 Ill. 530, 2 Am. St. Rep. 124, 13 N. E. 169; Western Union Co. v. Union Co., 65 Ga. 160, 38 Am. Rep. 781"; Gibbs v. Consolidated Gas Co., 130 U. S. 396, 9 Sup. Ct. Rep. 553, 32 L. ed. 979. Gibbs rendered service in effecting a combination of Baltimore gas companies, fixing rates chargeable on mutual consent, and he was denied recovery for services because of the illegality of the contract. The general principles stated in West Virginia Trans. Co. v. Ohio River Pipe Line Co., 22

W. Va. 600, 46 Am. Rep. 527, condemn this contract, because a contract between corporations giving to each exclusive right to furnish gas in certain areas, and fixing prices dependent for change upon mutual consent. This contract stifled competition and placed the public at the mercy of the corporations as to prices. Within a large extent of ground, including the city of Charleston and adjoining territory containing thousands of people, it debarred one company from operating in one section, the other in another. It prohibited the Charleston company from producing gas in a certain territory, though it had leases in it. It prohibited either company from allowing a competitor to sell gas under its franchise. It could not sell gas to another supplier. Nor was the Charleston company to buy gas from another seller than the Kanawha company. It is hard to see how there could be furnished a plainer instance of monopoly. Far back in the English common and statute law monopolies were condemned: Brannon's Fourteenth Amendment, 132. In *Darcy v. Allen*, [1602] 11 Coke, 84, a grant from the crown of a monopoly was held void. As to the evil the court said: "The price of the same commodity will be raised; for he who has the sole selling of any commodity may and will make the price as he pleases." In 1623 the ruling in the *Darcy* case was approved by an English act declaring prior monopoly grants void and no longer of effect. In the reign of Edward VI an act condemned the old modes of monopoly and restraint of trade called regrating, forestalling and engrossing. Parliament often legislated against monopoly. It has assumed varied forms in later days. "Trusts" are common, made with intent to monopolize under another name. It still remains common law. "A combination, the object of which is to obtain control of a particular branch of business, is a conspiracy, and all contracts for the accomplishment of this end are void. So far as relates to ²⁷ its legality the extent of the combination is immaterial. It may be confined to a single city or town, or it may extend to a state or a number of states, or it may include the country. The gist of the offense is the conspiracy or the combination for the purpose of accomplishing the end sought": Beach on Monopoly, sec. 81. The supreme court of Pennsylvania said in a celebrated case on monopoly: "A combination is criminal whenever the act to be done has a necessary tendency to prejudice the public or oppress indi-

viduals, by unjustly subjecting them to the power of the confederates, and giving effect to the purposes of the latter, whether of extortion or of mischief. . . . Men can often do by the combination of many what severally no one could accomplish, and even what, when done by one, would be innocent": *Morris Run Co. v. Barclay Coal Co.*, 68 Pa. St. 173, 8 Am. Rep. 159. Our own late case, *Slaughter v. Thacker Coal Co.*, 55 W. Va. 642, 104 Am. St. Rep. 1013, 47 S. E. 247, held void, as against public policy in suppressing competition, an agreement between coal companies to put their entire output into the hands of another corporation to sell, fixing price, and prohibiting sale at less than as agreed between them. Action on it for its breach was denied. In *Harding v. American Glucose Co.*, 182 Ill. 551, 74 Am. St. Rep. 189, 55 N. E. 177, 64 L. R. A. 738, 65 L. R. A. 342, it is laid down for law that "any combination of competing corporations, the necessary consequence of which is the controlling of prices, or limiting production, or suppressing competition, in such a way as to create a monopoly, is contrary to public policy and void. An agreement tending to prevent competition and create a monopoly is void by the principles of the common law, because it is against public policy." In *Chicago Gas L. Co. v. People's etc. Co.*, 121 Ill. 530, 2 Am. St. Rep. 124, 13 N. E. 169, was an agreement between two gas companies dividing the city into two sections, giving one section to each company, binding them not to lay pipes or sell gas in the sections of each other. Just this case. The decision was: "A private corporation to which is granted by its charter the privilege of manufacturing and supplying a city and its inhabitants with gas for illuminating purposes, cannot, by contract with any other company, disable itself from the performance of its duty to the public, and transfer, absolutely, its right to furnish gas to any part of the city, and a court of equity will not enforce such a contract, it being contrary to public policy." If two ²⁸ companies having permission to supply natural gas to a city make an agreement fixing the price of gas to consumers, and stipulating that neither company will furnish gas to patrons of the other, such "agreement is a restriction upon fair competition, and creates, at least, a basis for monopoly. It is therefore unlawful": *State v. Portland Nat. Gas Co.*, 153 Ind. 483, 74 Am. St. Rep. 314, 53 N. E. 1089, 53 L. R. A. 413. It declares for

the old rule, "Competition is the life of trade." A combination of two coal companies to give a monopoly on coal was involved in *Arnot v. Pittson etc. Coal Co.*, 68 N. Y. 558, 23 Am. Rep. 190. The court said: "A combination to effect such a purpose is inimical to the interests of the public, and all contracts designed to effect such an end are contrary to public policy and therefore illegal." "It is no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted on the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public." The old New York case in 1844, *Stanton v. Allen*, 5 Denio, 434, 49 Am. Dec. 190, held void an agreement between owners of boats to fix rates and binding members not to engage in business outside the association: *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666. Why quote from other cases when there is so much authority on this line? *Western Union v. American Union*, 65 Ga. 160, 38 Am. Rep. 781; *Greenhood on Public Policy*, 178; *State v. Standard Oil Co.*, 49 Ohio St. 127, 34 Am. St. Rep. 541, 30 N. E. 279, 15 L. R. A. 145; *People v. North River Sugar R. Co.*, 121 N. Y. 582, 18 Am. St. Rep. 843, 24 N. E. 834, 9 L. R. A. 33.

Here are two corporations licensed by the state to serve the city of Charleston, each having oil territory and appliances. The Charleston company had been supplying the city with a main line from Boone county, with pipes ramifying through the city. Its supply is inadequate. It acquires a gas field in Roane county intending to develop gas and pipe it to its city lines. Then comes the Kanawha company. It has a gas field in Roane and Kanawha counties. It develops and lays a line to Charleston; but though it got a franchise to do so, it had not yet laid pipes in the streets, but was about to do so. The two competing companies confront each other in competition. Then they overcome this crisis by the agreement. For what? To avoid competition. No other ²⁹ purpose. Whether that was the actual design or not is not material. Such the tendency; such the potentiality of the arrangement; such the result. The law looks at tendency, ability to do harm, at the result. "The form assumed by these corporations is immaterial in determining their illegality": 20 Am. & Eng. Ency. of Law, 2d ed., 847. Authorities above and those cited in Brannon's Fourteenth Amendment, 372, lead me to say that the statement of law

there made is sound: "Thus these several corporations were combined under one ownership and control, and no longer competed with each other in the production and sale of commodities. What the purpose of this arrangement? Abatement or destruction of competition, limitation of production, if demand declines and prices go down, maintenance or enhancement of prices for articles necessary for public consumption; in short, control of production and prices, control of the market in given lines, and either the destruction of outstanding concerns or their compulsory amalgamation with the combination; and sometimes even with express provision to buy in the stock of other companies. The courts declare such combinations partnerships, and held them illegal, because corporations can only separately carry out the functions assigned by the state, and cannot merge in a partnership." Here we have two public service corporations in a partnership. Corporations cannot form a partnership, but must act singly: *People v. North River Sugar R. Co.*, 121 N. Y. 582, 18 Am. St. Rep. 843, 24 N. E. 834, 9 L. R. A. 33. The public suffers, or may do so.

It is suggested that though some of the clauses of the agreement may be obnoxious to the vice of monopoly, yet those clauses are separable from the rest, and are not involved in this case. They are involved. They affect and poison the whole. The trouble is, the whole spirit, drift, object, effect of the contract promotes monopoly. It works a combine, a union against public policy. As an entirety it does so. Its warp and woof are made of monopoly. We are as a court asked to enforce a contract with these hurtful features and consequences interwoven in its frame. We cannot do so consistently with law.

We affirm the decree.

Unlawful Trusts and Monopolies are discussed in the monographic note to *Harding v. American Glucose Co.*, 74 Am. St. Rep. 235-273. For recent decisions bearing upon the doctrine of the West Virginia court in the principal case, see *Getz Bros. & Co. v. Federal Salt Co.*, 147 Cal. 115, 109 Am. St. Rep. 114; *Keene Syndicate v. Wichita Gas etc. Co.*, 69 Kan. 284, 105 Am. St. Rep. 164; *Monongahela River etc. Coal Co. v. Jutte*, 210 Pa. St. 288, 105 Am. St. Rep. 812; *Slaughter v. Thacker Coal etc. Co.*, 55 W. Va. 642, 104 Am. St. Rep. 1013. The true test of the validity of a contract or combination between corporations or other persons to fix the price and control the supply of a commodity is whether it affords only a fair and just protection to the parties thereto, or whether it is so broad as to interfere with the interests of the public. If the former, it is valid; if the latter, it is void; *Finck v. Schneider Granite Co.*, 187 Mo. 244, 106 Am. St. Rep. 452.

HOLLEY'S EXECUTOR v. CURRY.

[58 W. Va. 70, 51 S. E. 135.]

DEED of Trust—Equitable Mortgage.—A writing purporting to be a deed of trust, executed, acknowledged and recorded as such, but with no seal attached to the signature of the grantor, though void as a deed of trust, may constitute a valid equitable mortgage. (p. 945.)

DEEDS—Description.—It is essential to the validity of a grant that the thing granted should be so described as to be capable of being distinguished from other things of the same kind; but it is not necessary that the grant itself should contain such a description as without the aid of extrinsic testimony will show precisely what is conveyed. (p. 946.)

DEEDS—Description.—A description in a deed omitting the county or state where the land is situated does not render the deed void for want of certainty of description, provided the deed contains or provides other means for identifying the land conveyed. (p. 947.)

DEEDS OF TRUST—Description of Debt.—A deed of trust or other writing charging real estate to secure a debt must in some way describe and identify the debt it is intended to secure. Substantial and not literal accuracy is all that is required. The description of the debt must be correct as far as it goes, and must be full enough to direct attention to the sources of correct information, and be such a description of the debt as not to mislead or deceive as to its nature or amount. (p. 948.)

MORTGAGES—Equitable—Description of Debt.—An equitable mortgage stating that it is given to secure to one person as executor of another the payment of whatever amount a third person may owe him as executor on a settlement, sufficiently describes the debt to secure such amount as such party may owe on a settlement of accounts, except such items as are barred by limitation at the time of the making and delivery of such equitable mortgage. (p. 948.)

LIMITATION OF ACTIONS—New Promise.—A provision in an equitable mortgage that it is given to secure to one person, as the executor of another, the payment of whatever amount a third person may owe him as executor on a settlement, is not sufficient to constitute a new promise removing the bar of the statute of limitations. (pp. 948, 949.)

LIMITATION OF ACTIONS—New Promise.—An acknowledgment in writing, to operate as a new promise to remove the bar of the statute of limitations, must be a clear and definite acknowledgment of a precise sum, plainly importing a willingness and liability to pay, not in any wise conditional, nor by way of compromise or attempt at settlement. (p. 949.)

C. W. Campbell, G. R. Heffley, C. E. Burns and J. E. Chilton, for the appellant.

D. E. Wilkinson, for the appellees.

⁷¹ COX, J. This is an appeal from a decree of the circuit court of Lincoln county, in a suit in chancery brought on the

ninth day of August, 1893, by E. W. Holley, surviving executor of James A. Holley, deceased, against B. F. Curry and others, to enforce the lien of a writing purporting to be a deed of trust bearing date the second day of September, 1882, executed and acknowledged by B. F. Curry to J. E. Chilton, trustee, against ⁷² certain real estate which plaintiff claimed was charged by said writing for the purpose of securing a debt to plaintiff as executor. Such proceedings were had that upon final hearing plaintiff's bill was dismissed, and of this plaintiff complains.

Numerous defenses were interposed by the defendant by demurrers, answers and otherwise. It is claimed by the defense that the writing aforesaid is a mere nullity and that it cannot be enforced as a lien, for the following reasons: 1. Because it was not under seal; 2. Because of uncertainty in the description of the real estate sought to be charged thereby; 3. Because of uncertainty in the description of the debt sought to be secured thereby to James A. Holley's executor.

The writing purports to be a deed of trust. It was executed, acknowledged and recorded as such, but no seal or scroll was affixed to the signature of B. F. Curry thereto. It is not a deed: *Atkinson v. Miller*, 34 W. Va. 115, 11 S. E. 1007, 9 L. R. A. 544; *Dickinson v. Chesapeake etc. R. R. Co.*, 7 W. Va. 390. Although not a deed, if otherwise free from objection, it is, in substance, a contract for a lien, and as such, an equitable mortgage: *Atkinson v. Miller*, 34 W. Va. 115, 11 S. E. 1007, 9 L. R. A. 544; *Wayt v. Carwithen*, 21 W. Va. 516; *Knott v. Mfg. Co.*, 30 W. Va. 790, 5 N. E. 266.

In determining matters of description of the real estate sought to be charged, and of the debt sought to be secured, by said writing, the same principles apply which would apply if the writing were a deed instead of an equitable mortgage.

The writing in question describes the real estate sought to be charged as follows: "Seventy-two acres of land situate near Hamlin, the same bought of the land company. Also twelve and one-half acres of land also situate near Hamlin and the same conveyed to said B. F. Curry by James T. Carroll, Jr. Also three acres situate near Hamlin, and known as the old church lot. Also my storehouse and lot and livery stable and lot in Hamlin."

There are many decisions by this court on the subject of descriptions of real estate, in deeds and other writings. Among them are *Warren v. Syme*, 7 W. Va. 474; *Thorne v. Phares*, 35 W. Va. 771, 14 S. E. 399; *Simpkins v. White*, 43 W. Va. 125, 27 S. E. 361; *Mathews v. Jarrett*, 20 W. Va. 415; *Westfall v. Cottrills*, 73 24 W. Va. 763. The decisions of other states on the question of description are almost innumerable, and not always consistent. It may be laid down generally, that great liberality is allowed in the matter of description. In description, that is certain which can be made certain. A deed will not be declared void for uncertainty if it is possible, by any reasonable rules of construction, to ascertain from the description, aided by extrinsic evidence, what property it is intended to convey. The office of description in a deed or other writing, is not to identify the land, but to furnish means of identification: *Simpkins v. White*, 43 W. Va. 125, 27 S. E. 361; *Blake v. Doherty*, 5 Wheat. (U. S.) 359, 5 L. ed. 109; *Cox v. Hart*, 145 U. S. 376, 12 Sup. Ct. Rep. 962, 36 L. ed. 741; 2 Devlin on Deeds, 2d ed., sec. 1012, note 1; *Jones on Real Property*, sec. 323; *Brewster on Conveyancing*, sec. 75.

In the case of *Blake v. Doherty*, 5 Wheat. (U. S.) 1359, 5 L. ed. 109, the opinion being delivered by Chief Justice Marshall, it is held: "It is essential to the validity of a grant that the thing granted should be so described as to be capable of being distinguished from other things of the same kind. But it is not necessary that the grant itself should contain such a description as, without the aid of extrinsic testimony, to ascertain precisely what is conveyed."

Usually general descriptions such as "all the estate both real and personal of the grantor"; "all my land" in a certain town, county or state; "all my land wherever situated"; "all my right, title and interest in and to my father's estate at law," and the like, are held good: *Brewster on Conveyancing*, sec. 81; *Pettigrew v. Dobellaar*, 63 Cal. 396; *Frey v. Clifford*, 44 Cal. 335; *Austin v. Dolbee*, 101 Mich. 292, 59 N. W. 608; *Huron Land Co. v. Robarge*, 128 Mich. 686, 87 N. W. 1032; *Warren v. Syme*, 7 W. Va. 474.

Descriptions omitting town, county or state where the property is situated, have been held sufficient, where the deed or writing provides other means of identification: *Hawkins v. Hudson*, 45 Ala. 482; *Webb v. Mullins*, 78 Ala. 111; *Garden City Sand Co. v. Miller*, 157 Ill. 225, 41 N. E. 753;

Lloyd v. Bunce, 41 Iowa, 660; Mee v. Benedict, 98 Mich. 260, 39 Am. St. Rep. 543, 57 N. W. 115, 22 L. R. A. 641; Norfleet v. Russell, 64 Mo. 176; 13 Cyc. 549; McCullough v. Olds, 108 Cal. 529, 41 Pac. 420. Many other cases might be added.

"If the land is situated in a city, and the land is described as being in a certain city, although the name of the state or ⁷⁴ county may not be given, the court in an action of ejectment in which the deed is offered in evidence will take notice that such city is in a certain county in the state": 2 Devlin on Deeds, 2d ed., sec. 1011; Harding v. Strong, 42 Ill. 148, 89 Am. Dec. 415.

Under the authorities, the writing in question is not on its face void for want of certainty in description of the real estate sought to be charged thereby. This writing does not state in what county or state the real estate is situated. It was acknowledged and recorded in Lincoln county, in this state. The number of acres in some of the tracts is given. Three of the tracts are described as near Hamlin, the fourth as in Hamlin. The first tract is described as the same bought of the land company. The second, as conveyed to Curry by James T. Carroll, Jr. Hamlin is the county seat of Lincoln county, in this state, and of this fact the court will take judicial notice: People v. Faust, 113 Cal. 172, 45 Pac. 261. These things afford some, and we think sufficient, means of identification.

The papers copied in the record marked "B. F. Curry's Title Papers," cannot be considered, as they appear to have been copied in the record without authority.

This cause was twice referred to commissioners; the last time to Commissioner Jimison, who, in response to the requirement that he report "the number of acres and value of the lands named in said deed of trust, its location and what title, if any, Curry has to the same," reported certain lands included under the description in said writing. We cannot disturb this finding.

The writing in question describes the debt sought to be secured thereby in the following language: "And to secure D. S. Holley as executor of the last will and testament of James A. Holley, deceased, the payment of whatever amount said B. F. Curry may owe him as such executor on a settlement." An indulgence of twelve months was provided for by this writing. Is this description sufficient to secure any debt to Holley, executor? A deed of trust or other writing

charging real estate to secure a debt must in some way describe and identify the debt it is intended to secure. Literal accuracy is not required. Substantial accuracy—reasonably describing the debt—is sufficient. The description of the ⁷⁵ debt must be correct as far as it goes, and must be full enough to direct attention to the sources of correct information, and be such description of the debt as not to mislead or deceive as to its nature and amount: *Goff v. Price*, 42 W. Va. 384, 26 S. E. 287.

It is held in the case of *Riggs v. Armstrong*, 23 W. Va. 760, that: "It is not necessary to the validity of a trust deed that it should truly state the debt it is intended to secure; but it may stand as a security for the real equitable claims of the cestui que trust, if they appear to be bona fide and are satisfactorily proven to be the debts intended, in fact, to be secured": See, also, *Findley v. Cunningham*, 53 W. Va. 1, 44 S. E. 472; *Shirras v. Craig*, 7 Cranch, 34, 3 L. ed. 260; *McCarty v. Chalfant*, 14 W. Va. 531; *Lawrence v. Tucker*, 23 How. 14, 16 L. ed. 474; *Lyle v. Ducome*, 5 Binn. 585; *Wood v. Weimer*, 104 U. S. 786, 26 L. ed. 799; *Bowen v. Ratcliff*, 140 Ind. 393, 49 Am. St. Rep. 203, 39 N. E. 860.

The description here gives the party from whom and to whom the debt is due. Settlement is all that remains in order to ascertain the true amount secured. It seems clear to us that the description of the debt is sufficient. The description being sufficient, it is still necessary to determine what is included in it. Does the clause "to secure to D. S. Holley, as executor of the last will and testament of James A. Holley, deceased, the payment of whatever amount said B. F. Curry may owe him as such executor on a settlement," include all items against Curry upon settlement, whether such items were barred by the statute of limitations or not, at the time the writing was made, and delivered? In other words, does this clause constitute a new promise by Curry, removing the bar of the statute of limitations? Under our decisions the answers to these questions are not difficult. The clause mentioned does not constitute a new promise removing the bar of the statute of limitations.

In the case of *Quarrier's Admr. v. Quarrier's Heirs*, 36 W. Va. 310, 15 S. E. 154, it was held that "a promise to pay the 'agreed balance on your judgment' is not good as a new promise, the amount of such agreed balance not appearing."

In the case of *Bell v. Crawford*, 8 Gratt. 110, it was held that "a promise to settle is not good as a new promise."

Judge Brannon, in the opinion in the case of *Quarrier's Admr. v. Quarrier's Heirs*, 36 W. Va. 310, 15 S. E. 154, said: "On similar reasoning ⁷⁶ we can say that a promise to pay a balance not defined but to be agreed on or settled in the future will not constitute a new promise."

In the case of *Stiles v. Laurel Fork Oil etc. Co.*, 47 W. Va. 838, 35 S. E. 986, it was held that: "An acknowledgment in writing, to operate as a new promise to remove the bar of the statute of limitations, must be a clear and definite acknowledgment of a precise sum, plainly importing a willingness and liability to pay, not in any wise conditional, nor by way of compromise or attempt at settlement": See, also, *Findley v. Cunningham*, 53 W. Va. 1, 44 S. E. 472. In the settlement to be made under the clause in question only those items against Curry not barred at the time the writing was made and delivered can be included.

One of the objects of this suit is to make settlement under this clause. Commissioner Jimison in his report allowed against B. F. Curry three items, exhibits 4, 5 and 6, with plaintiff's bill, not barred by the statute of limitations, which, with interest to September 2, 1882, less payment made by B. B. Curry, aggregated the sum of \$234.75; and as a setoff to this aggregate sum, he allowed two items, viz., \$166.18 and \$188.18, being the individual store accounts due the firm of B. F. Curry & Brother from Margaret Holley and D. S. Holley individually. These items of setoff more than extinguished the three items of charge above mentioned, but no allowance was made for the residue. The item of \$166.18 was excepted to by the plaintiff in the court below; but the other item of \$188.18 was not excepted to. As to the item of \$166.18 excepted to, we have examined the evidence and do not find it sufficient to justify that setoff. Neither do we find the evidence sufficient to justify the charge against B. F. Curry under the equitable mortgage for the Margaret Holley note, being exhibit No. 5 with the plaintiff's bill. Exhibits Nos. 4 and 6 were proper charges against B. F. Curry. B. F. Curry claimed to be only the security of his brother B. B. Curry as to those items, but as to the payee, both B. B. Curry and B. F. Curry were principals. Excluding the Margaret Holley note and including

the setoff of \$188.18, the setoff more than extinguishes the amount of exhibits 4 and 6. Therefore, nothing is chargeable against ⁷⁷ B. F. Curry under the equitable mortgage on account of said exhibits Nos. 4 and 5.

All other items on both sides of the account were barred by the statute of limitations at the time the writing in question was made and delivered except the two items allowed by Commissioner Jimison, as follows: Exhibit No. 7 filed with plaintiff's bill, being the C. A. Johnson note, amounting with interest to the 15th of October, 1902, to \$36.17. Amount due on the H. H. Miller note, with interest to October 15, 1902, amounting to \$696.29. These two items aggregated \$733.46. These items were properly reported by Commissioner Jimison as the true amounts due from B. F. Curry to the estate of James A. Holley, deceased, and secured by said equitable mortgage.

Commissioner Jimison reported that there was due to L. M. Thacker on the Scites notes, also secured by said equitable mortgage, the sum of \$166.00. This debt must be provided for pro rata with the plaintiff's debt in any sale under said equitable mortgage.

For the reasons stated, the decree of the circuit court of Lincoln county, entered in this cause on the fifteenth day of February, 1904, is reversed, and this cause is remanded to be further proceeded with according to the principles announced in this opinion and the rules governing courts of equity, and with directions to pass upon the exceptions to the reports of the commissioners and to enter such proper decrees as may be necessary to subject the real estate reported by Commissioner Jimison to the payment of the plaintiff's debt and the debt reported in favor of Thacker, with proper interest on each.

A Mortgage, to be valid, must in some way describe and identify the indebtedness secured. Literal accuracy is not required, but the description must be correct, so far as it goes, and full enough to direct attention to the sources of correct information in regard to it, and be such as not to mislead or deceive as to the nature or amount of it: *Bowen v. Ratcliff*, 140 Ind. 393, 49 Am. St. Rep. 203, and note; *Moore v. Russell*, 133 Cal. 297, 85 Am. St. Rep. 166.

Acknowledgments and New Promises to suspend the running or remove the bar of the statute of limitations are discussed in the monographic note to *Warren v. Cleveland*, 102 Am. St. Rep. 751-777.

STATE v. PETROLEUM COMPANY.

[58 W. Va. 108, 51 S. E. 865.]

CORPORATIONS, FOREIGN—Constitutionality of Statute Requiring to Appoint State Auditor Its Attorney.—A statute requiring every foreign or nondomestic corporation doing business within the state, by power of attorney duly executed by it, to appoint the auditor of the state its attorney in fact to accept service of process or notice in the state, and by the same instrument to declare its consent that service of any process or notice in the state on such attorney or his acceptance shall be equivalent to and shall be due and legal service of process on the corporation, and that it shall pay such auditor ten dollars a year for so acting, to be turned into the treasury of the state, does not conflict with the fourteenth amendment to the constitution of the United States nor any part of the constitution of the state. (p. 953.)

Clark W. May, attorney general, Frank Lively, Frank W. Nesbitt and Brown, Jackson & McKnight, for the petitioner.

L. E. McWhorter and Chilton, MacCorkle & Chilton, for the respondents.

¹⁰⁸ BRANNON, P. By chapter 39 of the Acts of 1905 the state auditor was constituted the attorney in fact for every foreign corporation doing business in this state, and for every nonresident domestic corporation, and every such corporation is required, by power of attorney duly executed by it, to appoint the auditor its ¹⁰⁹ attorney in fact to accept service of process and notice in this state for it, and by the same instrument to declare its consent that service of any process or notice in this state on said attorney, or his accepting shall be equivalent to, and shall be, due and legal service upon the corporation. The act requires the corporation to pay yearly ten dollars to the auditor for acting, to be turned into the treasury by him. The defendant refusing to execute such power of attorney, the state asks a mandamus to compel it to do so. The corporation asserts that no duty rests upon it by reason of said act, because it is unconstitutional. The corporation says that the act denies it freedom of contract, freedom of choice of its agent, compels it to pay money, deprives it of property without due process of law, contrary to both the state and federal constitutions. We cannot concede this. We shall not discuss the general power of a state over corporations taking charters under it, or foreign corporations coming to

the state by its grace to do business in it. It might be plausibly said that a foreign corporation, or a nonresident domestic corporation having no office or officers in the state, the state, under power to regulate corporations, and particularly to see to it that judicial process to answer suits by proper means be made available, has the power assumed in the statute. It is a duty, and must be a legitimate power, that the state render effective the jurisdiction of its courts against corporations accepting its charter and doing business in the state, or chartered by another state and doing business in the state, but having, perhaps, no officer to be readily found in the state. We can see how often the service of process, without which court procedure would be ineffectual and not due process, may be delayed, or be inconvenient, or be frustrated; and we can see how the state must have wide power in such case to secure service of the process of its courts, so its legislation do not deprive the just right of the corporation. It ought to answer suitors in the courts. If the state deprives the corporation of an essential right, its action would not be held good; but what right does this act take away? If the auditor were clothed with discretion to do an act harmful to the corporation, complaint might be justly made; but the auditor does nothing but accept service—a mere ministerial act. He does ¹¹⁰ not confess judgment, nor does he do any discretionary act. Doubtless, if he fail to warn his corporation of the suit, he would be liable on his bond, just as to any person for failure to perform a legal duty. Before the act of 1905 the code required a corporation to appoint such attorney. This act changes this so far as to make the auditor such attorney, thus taking from it the choice of person, sometimes a valuable right, but in this instance not so. But whether but for section 8, chapter 53 of the code, this act would be valid, we need not, do not, say. That section reads thus: "Where the legislature has the right to alter or repeal the charter or certificate of incorporation heretofore granted to any joint stock company, or to alter or repeal any law relating to such company, nothing contained in this chapter shall be construed to surrender or impair such right. And the right is hereby reserved to the legislature to alter any charter or certificate of incorporation hereafter granted to a joint stock company, and to alter or repeal any law applicable to such company." When the defend-

ant obtained its charter that section was in force, and this charter is subject to it. Under such a reservation of right, either to amend a charter or to change the law regulating it, there is no limit to legislative power. It even includes right of repeal. In this instance the state has simply amended the law as to the appointment of an agent; has only made a public officer attorney, so that there be one particular person, at a fixed place, always to be found, and known to all to be the attorney, dispensing with the inconvenience and uncertainty of ascertaining persons for service: 7 Am. & Eng. Ency. of Law, 2d ed., 671; *Citizens' Bank v. City of Owensboro*, 173 U. S. 636, 19 Sup. Ct. Rep. 571, 43 L. ed. 840, and other cases cited in Brannon's Fourteenth Amendment, 365. When a charter issues under such law, the state has this right of amendment of the law in force before the charter; it is a condition of the charter as fully as if that right were in words in the charter. The law inserts or reads it into the charter: 10 Cyc. 1087; *Cross v. West Virginia etc. R. R.*, 35 W. Va. 174, 12 S. E. 1071. If the corporation do not see proper to conform to it, it must discontinue business, as the legislature cannot force it to do business under the change: *Yeaton v. Bank of Old Dominion*, 21 Gratt. 593. It cannot be said that the fourteenth amendment is violated because the act discriminates, requiring certain corporations, and not others, to appoint the auditor. As to domestic ¹¹¹ corporations having offices and officers in the state on whom service of process can be had there is no need of such a statute; but as to those not so situated there is need. The classification is based on the reason of their being differently circumstanced, and this justifies such discriminating classification: *Copper Co. v. Scherr*, 50 W. Va. 533, 40 S. E. 574; *Magon v. Illinois T. & S. Bank*, 170 U. S. 283, 18 Sup. Ct. Rep. 594, 42 L. ed. 1037.

As to the exaction of ten dollars for the service of the auditor: If his appointment is valid, this feature cannot render the statute invalid as taking property without due process. The auditor is paid by the state, and the state, by its officer, renders valuable service to the corporation. South Carolina instituted a commission for regulation of railroads, and required the company to pay salaries of its members, on the theory that the state had power of regulation and the service redounded to the benefit of the railroad company. The act was held not to violate the fourteenth amendment

either as taking property without due process of law or as denying the company the equal protection of the law: *Charlotte etc. R. Co. v. Gibbes*, 142 U. S. 386, 12 Sup. Ct. Rep. 255, 35 L. ed. 1051. To the same effect, *People v. Squire*, 145 U. S. 175, 12 Sup. Ct. Rep. 880, 36 L. ed. 666. That feature of the act providing that the corporation shall not be required to pay any fee to anyone who may have been before appointed such attorney was mentioned in oral argument as violating the constitution in impairing the obligation of a contract. That does not arise in this case. It is a matter between different persons. Further, that is a provision separable from the clause requiring the corporation to appoint the auditor, and if unconstitutional, would not touch or infect that provision: 26 Am. & Eng. Ency. of Law, 2d ed., 570.

Writ awarded.

Sanders, J., dissented.

From the Judgment Against It the Defendant prosecuted a writ of error to the supreme court of the United States, where the judgment of the state court was affirmed by an opinion as follows:

“Mr. Chief Justice Fuller delivered the opinion of the court:

“It is argued that the act of February 22, 1905, is invalid under the fourteenth amendment, in that it deprives the company of liberty of contract and property without due process of law, and denies it the equal protection of the laws. But, in view of repeated decisions of this court, the contention is without merit. The state had the clear right to regulate its own creations, and, a fortiori, foreign corporations permitted to transact business within its borders.

“In this instance it put all nonresident domestic corporations, which elected to have their places of business and works outside of the state, and all foreign corporations coming into the state, on the same footing in respect of the service of process, and the law operated on all these alike.

“Such a classification was reasonable, and not open to constitutional objection: *Orient Ins. Co. v. Dagg*s, 172 U. S. 557, 19 Sup. Ct. Rep. 281, 43 L. ed. 552; *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 20 Sup. Ct. Rep. 518, 44 L. ed. 657; *Central Loan etc. Co. v. Campbell Commission Co.*, 173 U. S. 84, 19 Sup. Ct. Rep. 346, 43 L. ed. 623; *National Council, J. O. U. A. M. v. Virginia*, 203 U. S. 151, 27 Sup. Ct. Rep. 46; *Northwestern Nat. L. Ins. Co. v. Riggs*, 203 U. S. 000, 27 Sup. Ct. Rep. 126; *Brannon*; *Fourteenth Amendment*, c. 16.

“It is true that the prior law left it to the corporation to appoint an attorney to represent it, and that the act of February, 1905, changed this so as to make the auditor such attorney, but this, at the most, was no more than an amendment as to the appointment

of an agent, and when the St. Mary's Company accepted its charter it did so subject to the right of amendment. And we agree with the state court that the requirement of the payment of ten dollars to the auditor for the use of the state does not amount to a taking of property without due process, or an unjust discrimination: *Charlotte etc. R. Co. v. Gibbs*, 142 U. S. 386, 12 Sup. Ct. Rep. 255, 35 L. ed. 1051; *New York v. Squire*, 145 U. S. 175, 12 Sup. Ct. Rep. 880, 36 L. ed. 666. If the act is valid, that is.

“The objection going to the expediency or the hardships and injustice of the act, and its alleged inconsistency with the state constitution and laws, are matters with which we have nothing to do on this writ of error, and the question whether the provision that the corporation shall not be required to pay any fee to anyone theretofore appointed an attorney is invalid or not requires no consideration on this record.

“Judgment affirmed”: *St. Mary's Franco-American Petroleum Co. v. State of West Virginia*, 27 Sup. Ct. Rep. 132.

The Power of the States to Prescribe how and upon whom process against foreign corporations can be served is discussed in the monographic note to *Abbeville Elec. etc. Co. v. Western Elec. etc. Co.*, 85 Am. St. Rep. 927-933. It is competent for a state to change the officers on whom service may be made: *Woodward v. Mutual Reserve Life Ins. Co.*, 178 N. Y. 485, 102 Am. St. Rep. 519.

BROWN v. BECKWITH.

[58 W. Va. 140, 51 S. E. 977.]

EXEMPTIONS—Nonresidence.—A person entitled to have his personal property exempted from forced sale in one state does not forfeit such right, on the ground of nonresidence, until he begins to remove from his residence in such state, with intent to take up his residence elsewhere, and the fact that he may intend to leave the state permanently and has made complete arrangements to do so by delivering his personal property for shipment to a point outside the state does not forfeit his right of exemption, until he begins to remove his person from the state. (p. 957.)

EXEMPTIONS—Nonresidence.—The elements of nonresidence in the law of attachment, and within the meaning of statutes conferring a right to exempt personal property from forced sale, are the same, and in either case a person does not become a nonresident until he begins the removal of his person from his place of residence in one state, with intent to acquire a residence in another. (p. 958.)

JUDGMENTS—Res Judicata—Nonresidence.—A finding of nonresidence on a motion to require security for costs in a pending action is not res judicata in another action between the same parties. (p. 959.)

EXEMPTIONS.—An Order of Attachment is process against which the right to claim personal property as exempt from forced sale may be exercised. (p. 960.)

W. E. McDougale, for the appellant.

H. B. Dodge and L. R. Via, for the appellees.

140 POFFENBARGER, J. Minnie Brown complains of a decree of the circuit court of Wood county, dissolving an injunction by which she attempted to prevent the sale of certain personal property claimed by her as exempt under the provisions of sections 23 and 24 of chapter 41 of the Code, and dismissing her bill.

141 The property consisted principally of household goods, and B. F. Beckwith, constable, was proceeding to sell the same under orders of a justice of the peace in attachment proceedings instituted by three several creditors of the plaintiff—Samuel L. Koonse, Samuel Cross and A. E. Beatty. The attachments were levied on the ninth day of December, 1902, exemption claims were delivered to the officer on the thirteenth day of December, 1902, judgments were rendered and orders of sale made on the eighteenth day of December, 1902, and on said last-named day the debtor served on the constable written instruments, demanding the release of the property, notifying him that, in case of his refusal to do so, she would claim the damages allowed by law for detention thereof. By some collateral proceedings, which need not be here detailed, action was delayed so that the time fixed for sale was the fifth day of March, 1903, on which day a preliminary injunction was awarded on the plaintiff's bill against the justice, constable and creditors, restraining the sale. Answers were filed by the defendants, depositions were taken and filed, and, on the twentieth day of August, 1903, the order complained of was made and entered.

The defense relied upon mainly is the alleged nonresidence of the plaintiff at the time she presented her claim of exemption. She had occupied as tenant a certain house in the city of Parkersburg, from which, on the day on which the actions were commenced and her property seized, she had removed all her property and effects, including her wearing apparel not in actual use, to the wharfboat at said city and had them consigned to herself at Marietta in the state of Ohio and had vacated the house in which she had resided. She testifies that she stayed at the Dewitt hotel in Parkersburg

on the night of the day on which her property was sent to the wharfbboat and levied upon, and later went to the residence of a Mrs. Core, in Parkersburg, with whom she stayed for some time, and then went to another place in said city. She denies that she ever had any intention of leaving the city, and explains the shipment of her property by saying she had rented it to certain persons in Marietta. In addition to the fact of the removal of plaintiff's property and the evidence of intent on her part to take up her residence at Marietta, the defendants rely upon testimony showing her ¹⁴² presence at Marietta at a time subsequent to the presentation of her exemption claim, and also an admission made by her in an action which she prosecuted in a justice's court against the constable for damages for the detention of the property. This trial was had at Williamstown, directly opposite the city of Marietta, and a witness testifies that she came to Williamstown on the morning of the trial from Marietta. On that occasion she testified that she had no legal residence.

If it be conceded that the evidence justified the finding by the court of a fixed intention on the part of the appellant to remove from Parkersburg to Marietta, and of preparation by her to do so, we are confronted with the question whether there does not yet remain to be supplied one essential element of change of residence, namely, actual commencement of removal, not of the property, but of the person—personal departure from the old place of residence in the state for the new outside of it. *State v. Allen*, 48 W. Va. 154, 86 Am. St. Rep. 29, 35 S. E. 990, 50 L. R. A. 284, decides that within the meaning of attachment laws a person becomes a nonresident the moment he begins the removal of his person from the place of his residence, with intent to acquire a residence in another state, even before he gets outside the state. To the same effect are *Moore v. Holt*, 10 Gratt. 284, and *Clark v. Ward*, 12 Gratt. 440. According to many authorities, such commencement of removal, coupled with an intent to abandon the state, falls short of the requisites of nonresidence. *Shinn on Attachment*, section 96, says it is necessary that the defendant acquire a residence and place of abode outside of the state. *Drake on Attachment*, section 64, says a mere purpose to change residence, evidenced by acts of the removal of the party's property, will not make him a nonresident of the state from which he purposes to depart until he shall have begun at least the removal of his person. *Wade on At-*

tachment, section 78, accords with the proposition last above stated. No case has been found which propounds a doctrine more rigid and illiberal toward the defendant. Hence, it may be safely said that by the great weight of authority nothing short of such act of removal, accompanied by intent to abandon the state, will render the party amenable to an attachment on the ground of nonresidence. This proposition seems to be in accord with the general principles of the law¹⁴³ relating to domicile and residence enunciated by this court in *White v. Tennant*, 31 W. Va. 790, 13 Am. St. Rep. 896, 8 S. E. 596, as follows: "The original domicile continues until it is fairly changed for another. It is a legal maxim that every person must have a domicile somewhere; and he can have but one at a time for the same purpose. From this it follows that one cannot be lost or extinguished until another is acquired: *Baird v. Byrne*, 3 Wall. Jr. 1, Fed. Cas. No. 757. When one domicile is definitely abandoned and a new one selected and entered upon, length of time is not important; one day will be sufficient, provided the animus exists. Even when the point of destination is not reached, domicile may shift in itinere if the abandonment of the old domicile and the setting out for the new are plainly shown: *Munroe v. Douglass*, 5 Madd. 405. Thus a constructive residence seems to be sufficient to give domicile, though an actual residence may not have begun."

State v. Allen, 48 W. Va. 154, 86 Am. St. Rep. 29, 35 S. E. 990, 50 L. R. A. 284, further declares that the elements of nonresidence in the law of attachment and the elements of nonresidence within the meaning of the statutes conferring a right to exempt personal property from forced sales are the same. This position seems to be supported by both principle and reason. Surely, the law is not less favorable to the claimant of a constitutional right of a character so high that the statutes providing for its vindication are by the courts of almost all the states liberally construed (12 Am. & Eng. Ency. of Law, 75), than to the right of a debtor to defeat an attachment. In the former case the law impresses upon the property a status, immunity from forced sale, and withdraws it from the reach of the creditor; in the latter, the party is only given the benefit of a strict construction of remedial statutes, designed to give the creditor a means of obtaining from him what he is entitled to have—satisfaction of his debt out of the property. In both instances the law is

liberal to the debtor. Hence, it would seem that in both cases the same rules for determining the question of nonresidence ought to govern.

What evidence in the case supplies this element of personal removal? Nobody testifies to any departure by the appellant from Parkersburg. A witness states that she came from Marietta to Williamstown to attend the trial of an action brought by her against the constable, and that on that occasion ¹⁴⁴ she said she had no legal residence. Her coming from Marietta is in no sense inconsistent with the retention of her residence in Parkersburg at the time, which she establishes by the testimony of herself and other witnesses. The statement that she had no legal residence must be subject to the rule that she did have a legal residence somewhere; for, having had a residence in this state, it continued until she acquired one elsewhere. The language in *State v. Allen*, 48 W. Va. 154, 86 Am. St. Rep. 29, 35 S. E. 990, 50 L. R. A. 284, importing that one need not acquire a domicile or residence in another state in order to render him a nonresident of this state means that there need not be an actual domicile or residence in another state. There may be a constructive residence in either state for the purpose of working out the legal rights of parties. Appellant not having acquired either an actual or constructive residence elsewhere, her residence in this state must be deemed to have continued. Our conclusion is that the evidence wholly fails to establish the element of actual removal to a place out of the state, and also the inception or beginning of such removal within it.

On the question of residence, the principle of *res judicata* is relied upon. In the action by the appellant against the constable, an affidavit of her nonresidence was filed and a demand made for security for costs. This motion was resisted and evidence was heard upon it, and the justice, believing nonresidence to have been established, required security to be given, and, in default thereof, dismissed the action. This was not a hearing on the merits, but one upon a mere collateral motion. "A judgment not based upon the merits is not final and conclusive in the sense that a plea of *res judicata* may be founded on it": 21 Am. & Eng. Ency. of Law, 266. A nonsuit is not *res judicata*: 21 Am. & Eng. Ency. of Law, 271. The dismissal in equity for want of jurisdiction or any cause precluding inquiry into the merits is not *res judicata*: 21 Am. & Eng. Ency. of Law, 271.

But one other proposition remains to be disposed of, namely, that the claim of exemption is insufficient, which contention is based upon two grounds, one of which is predicated upon the following language in the affidavit: "That she is entitled to have and claims all the above-listed property claimed by her as husband and parent exempt from execution or other process in the above cause." The point made ¹⁴⁵ is that she does not specify the character in which she claims. To determine this question it is necessary and proper to read the language above quoted in connection with another part of the affidavit in which the appellant says she is a parent and resident of the state. This language established her character as a female parent, and is wholly inconsistent with the character of husband. Moreover, the word "husband" was used by way of recital and description of the property, and its use appears to have been a mere inadvertence. So read, the affidavit plainly asserts a claim as parent and resident. In this respect, the demand is sufficiently certain in a legal sense. The other is based upon the assertion that, at the time the officer received the lists and claims of exemption, he held no execution or other process authorizing a sale of the property. The statute clearly includes an order of attachment within the term "process." In section 25 of chapter 41 attachment is specifically mentioned and provision made for release by the officer of claims and demands garnisheed under the order of attachment. While there is no specific direction to him as to property levied upon and taken into his possession under an order of attachment, the provision for the release of claims and demands suggested and garnisheed shows a clear legislative intent that the officer shall not, after the delivery to him of the lists specified in the statute and the lapse of the time prescribed for appraisement, withhold the possession of property taken under process of any kind, unless it be in respect to claims which are excepted from the operation of the exemption law.

The conclusion resulting from this examination of the record and authorities is that the circuit court erred in dissolving the injunction and dismissing the bill, and that the decree must be reversed with costs in this court to the appellant, the bill reinstated and a decree entered perpetuating the injunction and requiring the appellees to pay to the appellant her costs in the circuit court.

Reversed and injunction perpetuated.

One is a Nonresident within the Meaning of the Exemption Laws, it has been held, though still within the state, if he has begun to remove therefrom with a fixed intent to leave it and take up his residence in another state. A nonresident, within the meaning of the exemption laws, cannot be entitled to exemption on the ground that he is a resident: *State v. Allen*, 48 W. Va. 154, 86 Am. St. Rep. 29. See the general discussion in the note to *Berry v. Wilcox*, 48 Am. St. Rep. 711-717, of the question of residence, what and where is, and how lost or changed.

HEFNER v. FIDLER.

[58 W. Va. 159, 52 S. E. 513.]

DETINUE—Essentials to Maintain.—To maintain an action of detinue the plaintiff must have property in the thing sought to be recovered of some value; it must be capable of identification, and he must be entitled to its immediate possession, while the defendant must have had possession at the institution of the action or some time prior thereto. (p. 962.)

DETINUE to Recover Note.—The action of detinue will lie to recover possession of a note. (p. 962.)

DETINUE to Recover Note—Fraud.—An action of detinue will not lie to recover the possession of notes given for the purchase price of property upon the discovery of such fraud as would entitle the maker of the notes to a rescission of the contract of sale. (pp. 962, 963.)

R. F. Kidd and A. L. Holt, for the appellant.

R. G. Linn and L. H. Barnett, for the appellees.

160 SANDERS, J. This is an action of detinue, instituted before a justice of the peace of Gilmer county, for the recovery of the possession of two certain promissory notes of sixty-two dollars and fifty cents each. Upon the trial of the case, both before the justice and upon appeal to the circuit court, judgment was rendered in favor of the plaintiffs, and to this judgment a writ of error and supersedeas has been allowed.

The defendant sold to the plaintiffs one four-horse power engine and boiler for the sum of one hundred and twenty-five dollars, to be paid in two equal payments of sixty-two dollars and fifty cents each, for which they executed the said two notes. The plaintiffs claim that shortly after the consummation of the trade, by the execution of the notes and delivery of the engine and boiler, they discovered that the defendant had

knowingly made false and fraudulent representations to them in regard to said engine and boiler for the purpose of misleading and deceiving them, and which did mislead and deceive them, to their prejudice, and for which they claim they are entitled to rescind the contract; and to this end they offered to return the engine and boiler to defendant, and demanded possession of the notes, and defendant claimed that he had assigned the notes away, and could not comply with their offer.

The first question that confronts us is, Does the action of detinue lie? In order to ground the action, these points are necessary: 1. The plaintiff must have property in the thing sought to be recovered; 2. He must have the right to its immediate possession; 3. It must be capable of identification; 4. It is essential that the property be of some value; and 5. The defendant must have had possession at some time before the institution of the action.

The authorities universally hold that the action of detinue will lie to recover the possession of a promissory note. Some of these are: 1 Barton's Law Practice, 214; 1 Chitty on Pleading, 11th ed., 121; Cooper v. Watson, 73 Ala. 252; Robb v. Cherry, 98 Tenn. 72, 38 S. W. 412; Lewis v. Horner, 24 Ky. 500, 19 Am. Dec. 120; Robinson v. Peterson, 40 Ill. App. 132; Carter v. Turner, 37 Tenn. 178.

But while this action will lie to recover the possession of a promissory note, yet one, to maintain it, must bring himself within the rule herein stated. As we have seen, the ¹⁶¹ plaintiff must have property in the thing sought to be recovered, and it must be of some value. Then the pertinent inquiry is, What property have the plaintiffs in the notes sought to be recovered, and what is their value? When recovered by the plaintiffs, they are of no value to them; it could only be the possession by them of evidence of outstanding indebtedness. If the theory of the plaintiffs is correct, that they have the right to rescind, and have rescinded, the contract, the notes are also of no value to the defendant, he having lost the right to recover on them. If, however, he has not lost the right to recover, he would be in the lawful possession of them, and the plaintiffs' action could not for that reason be maintained.

The plaintiffs are deprived of nothing of value to them by reason of the detention of the notes. It may be claimed that the defendant may sue upon them; if so, the plaintiffs can

make any defense which they may have. If they have the right to rescind the contract, they can set this up as a defense. Then, again, the notes should have an alternative value. A judgment in *detinue* should be for the specific property, of a specified value, so that if the property cannot be had, its value may be recovered. Certainly a judgment could not be given for the plaintiffs for the face value of these notes, for they have no such value in them. Would they be of that value to the plaintiffs, if recovered? This question must be answered in the negative. Then, if not, how could they have a judgment for the value of a thing which is valueless? In the case of *Todd v. Crookshanks*, 3 Johns. (N. Y.) 432, the plaintiff brought an action to recover the possession of a note which he had paid and had taken a receipt showing payment in full; and the court, speaking in this case, says: "There was no foundation for the action below. After the note was paid, a receipt in full given by one of the payees, it was completely discharged, so as to be of no value."

For these reasons the judgment of the circuit court is reversed, the verdict of the jury set aside, and the action dismissed.

In an Action of Detinue the plaintiff must have, at the commencement of the suit, a general or special property in the subject matter, and the right to its immediate possession: See the note to *Sinnott v. Feiock*, 80 Am. St. Rep. 744.

Detinue Lies to Recover a Note evidencing a debt to which the plaintiff has a right of property and the immediate right of possession, no matter how the defendant obtained possession: *Lewis v. Hoover*, 1 J. J. Marsh. 500, 19 Am. Dec. 120.

PENCE v. CARNEY.

[58 W. Va. 296, 52 S. E. 702.]

WATERS, PERCOLATING.—All subterranean waters not existing in a well-defined and known channel are deemed to be percolating. (p. 967.)

WATERS.—Subterranean Waters are Presumed to be Percolating until it is shown that they exist in a known and well-defined channel. (p. 967.)

WATERS—Subterranean Channel Water.—The underground waters which the law recognizes as existing in underground bodies or streams in well-known and defined channels, are those only which are known to so exist, or ascertainable or discoverable from surface

indications, or other means, without subsurface excavations for that purpose. (p. 968.)

WATERS—Percolating—Use of.—The use by the owner of land who searches therein, discovers, and produces percolating water, is limited to a reasonable and beneficial use of such water, where to use it otherwise would deprive the adjacent and neighboring lands of the enjoyment of the percolating or natural spring water therein. (p. 969.)

WATERS—Percolating—Right to Use.—A land owner has no right by anything done on his land to waste, whether through malice or indifference, the percolating waters there found, or which he therein develops or brings to the surface by means of ditches or wells, with or without pumping apparatus, if by such waste the neighboring land owner is deprived of percolating water which otherwise would be within his land and which he there has a necessity for using. (pp. 971, 972.)

WATERS—Percolating—Diversion.—The temporary pumping to a reasonable extent of percolating water from a well being sunk by the owner on his land in good faith for the purpose of completing the well for a legitimate use and the casting of such water upon his own land, is not such unreasonable use of such water as will sustain an injunction, although such pumping may temporarily decrease the supply of water to a natural spring on adjacent land. (p. 973.)

INJUNCTION—Irreparable Injury.—To sustain an injunction against a trespass on the ground that the injury caused thereby is irreparable, the facts constituting such injury must be alleged and proved. (p. 974.)

T. N. Read and Vinson & Thompson, for the appellants.

J. W. Kennedy, Brown, Jackson & Knight and J. Wehrle, for the appellees.

297 COX, J. A. P. Pence and George N. Davis filed their bill in equity in the circuit court of Summers county against A. C. Blair and B. E. Carney to enjoin them and their agents from unreasonably and unusually abstracting and using the water from a well sunk by them on a tract of land owned by them and from casting the same on their land, whence it flowed upon plaintiffs' land. Upon presentation of the bill a temporary injunction was awarded. Defendants demurred to the bill and filed their answer. Depositions were taken and the case submitted for final hearing on March 29, 1905, on the pleadings and depositions and upon the motion of defendants to dissolve the injunction and the motion of the plaintiffs to perpetuate the injunction, and the court entered a decree sustaining the demurrer to the bill, dissolving the injunction and dismissing the bill. From this decree an appeal was allowed the plaintiffs by this court.

The errors assigned involve a consideration of the whole case. It appears from the record substantially as follows:

Plaintiffs Pence and Davis are the owners of a tract of land of two hundred and eighty-three acres, upon which there is a valuable spring called Pence's Spring, known as a flowing spring as far back as 1849. So long as known by witnesses, unless interfered with by some mechanical obstruction, and until the acts of defendants complained of, this spring has flowed continuously unaffected by rainfall. The water of this spring is supposed to contain valuable curative and medicinal qualities, and has been widely advertised by sample. Some years ago certain improvements were made to this spring. At that time an excavation was made to a depth of ²⁹⁸ about fourteen feet, where the water supplying the spring was found to issue forth or flow in a constant and well-defined stream, or, as some of the witnesses say, to boil up through a well-defined crevice about ten inches long and one and one-half inches wide, in a rock, with well-defined walls. Plaintiff Pence is the owner of one acre of land adjoining the two hundred and eighty-three acres. Upon it he has erected and maintains a valuable hotel and hotel plant and has secured from his coplaintiff his interest in the two hundred and eighty-three acres at a rental of one thousand dollars a year for twenty-five years from November 28, 1901. The water from Pence's Spring is used to supply the guests and patrons of the hotel, who frequent it for the purpose of using this water; and by reason of the use of this water the hotel plant and property are greatly increased in value. Plaintiff Pence also uses this water commercially, shipping it to various points in this and adjoining states. Defendants Blair and Carney, having purchased a tract of nineteen acres adjoining the two hundred and eighty-three acres, recently began to explore for the same kind of water as that flowing from Pence's Spring, and after some unsuccessful efforts sunk a well on their land and at a depth of fifty-eight feet below the surface found water, which the evidence tends to show was in taste and effect like that flowing from Pence's Spring. According to some of the evidence the water supplying the well came into it through a crevice in the rock, practically in the same manner that the water came into Pence's Spring. Some of the evidence tends to show that the well was supplied by two such streams coming into it from different directions. After water was found in the well defendants placed therein a steam pump of large capacity, producing, as some of the witnesses say, from sixty to seventy gallons of water per minute, which was cast

upon defendant's land whence it flowed upon plaintiffs' land. About twenty-four hours after the pump was started the flow at Pence's Spring began to subside, and the pumping being continued, the flow at the spring ceased. Before the pumping there was no visible effect upon the spring by the sinking of the well and the finding of water therein. After the injunction was awarded the pumping was discontinued for a time, with the effect that the water at the spring began to rise in the receptacle placed over it and continued to rise ²⁹⁹ until the water flowed out from the receptacle, but not in as great quantities as before any pumping was done. Sometime afterward the pumping was resumed and was again discontinued with like effect upon Pence's Spring as in the first instance. The well, according to the evidence of plaintiffs, is from one thousand to eleven hundred feet, and according to the evidence of the defendants, thirteen hundred and fifty feet from Pence's Spring. The well is twenty-five feet higher than the spring according to surface elevation. The tracts of land mentioned are located along Sulphur Spring Branch of Greenbrier river in Summers county, in a narrow, irregular valley. Sulphur Spring Branch is a running surface stream of water with well-defined banks. Until the improvements were made to Pence's Spring its overflow ran in a stream with well-defined banks a distance of about twenty feet and there emptied into Sulphur Spring Branch. The nineteen acre tract belonging to defendants is located farther up the valley than the lands of plaintiffs. On either side of this valley the mountains rise abruptly. By defendants' answer it is substantially denied that the waters supplying their well were from a known subterranean stream with well-defined channel, or that their pumping was unreasonable, or that they acted otherwise than lawfully, or that they had any intent to injure plaintiffs' spring thereby; but they claimed that the pumping was necessary in order to complete the well and make it useful to them in their contemplated business of running a hotel and furnishing water to the patrons thereof and to the general public.

The subject of this controversy is subterranean water. Some of the questions involved are comparatively new in the courts of this state and are of great importance. It has been truly said that the two fundamental principles underlying the consideration of the rights of adjacent or neighbor-

ing owners of land in subterranean waters are: 1. That the owner of land owns from the surface upward to the sky and downward to the center of the earth; and 2. That the owner must so use his own as not to injure another. Some courts have emphasized one of these principles almost to the exclusion of the other, but the greater number have made an effort to apply both in harmony. Many authorities for the purpose of applying these principles have divided subterranean waters into two classes: 1. Underground ³⁰⁰ bodies or streams of water existing in known and well-defined channels; and 2. Underground waters which ooze or percolate through the earth, or percolating waters; and have endeavored, as far as practicable, to apply the rules of law applicable to surface streams or bodies existing in well-defined channels to the like streams or bodies existing underground: 30 Am. & Eng. Ency. of Law, 311; *Miller v. Black Rock Springs Co.*, 99 Va. 747, 26 Am. St. Rep. 924, 40 S. E. 27; *Wheelock v. Jacobs*, 70 Vt. 162, 67 Am. St. Rep. 659, and note, 40 Atl. 41, 43 L. R. A. 105; *Frazier v. Brown*, 12 Ohio St. 294.

Underground waters are presumed to be percolating waters until it is shown that they exist in known and well-defined channels: 30 Am. & Eng. Ency. of Law, 311; *Boyce v. Cupper*, 37 Or. 256, 61 Pac. 642, 10 Am. & Eng. Dec. in Eq. 716, and cases there cited.

The burden of proof, then, is upon the plaintiffs in this case to show that the waters in controversy exist in a known underground stream with well-defined channel, if they would have the law of a similar surface stream apply here. It appears that upon the pumping of defendants' well the supply at Pence's Spring was depleted, and upon the continuance of the pumping, that the flow at Pence's Spring ceased, and that this operation was repeated with a like effect on the spring; and that at the points where the water came into the well and into the spring, there were well-defined crevices in the rock, but these facts do not show the existence of a stream with a known and well-defined channel for the entire distance between the well and the spring, or that both do not receive their supply from a saturated area or stratum extending under the lands of both plaintiffs and defendants: *Taylor v. Welch*, 6 Or. 198; *Ocean Grove v. Asbury Park*, 40 N. J. Eq. 447, 3 Atl. 168; *Cole v. Bacon*, 63 Cal. 571; *Clark County v. Mississippi Lumber Co.*, 80 Miss. 535, 31 South. 905; *Huber v. Murkel*, 117 Wis. 355, 98 Am. St. Rep. 933, 94 N. W. 354, 62 L. R. A. 589, 10 Am. & Eng. Dec. in Eq. 693.

The underground waters which the law recognizes as existing in underground bodies or streams in well-defined channels are those, and those only, which are known to so exist, or that they do so exist is ascertainable or discoverable from surface indications or other means, without subsurface excavations for that purpose: *Black v. Ballymena Commrs.*, 301 17 L. I. R. 459; *Lybe's Appeal*, 106 Pa. St. 626, 51 Am. Rep. 542; *Haldeman v. Bruekhart*, 45 Pa. St. 519, 84 Am. Dec. 511; *Wheelock v. Jacobs*, 70 Vt. 162, 67 Am. St. Rep. 659, 40 Atl. 41, 43 L. R. A. 105.

No surface indications other than the facts hereinbefore detailed are shown indicating a known and well-defined underground stream. We think that the facts appearing, taken together, are insufficient to overcome the presumption that the waters in controversy are percolating waters, and tend rather to show that both the well and the spring receive their supply from an underground saturated area or stratum extending under the lands of both plaintiffs and defendants. We shall therefore treat the waters in controversy as underground, percolating waters.

The early, and, we may say, the general, rule was that underground percolating waters belong to the soil, and that the owner of the land may search and explore for and obtain them at will and use them at pleasure, though in so doing he may drain or entirely divert such waters from the lands of adjacent or neighboring owners to which they would otherwise necessarily pass. This seems to be the rule in England and the rule followed in nearly all of the early and some of the later American cases: *Acton v. Blundell*, 12 Mees. & W. 324; *Chasemore v. Richards*, 7 H. L. Cas. 349; *Eward v. Bellfast*, 9 L. R. Ir. 172, 10 Am. & Eng. Dec. in Eq. 694, and cases there cited; 30 Am. & Eng. Ency. of Law, 310-312; *Miller v. Black Rock Springs Co.*, 99 Va. 747, 86 Am. St. Rep. 924, 40 S. E. 27. Of the English cases and of the common law on this subject, Mr. Farnham, in his late comprehensive work on *Waters and Water Rights*, volume 3, page 2718, says: "When it is remembered that the first English cases dealing with percolating water arose in 1840, and that it was not decided that the land owner might exhaust the water to furnish a municipal water supply until 1860, it will be at once seen that there was no English law on the subject at the time the common law was adopted by statute, in most American states, and

that the opinion of the American courts as to what is the common law is as good as subsequent decisions in English courts. Therefore, in any case, the question can be decided on its merits, giving the English decisions the weight to which they are entitled, but without the necessity of regarding them as binding precedents."

Under the early rule, considered without limitation or ³⁰² qualification, there were no correlative rights between adjoining or neighboring owners of land in underground, percolating waters. Can it then be said in these days of powerful machinery and modern appliances, when it is possible for one land owner to drain the lands of a neighborhood, or section of country, of their underground water and thus render them practically valueless, that underground, percolating waters are wholly without the protection of the law—that they, like the wild animal, belong to him who first obtains possession of them? Such an instance of draining a whole section of country was found and held to be unlawful in the case of *Forbell v. City of New York*, 164 N. Y. 522, 79 Am. St. Rep. 666, 58 N. E. 644, 51 L. R. A. 695. While the early rule, both in England and this country, is as stated above, the weight and trend of the recent authorities and cases in America are to qualify the early rule by limiting the use by the owner of the land who searches therein and produces percolating water to a reasonable and beneficial use of such water, where to use it otherwise would deprive the owners of adjacent and neighboring lands of the enjoyment of the waters of their lands.

In volume 30 of *American and English Encyclopedia of Law*, second edition, issued in 1905, after noting the general or early rule, it is said: "In the later cases the right of a land owner to intercept and divert percolating waters has been subjected to some qualifications, on the ground that such right relates to the beneficial use of the waters or of the land for some purpose connected with the ordinary operations of agriculture mining, domestic use, or improvements, either public or private. Under this doctrine it has been held that a land owner has no right, except for the benefit and improvement of his own premises, or for his beneficial use, to drain, collect or divert percolating waters therein, where such act will destroy or materially injure the spring of another, the waters of which spring are used by the general public for domestic purposes;

that he cannot drain, collect or divert such waters for the sole purpose of wasting them."

In Mr. Farnham's work on Waters and Water Rights, issued in 1904, volume 3, page 2712, it is said: "It has been said that there are no correlative rights existing between proprietors of adjoining lands in reference to the use of waters in the earth or percolating under its surface. And ³⁰³ many cases have been decided upon this principle. But the attempt to act upon that doctrine very soon forces the conclusion that percolating water is not an exception to the general rule that rights in organized society are not absolute, but correlative, and that one man cannot be permitted to exercise any right if the direct effect of his act would be an injury to his neighbor." This subject is treated extensively in the note to the case of Barclay v. Abraham (121 Iowa, 619, 100 Am. St. Rep. 365, 96 N. W. 1080, 64 L. R. A. 225), 10 Am. & Eng. Dec. in Eq., issued in 1905. At page 704 it is said: "It may be said to be now the generally accepted doctrine in the United States that the rights of the owner of the soil to percolating waters are limited to the use for proper purposes, connected with the natural enjoyment of his property. Thus, while the early cases held that anyone might abstract the percolating water from his land, and convey it to a neighboring town or village for sale to others—and this would seem to be still the rule in England—the modern cases have adopted the rule that the right of the land owner to divert or consume percolating water does not extend to authorizing the destruction of a stream, spring or well, by cutting off its natural source of supply, when the acts that produce that result are not done for the beneficial use and enjoyment of the land on which they are done, but for the sole purpose of gathering the water and conveying it to a distant place for the use of strangers, who have no right thereto as against the owners of the neighboring lands; and this rule is applied with especial strictness when the percolating water is abstracted by artificial and powerful means so as to create an unnatural and forced drainage, and a corresponding depletion of the natural water supply. Accordingly, when such abstraction of the percolating water affects a large extent of territory, and creates a permanent lowering of the underlying water-table so as to cause serious and permanent injury to the land of others and unfit it for profitable cultivation, the land owner whose acts cause the injury will be liable in

damages, and will be enjoined from continuing his unlawful acts. The rule applies to municipal corporations and water companies equally with individuals": See, also, the many cases cited at page 705. At page 706 it is said: "According to the best considered cases, the early doctrine must also be limited so as to permit only a reasonable use of the percolating water underlying the land; ³⁰⁴ and it is accordingly held that if such water is drawn off, not in the bona fide enjoyment of the defendant's property, but for no beneficial purpose, and a fortiori if it be drawn off maliciously, he may be enjoined from so doing, especially if the interests of the public would otherwise suffer, though the water be used colorably for some purpose of benefit to himself." At page 721 it is said: "The modern doctrine applies with especial force to the case of mineral springs fed by percolating waters, on account of the great value of many of these springs, and the magnitude of the injury that may be caused by an interference with their source of supply": *St. Amand v. Lehman*, 120 Ga. 253, 47 S. E. 949.

Mr. Freeman, who appended a lengthy note to the case of *Wheelock v. Jacobs* (70 Vt. 162, 40 Atl. 41, 43 L. R. A. 105), 67 Am. St. Rep. 659, also appended a note on the same subject to the case of *Katz v. Walkinshaw*, (141 Cal. 116, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236), 99 Am. St. Rep. 35. In the later note he says: "In our note to the case of *Wheelock v. Jacobs*, 67 Am. St. Rep. 659, we treated only the question of what waters are percolating, perhaps under the impression, which the later and best considered cases do not sustain, that when this question was solved and the answer reached that the waters in question were percolating, no other inquiry need be made, except to ascertain on whose lands they were found, when used, appropriated or otherwise interfered with." At page 71 he says: "The very decided weight of authority supports the proposition that the land owner has no right by anything done on his land to waste, whether through malice or indifference, the percolating waters there found, or which he therein develops or brings to the surface by means of ditches or wells, with or without pumping apparatus, if by such waste the neighboring land owner is deprived of percolating waters which otherwise would be within his land and which he there has a necessity for using": See authorities there cited. Tending to sustain the later doctrine of reasonable and beneficial use of underground perco-

lating waters, see *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569, 82 Am. Dec. 179; *Sweets v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276; *Katz v. Walkinshaw*, 141 Cal. 116, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236; *Barclay v. Abraham*, 121 Iowa, 619, 100 Am. St. Rep. 365, 96 N. W. 1080, 64 L. R. A. 255; *McClintic v. Hudson*, 141 Cal. 275, 99 Am. St. Rep. 33, 74 Pac. 849; *Forbell v. City of New York*, 164 N. Y. 522, 79 Am. St. Rep. 666, 58 N. E. 644, 51 L. R. A. 695; *Reisert v. New York*, 174 N. Y. 196, 66 N. E. 731; *Smith v. Brooklyn*, 160 N. Y. 357, 54 N. E. 787, 45 L. R. A. 664; *Willis v. City of Perry*, 92 Iowa, 297, 60 N. W. 727, 26 L. R. A. 124; ³⁰⁵ *Stillwater Co. v. Farmer*, 89 Minn. 58; *St. Amand v. Lehman*, 120 Ga. 253, 47 S. E. 949; *East v. Railroad Co. (Tex. Civ. App.)*, 77 S. W. 646; *Gagnon v. French Lick Springs Co.*, 163 Ind. 687, 72 N. E. 849, 68 L. R. A. 175; also note by Mr. Farnham published since his work on *Waters and Water Rights*, 64 L. R. A. 336.

We must yield assent to the later doctrine of reasonable and beneficial use, which constitutes rather a qualification of the early rule than an announcement of a new rule. The later doctrine seems to us to be sustained by the weight of authority as well as by the weight of reason. What is a reasonable and beneficial use under this later doctrine must be determined in the light of the facts and circumstances appearing in each case as it arises. We do not desire to be understood as announcing any fixed rule applicable to all cases as to the question of what constitutes such reasonable and beneficial use. Such reasonable and beneficial use has often been understood and held to mean use for any purpose for which the owner of the land upon which underground such percolating waters are found might legitimately use and enjoy his land: 30 Am. & Eng. Ency. of Law, 314; 10 Am. & Eng. Dec. in Eq., *supra*.

By the later doctrine, is not much of the difference between the rules of law governing streams existing in well-defined channels and the rules of law applicable to underground, percolating waters virtually extinguished? It may be so, but we do not decide here that it is so. We must keep in mind, however, in investigating the subject here involved the fact that water in some form is necessary to the very existence of man and to the enjoyment of his land. Without it his land becomes a desert, of no value for agricultural purposes, and unfit for habitation. In this respect water may be unlike

oil or gas, or other such subterranean substances, which, while useful to man, are not absolutely necessary to his existence or to the enjoyment of his land, and may be abstracted therefrom without destroying the value of the land. These substances may be termed merely commercial products, but we are not deciding any question in relation to these products termed commercial products.

Applying the law to this case, we believe that the facts alleged in the bill, if sustained by proof, are sufficient to entitle the plaintiffs to relief in equity, and the demurrer to the ~~306~~ bill should have been overruled. The bill proceeds upon the theory that the waters tapped and abstracted from defendant's well were supplied by an underground stream existing in a known and well-defined channel, but the evidence does not support this theory; nor does it, in our judgment, sustain the theory of an unreasonable and nonbeneficial use by defendants of the water produced from their well. The defendant's contention that the pumping and wasting of the waters from their well, shown by the evidence, were merely temporary and done in good faith for the purpose of completing the well for legitimate use seems to be sustained. The evidence of plaintiffs in a great measure sustains the contention of defendants that the pumping was only temporary and without malice, and for the purpose of completing the well for use. On cross-examination plaintiff A. P. Pence testified as follows:

"Q. In operating this well, do you know what pumping was or was not necessary in operating it as they were operating it? A. They pumped the water out so they could work down in there.

"Q. Wasn't it necessary to pump the water out so they could work down in there? A. It might have been necessary; I wasn't there.

"Q. Don't you know they could not work down in that well with that shaft with the water and without pumping it out? A. No, I don't see how they could have worked without pumping the water out."

J. D. Pence, a son of plaintiff A. P. Pence, on cross-examination, testified as follows:

"Q. The pumping that you have spoken of from this well was necessary in the operation of sinking the well, wasn't it? A. That depends upon how you have reference to sinking the well.

"Q. Is that as far as you can answer this question?
A. It is, until I know further about how the well is to be sunk.

"Q. Don't you know how that well was being sunk?
A. It was sunk by means of a stream drill, and also by means of pick and shovel.

³⁰⁷ "Q. Then you do know how this well was being sunk, do you? A. I do.

"Q. I will ask you again if this pumping was not necessary in the operation of sinking this well as it was being sunk?
A. As they were working at it I should say it was."

This evidence seems to be conclusive. We cannot say that the pumping and wasting of the water from defendant's well was such an unreasonable use of the water as to violate the rule of reasonable and beneficial use by defendants. We hold, therefore, that plaintiffs were not entitled to a perpetuation of the injunction against such temporary use of the water from defendants' well as is disclosed by the evidence.

Plaintiffs claim that under the allegations of the bill they were entitled to have the injunction perpetuated because defendants had cast the water upon the earth and the same had flowed upon and over plaintiffs' land, by reason whereof the damage to plaintiffs was irreparable. There is no allegation that defendants were insolvent, and no facts constituting irreparable injury are alleged in the bill or shown by the evidence in relation to the water which flowed upon plaintiffs' land, and plaintiffs were not entitled to a perpetuation of the injunction on the ground that such trespass or injury was irreparable: See *Farland v. Wood*, 35 W. Va. 458, 14 S. E. 140; *Becker v. McGraw*, 48 W. Va. 539, 37 S. E. 532; *Merriner v. Merriner*, 54 W. Va. 169, 46 S. E. 118.

It is claimed that the motion to dissolve the injunction should not have been considered at a time when a rule was pending and undetermined against defendants for violating the injunction. On the thirteenth day of January, 1905, an order was entered by consent of both parties continuing the consideration of the rule. This cause was submitted for final hearing, among other things, upon motion of plaintiffs to perpetuate the injunction, without having the question of the rule determined. No objection to the final hearing was made in the court below because of the pendency of the rule, and we think, under these circumstances, that the decree cannot be reversed because of the pendency of the rule at the in-

stance of the plaintiffs: *Endicott v. Mathis*, 9 N. J. Eq. 110; *Crabtree v. Baker*, 75 Ala. 91, 51 Am. Rep. 424; *Hebb v. County Court*, 48 W. Va. 279, 37 S. E. 676. It appears to us from the whole case that ³⁰⁸ the lower court did not err in dissolving the injunction and dismissing the bill, but in our judgment the decree in this cause should be without prejudice, as hereinafter indicated.

For the reasons stated it is ordered that the decree of the circuit court entered in this cause on the twenty-ninth day of March, 1905, be modified so as to overrule the demurrer to the plaintiffs' bill, and, as modified, that the same be affirmed without prejudice to the right of the plaintiffs to proceed by a bill for an injunction, or otherwise, against the defendants for any future unlawful extraction, use or waste of said underground water which may be found or obtained upon their lands, resulting in injury to the property or rights of the plaintiffs.

Modified and affirmed.

The Question of what are percolating waters is discussed in the monographic note to *Wheelock v. Jacobs*, 67 Am. St. Rep. 663-672; and the right of land owners to use such waters is discussed in the monographic note to *Katz v. Walkinshaw*, 99 Am. St. Rep. 66-75. The general rule is, that one under whose land there is percolating water may make such beneficial use thereof as he may choose, but he has no right to draw from the subterranean supply merely to waste the water or to injure adjoining owners: *Barclay v. Abraham*, 121 Iowa, 619, 100 Am. St. Rep. 365; *Stillwater Water Co. v. Farmer*, 89 Minn. 58, 99 Am. St. Rep. 541; *Houston etc. R. R. Co. v. East*, 98 Tex. 146, 107 Am. St. Rep. 620.

BALTIMORE AND OHIO R. R. CO. v. ALLEN.

[58 W. Va. 388, 52 S. E. 465.]

ATTACHMENT—Nonresidents.—The general rule that the situs of a debt is at the domicile of the creditor always yields to laws for attaching the property of a nonresident, as such laws necessarily assume that the property has a situs distinct from the owner's domicile. (p. 978.)

ATTACHMENT—Nonresidents.—While, generally speaking, the situs of a debt is constructively with the creditor to whom it belongs, it is within the power of the sovereign of the residence of the debtor, by reason of its control over its own residents, to pass laws subjecting the debt to seizure within its territorial limits. (p. 978.)

GARNISHMENT—Foreign Corporations.—Railroad companies incorporated in one state, but owning and operating railroads and having agents in another state, have the status of residents of the latter state, though not citizens of nor domiciled therein in the technical sense of such terms, and they are subject to garnishment in the latter state without reference to the jurisdiction in which the debts due from them were contracted or are payable. (p. 987.)

GARNISHMENT—Situs of Debt.—For the purpose of garnishment, a debt is annexed to the person of the debtor and subject to garnishment wherever he is found, unless expressly made payable elsewhere. (p. 987.)

ATTACHMENT and Garnishment—Foreign Corporations.—The status of a railroad company incorporated in one state and doing business in another, within the meaning of attachment laws, is equivalent to a resident of the latter state, and it may be proceeded against as a garnishee, to the same extent, and in respect to the same classes of debts, as natural persons residing within the state. (p. 992.)

R. White, J. B. Somerville and D. C. Westenhaver, for the appellant.

Caldwell & Caldwell, for the appellee.

389 **POFFENBARGER, J.** Upon a writ of error to a judgment discharging a rule in prohibition and dismissing plaintiff's petition, the inquiry is whether a justice of the peace has jurisdiction to proceed with an attachment against a railroad company, chartered by the legislature of Maryland and permitted by an act of the legislature of Virginia, before the division of the state, to build and operate its railroad through what is now West Virginia, as garnishee, for the subjection of a debt contracted by the same railroad company in the state of Pennsylvania, and payable there, to the satisfaction of a demand due from the creditor of said company to a third party, such creditor being a nonresident and not having appeared in the action. The supposed lack of jurisdiction is predicated upon two grounds: 1. That the situs of the debt sought to be subjected is in the state of Pennsylvania, where the creditor resides, where it was contracted and where it is payable; 2. That though the situs of the debt be not in the state of the residence of the creditor, it is not in this state, because the garnishee is domiciled in another state and found here only temporarily.

II. F. Putnam, an employé of the Baltimore and Ohio Railroad Company on part of its line in Pennsylvania, to whom said company was indebted for services, was himself indebted to J. D. Miller and Son, also residents of Pennsylvania. Miller & Son assigned their claim against Putnam to W. W.

Rogers of Wheeling, who ³⁹⁰ brought an action on it before Allen, justice of the peace of Ohio county, making the railroad company a garnishee. Thereupon the company presented its petition for a writ of prohibition to a judge of the circuit court of that county, who, after awarding a rule, discharged it on motion and dismissed the petition. The petition alleged, in addition to the facts already stated, that the debt due Putnam was contracted and payable in Pennsylvania.

Great conflict and confusion characterize the decisions of the courts of the several states respecting the right to proceed by garnishment against debts due from corporations to nonresidents and made payable in a foreign jurisdiction. Many of them rest their decisions on the theory that the debt follows the person of the creditor and can be subjected only in the jurisdiction in which he resides. Others take the opposite view, saying it follows the person of a debtor and belongs to the jurisdiction of his residence. Still others give the idea of situs no peculiar force, holding that it may be subjected wherever the debtor may be sued. The adherents to the first proposition defend it upon the ground that the ownership of the debt is of necessity in the creditor, for no man can have property in a debt that he owes to another.

Thus, in *National Bank v. Furtick*, 2 Marv. (Del.) 35, 69 Am. St. Rep. 99, 42 Atl. 479, 44 L. R. A. 115, the court says: "This inquiry could present no difficulty in respect to real estate, and little or none in regard to tangible personal property having an actual situs. But for the purpose of jurisdiction, the situs of a debt or chose in action is a question upon which there has been some diversity of opinion. There is, of course, no actual or visible, but only constructive, situs. Does the debt follow the creditor and his domicile, or the debtor and his domicile? The legal right and title are clearly in the creditor, and by analogy to the principle that constructive possession is with the rightful owner, we should expect that the chose in action, particularly a debt, follows the person of the creditor for the purpose of attachment, as well as for many other purposes. And such seems to us to be the law, especially where there is no stipulation to the contrary."

In his very able note to this case, in 69 Am. St. Rep. ³⁹¹ Mr. Freeman says, at page 117: "By the great weight of reason and authority debts are considered as the property of
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the persons to whom they are due, and their situs to be at the domicile of the creditor for the purpose of garnishment, as for all other purposes."

Mr. Freeman does not mean to say, however, that the decisions in all the cases cited for the foregoing proposition were controlled by it. It is merely stated as a sort of basic principle which has been modified in several ways. In the next subdivision of his note, page 118, he says many of the leading cases cited hold that the rule has been dispensed with by statutes. "In states whose courts recognize the authority of the general rule that the situs of a debt is at the domicile of the creditor, it is sometimes admitted that 'this fiction always yields to laws for attaching the property of a nonresident, because such laws necessarily assume that the property has a situs distinct from the owner's domicile': Wyeth Hardware etc. Co. v. Lang, 54 Mo. App. 147; affirmed in 127 Mo. 242, 48 Am. St. Rep. 626, 29 S. W. 1010, 27 L. R. A. 651. Statutes and the custom of London may, and often do, for the purposes of attachment or garnishment at the suit of a third person, give the debt a situs at the domicile of the debtor: Swedish-American Nat. Bank v. Bleecker, 72 Minn. 383, 71 Am. St. Rep. 492, 75 N. W. 740, 42 L. R. A. 283; Williams v. Ingersoll, 89 N. Y. 508; Douglass v. Phenix Ins. Co., 138 N. Y. 209, 54 Am. St. Rep. 448, 33 N. E. 938, 20 L. R. A. 118; Lancashire Ins. Co. v. Corbetts, 165 Ill. 592, 56 Am. St. Rep. 275, 46 N. E. 631, 36 L. R. A. 640. Compare Root v. Davis, 51 Ohio St. 29, 36 N. E. 669, 23 L. R. A. 445, 30 L. R. A. 364. 'We conceive it to be well settled by authority,' said the court in Reimers v. Seatco Mfg. Co., 70 Fed. 573, 37 U. S. App. 426, 'that while, generally speaking, the situs of a debt is constructively with the creditor to whom it belongs, it is within the competence of the sovereign of the residence of the debtor by reason of its control over its own residents to pass laws subjecting the debt to seizure within its territorial sovereignty': See Pomeroy v. Rand, McNally & Co., 157 Ill. 176, 41 N. E. 636; Bragg v. Gaynor, 85 Wis. 468 55 N. W. 919, 21 L. R. A. 161; Newland v. Circuit Judge, 85 Mich. 151, 69 Am. St. Rep. 118, 119, 48 N. W. 544."

In a number of the cases referred to in these portions of the note the decisions stand upon the view that neither debtor nor creditor resided in the state in which it was attempted to subject the debt, and whether it was with the **392** debtor or creditor was wholly immaterial: Swedish-Ameri-

can Bank v. Bleecker, 72 Minn. 383, 71 Am. St. Rep. 492, 75 N. W. 740, 42 L. R. A. 283; Douglass v. Phoenix Ins. Co., 138 N. Y. 209, 34 Am. St. Rep. 448, 33 N. E. 938, 20 L. R. A. 118; National Bank v. Furtick, 2 Marv. (Del.) 35, 69 Am. St. Rep. 99, 42 Atl. 479, 44 L. R. A. 115; Louisville etc. R. R. Co. v. Dooley, 78 Ala. 524; Alabama etc. R. R. Co. v. Chumley, 92 Ala. 317, 9 South. 286; Central Trust Co. v. Chattanooga etc. Co., 68 Fed. 685.

Though a great deal is said in the reported cases in support of the doctrine that the debt follows the person of the creditor, few decisions in attachment cases stand upon it. It is usually referred to as a general principle having more or less bearing upon some other proposition which forms the basis of the final disposition of the case. Missouri Pacific Ry. Co. v. Sharitt, 43 Kan. 375, 19 Am. St. Rep. 143, 23 Pac. 430, 8 L. R. A. 385, 389; Chicago etc. Ry. Co. v. Sturm, and Chicago etc. Ry. Co. v. Campbell, 58 Kan. 818, 51 Pac. 1100, reversed by the supreme court of the United States, 174 U. S. 710, 718, 19 Sup. Ct. Rep. 797, 873, 43 L. ed. 1144, 1147, however, adopt and apply that rule.

It is manifestly at variance with a fundamental principle of the law of attachment, and the conception of the nature of the rights to be vindicated and wrongs to be redressed, which originally called the remedy by attachment into being and has made its use indispensable in modern jurisprudence. All courts characterize it as a special, anomalous and harsh remedy, authorizing the seizure of the debtor's property in advance of an adjudication against him. It is based upon and deals with circumstances and conditions which put it beyond the power of the court to do justice and work out the substantial rights of the parties by the use of the ordinary legal remedies. Total want of remedy at law and inadequacy thereof in view of the peculiar situation of the parties, respecting property and personal rights, necessitated the establishment of the system known as equity jurisprudence for the vindication of equitable rights of which the law courts could take no notice and for relief against fraud and mistake. Under this system authority is generally exercised over the persons of the parties in respect to their rights, rather than over the property which is the subject matter of their differences, although in many instances the property itself is a subject of the direct and immediate action of the court. But the circumstances are often such that the reme-

dies in equity are not broad, flexible and swift enough to prevent the impending wrong or save the endangered right ³⁹³ of the party. Hence, the necessity for the special statutory remedy by attachment, substantially in the form in which it was exercised by the courts of London under a custom, as a jurisdiction peculiar to those courts, unknown throughout the balance of the kingdom, and giving relief under practically the same conditions and of the same kind as that afforded by attachment by the custom of London. The extraordinary circumstances calling for its exercise creates a right which, in fact and in its nature, is equitable rather than legal, as tested by legal and equitable rules and principles, unaffected by any custom or statute. Fraud in some form or non-residence of the debtor renders the ordinary common-law remedies unavailing. Fraud, so far as they are concerned, may wholly deprive the creditor of his rights, and non-residence of the defendant makes it impossible for the creditor to sue in his own state, and unjustly compels him to pursue the fleeing debtor into a foreign jurisdiction, although he has left property behind him amply sufficient to pay the debt, against which the creditor cannot proceed by any form of action known to the common law. Instead of awaiting such further development of equity jurisprudence as to enable it to give the creditor under these circumstances what he has a clear moral right to exact, the legislature adopted as a legal remedy that which has existed for centuries by the custom of London, and allowed a legal proceeding against property of the defendant as well as against his person.

If, by giving a remedy against the resident debtor of the nonresident creditor, who is the debtor of the plaintiff, the legislature has impliedly said the plaintiff may, by a legal process, resort to the man in whose hands the money belonging to the absent defendant is, and thereby make him hold the fund as a trustee, or deliver it to an officer of the court, all the right which the defendant may have to that fund shall be deemed to be within the jurisdiction of the courts of this state for the purposes of the attachment, can the court say it shall not be so? The statute is founded upon a recognition of the plaintiff's moral right to treat him as a trustee and declares that he shall be so treated in the law courts. But for the statute, the legal right and property in the debt would undoubtedly be with the absent creditor. As

³⁹⁴ the statute exists, however, we must keep our eyes upon the conditions it has wrought out, and not wander into a field of speculation from which we are fenced out by the plain intent and inevitable force and effect of the statute, in the ultimate achievement of the end for the accomplishment of which the statutory remedy is given, namely, seizure of the debt at the residence of the debtor, prevention of its withdrawal by either party from the territorial jurisdiction of the court, extinguishment of the creditor's interest in it by adjudication, and application of it to the payment of the plaintiff's debt.

To the anticipated suggestion that this line of argument assumes the determination of the very point in controversy, the reply is that one of the declared and primary objects of the remedy is to reach and subject the property and effects of nonresident debtors. Nonresidence is the basic fact of the jurisdiction and the remedy. Are we to assume that it was not the intention to subject debts due the defendant, but only tangible property? Is it possible that the lawmakers of all the states have stood by in silence and watched the courts for centuries misapply the remedy to the detriment and injury of thousands of people, without inserting a simple exception in the statute?

As already indicated, the attachment system of law had its origin in the custom of London. By that law it determined and announced that, for its purposes, the debt was annexed to the person of the debtor and not to that of the creditor. "By this custom a debt contracted without the jurisdiction of the city may be attached, if the debtor is found within the jurisdiction, for every debt follows the person of the debtor": Bacon's Abridgment, 54. "Neither is it necessary to aver that the plaintiff in the principal case was indebted to the plaintiff below within the jurisdiction of the mayor's court; for it is not necessary that the debt should arise, or the defendant reside within it, or that he should be actually summoned": Bacon's Abridgment, 56.

The position here adopted was taken by the supreme court of the United States in *Chicago etc. Ry. Co. v. Strum*, 174 U. S. 710, 19 Sup. Ct. Rep. 797, 43 L. ed. 1144. Mr. Justice McKenna, delivering the opinion, said: "Our attachment laws had their origin in the custom of London: *Drake on Attachments*, sec. 1. Under it a debt was regarded as ³⁹⁵ being where the debtor was, and questions of jurisdiction were set-

tled on that regard. In *Andrews v. Clark*, 1 Carth. 25, Lord Chief Justice Holt summarily decided such a question, and stated the practice under the custom of London. The report of the case is brief, and is as follows:

“ ‘Andrews levied a plaint in the sheriff’s court in London, and upon the usual suggestion that one T. S. (the garnishee) was debtor to the defendant, a foreign attachment was awarded to attach that debt in the hands of T. S., which was accordingly done; and then a diletur was entered, which is in nature of an imparlance in that court.

“ ‘Afterward T. S. (the garnishee) pleaded to the jurisdiction, setting forth that the cause of debt due from him to the defendant Sir Robert Clarke, and the contract on which it was founded, did arise, and was made at H. in the county of Middlesex, extra jurisdictionem curiae; and this plea being overruled, it was now moved (in behalf of T. S., the garnishee) for a prohibition to the sheriff’s court aforesaid, suggesting the said matter, viz., that the cause of action did arise extra jurisdictionem, etc., but the prohibition was denied because the debt always follows the person of the debtor, and it is not material where it was contracted, especially as to this purpose of foreign attachments; for it was always the custom in London to attach debts upon bills of exchange, and goldsmith’s notes, etc., if the goldsmith who gave the note on the person to whom the bill is directed liveth within the city without any respect had to the place where the debt was contracted.’ The idea of locality of things which may be said to be intangible is somewhat confusing, but if it be kept up the right of the creditor and the obligation of the debtor cannot have the same, unless debtor and creditor live in the same place. But we do not think it necessary to resort to the idea at all or to give it important distinction. The essential service of foreign attachment laws is to reach and arrest the payment of what is due and might be paid to a nonresident to the defeat of his creditors. To do it he must go to the domicile of his debtor, and can only do it under the laws and procedure in force there. This is a legal necessity, and considerations of situs are somewhat artificial. If not artificial, whatever of substance there is must be with the debtor. 396 He and he only has something in his lands. That something is the res, and gives character to the action as one in the nature of a proceeding in rem: *Mooney v. Buford & George*

Mfg. Co., 72 Fed. 32, 18 C. C. A. 421; Conflict of Laws, sec. 549, and notes."

Does the additional circumstance that the debt is payable in the foreign state vary the law in this respect? The affirmative of this proposition is predicated upon the supposition that a debt made payable to a person in the state in which he resides is thereby specially annexed to him, and withdrawn from the jurisdiction in which the debtor resides, if they are in different states. It is not pretended that it can have a situs irrespective of both debtor and creditor. If it can be said to have a situs at all, it must be with the one or the other of them. It has no tangible existence. Hence, the only conceivable effect that could result from making the debt payable at the residence of the creditor, in this connection, would be the more effectual binding of it to his person. Can it be said that the circumstance of the place at which a debt is made payable makes it more effectually, or sacredly, the property of the creditor? Suppose it did. Is it not the very object and purpose of the attachment to extinguish his right and property in the debt so far as may be necessary to effectuate satisfaction of the plaintiff's debt? Does it depend upon whether the debt is bound to him tightly or not? If it were attached to his person at all, would it not defeat the jurisdiction? If this consideration could have any force, it would be necessary to give it some effect, when the debt is payable at a place in which neither party resides. What possible effect could it have? Would it put the debt beyond reach through either debtor or creditor? This would be a bald absurdity, in which everything of substance would be sacrificed to a bare technicality. Place of payment has nothing to do with the place of enforcement. No action can be maintained for the debt by anybody until after default. Action does not produce payment at the place named. It exacts damages "for the breach, payable in the jurisdiction of the forum. There can be no action until after breach of the contract, and then it may be maintained wherever the defendant can be sued. That the garnishment prevents compliance with all the terms of the contract is no valid objection, ³⁹⁷ because its primary office is to break asunder the contractual relations between the debtor and creditor to the extent of substituting the plaintiff to the beneficial interest of the creditor in the debt.

Having no doubt about the untenableness of the position, that the proceeding must be at the place of residence of the defendant, the next inquiry is whether the garnishee is within the jurisdiction of the court. In the case of *Pennsylvania etc. Co. v. Rogers*, 52 W. Va. 450, 44 S. E. 300, 62 L. R. A. 178, this court held that a foreign railroad corporation, operating no line of road, nor carrying on its ordinary business, within the state, is not subject to garnishment in respect to a debt due from it to a nonresident, not agreed to be paid to him within the state. If, notwithstanding the different situation of the plaintiff, which built and operates its road within the state under legislative authority specially conferred, its legal status is the same as that of the *Pennsylvania Railroad Company*, the conclusion will be the same. The difference in that respect, if any, is the only ground upon which the two cases can be distinguished, except as to service of process. This case differs from *Mahany v. Kephart*, 15 W. Va. 609, and *Stevens v. Brown*, 20 W. Va. 450, in only one important particular, namely, that in each of those cases the defendant, creditor of the railroad company, appeared, but did not appear in this.

As asserted in *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 450, 44 S. E. 300, 62 L. R. A. 178, by way of marking the distinction between it and *Mahany v. Kephart*, 15 W. Va. 609, this court, in the latter, most assuredly decided the status of the *Baltimore and Ohio Railroad Company* to be such as made it liable to the process of garnishment at the instance of a resident assignee of a debt contracted by the defendant in another state, on account of wages due the defendant from the assignee for services rendered in such other state. In delivering the opinion of the court, Haymond, Judge, said: "I am unable to see, if the said railroad company can be sued for debts contracted in this state, why it may not also be sued in this state for debts contracted in other states. It would be strange indeed if residents of this state could sue and enforce the payment of their debts contracted in this state against said railroad company and its property in this state, through the courts thereof, and non-resident creditors, and resident ³⁹⁸ creditors of said railroad company where contracts are made in another state, should be denied the same rights and privileges and thus be left without remedy in our courts. I do not feel at liberty to so hold under my convictions of the law with us touching the question. Certainly if *Kephart* could have

properly sued the railroad company for said one hundred and five dollars in the county of Harrison, at the time this action was brought, the plaintiff in this suit had a right to sue Kephart there and garnishee the railroad company there as the debtor of Kephart." Following this is the assignment of the reasons for his conclusion. In this part of his opinion, he makes no reference to the appearance of the defendant as having aided the jurisdiction of the court. It is alluded to only upon the inquiry as to the power of the court to render a personal judgment against him. However, it may have been, in law, a waiver of defects which would otherwise have been held fatal, in consequence of which it could now be relied upon as showing the decision to be sound in principle. Whether it would have made any difference in the opinion and conclusion of the court, no person can possibly know, since it cannot be ascertained from the report of the decision.

The Baltimore and Ohio Railroad Company is undoubtedly a foreign corporation, as tested by the jurisdiction of the federal courts: *Baltimore etc. R. Co. v. Harris*, 12 Wall. (U. S.) 65, 20 L. ed. 354; *Marshall v. Baltimore etc. Ry. Co.*, 16 How. 329, 14 L. ed. 959; *O. & M. R. R. Co. v. Wheeler*, 1 Black, 297, 17 L. ed. 130; *Chicago etc. Co. v. Whitton*, 13 Wall. 270, 20 L. ed. 571. This court, in *Rece v. Newport News etc. Co.*, 32 W. Va. 164, 9 S. E. 212, 3 L. R. A. 572, came to the same conclusion, under the federal authorities above cited, and others. But the test of jurisdiction in the federal courts is not residence, but citizenship, under section 2 of article 3 of the federal constitution, extending the judicial power to all cases "between citizens of different states." The distinction between citizenship and residence, as applied to corporations is observed by the courts. "It should be observed that the corporation, although it may have a quasi habitat or residence in another state than that which created it, yet cannot be a citizen elsewhere, and therefore cannot claim the benefit of that clause of the United States constitution (article 4, section 2), which declares that "the citizens of each state shall be entitled to all ³⁹⁹ privileges and immunities of citizens in the several states."

Upon applications for removal of causes from state to federal courts, as in *Rece v. Newport News etc. Co.*, 32 W. Va. 164, 9 S. E. 212, 3 L. R. A. 572, cited, and perhaps a few other instances, the state courts are called upon to no-

tice and observe this distinction, but in the ordinary actions by and against corporations, jurisdiction is tested by the fact of residence, except when it is acquired under special statutes. Though a corporation is incapable of having a residence in the sense in which that term is applied to an individual, just as it is not, in fact, a citizen, it may be and is often deemed to have a residence, or the equivalent thereof, in a state other than that of which it is a citizen.

There is no conflict between this view and the conclusion expressed in *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 450, 44 S. E. 300, 62 L. R. A. 178. The garnishee in that case was only temporarily or casually in the state. It had an agent here for a special purpose. Its situation was analogous to that of a nonresident individual temporarily or casually in the state, having no usual place of abode at which service could be made in his physical absence therefrom. Here, the case is radically different. The corporation actually operates its road through the state, having agents along its line permanently, upon whom service may be had at any time, owning property of immense value and carrying on a business of vast proportions, in view of which the statute contains special provisions, applicable to such foreign corporations and to no other, as will be shown.

By the great weight of judicial authority this gives it the equivalent of residence in the state, and as a resident it may be proceeded against as garnishee, just as a resident individual may. "Accordingly, the doctrine of the court now is that several states may by competent legislation unite in creating the same corporation or in combining several pre-existing corporations into a single one; that one state may make a corporation of another state, as thus organized and conducted, a corporation of its own, as to any property within its territorial jurisdiction; and that a state may by an enabling act authorize a corporation created in another state to build and use a railroad within its own limits without creating a new corporation. Illustrations of these conclusions are now ⁴⁰⁰ seen every day in the passage by states of enactments making foreign corporations, doing business within the domestic jurisdictions, domestic corporations, and amenable in all respects to the domestic laws and police regulations, notwithstanding the provisions of their foreign charters. But it remains equally true that for many purposes of legal procedure and practical convenience in the administration of

justice each one of the bodies so created remains a domestic corporation within the state under whose legislature it has been called into existence. Clearly such a corporation is a domestic corporation within each of the states whose legislation has created it, for the purpose of local jurisdiction to the application of local police regulations. Such a corporation is a resident of each of such states, for the purpose of the ordinary jurisdiction of its courts, and consequently may be subjected to garnishment in any one of them, provided the situs of the debt is there, although its principal office or place of business be not there": 10 Cyc. 170, 171.

nn National Fire Ins. Co. v. Chambers, 53 N. J. Eq. 468, 32 Atl. 663, the court holds that: "A corporation is capable of having several domiciles and of being sued at the same time in more than one jurisdiction." The opinion in that case reviews many decisions, English and American, holding this doctrine. Though not accrediting the foreign corporations with a domicile in the state, the following cases hold it liable as garnishee: *Mooney v. Buford & George Mfg. Co.*, 72 Fed. 32, 18 C. C. A. 421; *Pomeroy v. Rand, McNally & Co.*, 157 Ill. 176, 41 N. E. 636; *Mooney v. Railroad Co.*, 60 Iowa, 346, 14 N. W. 343; *German Bank v. American Fire Ins. Co.*, 83 Iowa, 491, 32 Am. St. Rep. 316, 50 N. W. 53; *Burlington etc. R. R. Co. v. Thompson*, 31 Kan. 180, 47 Am. Rep. 497, 1 Pac. 622; *Harvey v. Great Northern Ry. Co.*, 50 Minn. 405, 52 N. W. 905, 17 L. R. A. 84; *Wyeth Hardware Co. v. Lang*, 127 Mo. 242, 48 Am. St. Rep. 626, 29 S. W. 1010, 27 L. R. A. 651. In some of them, it is done on the theory of a quasi residence in the state by the corporation, thereby holding the situs of the debt to be in the state. In others, the courts proceed upon the assumption that a debt has no situs and that the debtor may be proceeded against wherever service upon him may be had, without regard to his residence. This doctrine is contrary to the principles underlying the decision in *Pennsylvania Co. v. Rogers*, 52 W. Va. 450, 44 S. E. 300, 62 L. R. A. 178, cited, which are believed to be sound and supported by the great weight of judicial authority. A nonresident may be summoned as garnishee, but upon his showing that he has ⁴⁰¹ nothing in the state belonging to the defendant and is not bound to deliver or pay him anything in the state, he must be discharged.

There are decisions, however, which hold foreign corporations, having the right to do business, and consenting to be sued, in the state, not liable as garnishees, unless they have property of the defendant in their possession within the state, or are bound to deliver property or pay him money in the state: *Louisville etc. R. R. Co. v. Dooley*, 78 Ala. 524; *Alabama etc. R. R. Co. v. Chumley*, 92 Ala. 317, 9 South. 286. In the last-named case, the court held a judgment, rendered in Tennessee against an Alabama railroad company, operating its road through the former state, as garnishee, for wages earned in the latter state, void on the ground that the Tennessee court had not acquired jurisdiction, saying: "Plaintiff being a resident of Alabama, and defendant an Alabama corporation, the debt, being contracted and payable in this state, could not be subjected by process of garnishment by a court of Tennessee."

Similarly, in *Douglass v. Phenix Ins. Co.*, 138 N. Y. 209, 34 Am. St. Rep. 448, 33 N. E. 938, 20 L. R. A. 118, it was held that: "The right of a creditor of a corporation to prosecute an action to recover the debt in the courts of his own state cannot be defeated by the pendency of attachment proceedings against him in another state by a creditor there, when the only claim of jurisdiction by the foreign court rests upon authority given by the statutes of its state to seize the debt by and through process proceedings against an agent of the corporation in that state. 2. While a state may authorize the seizure and sale, by means of appropriate legal proceedings, of property of nonresidents in the jurisdiction, for the payment of their debts, it cannot subject to its laws either their real or personal property out of the jurisdiction. 3. In attachment proceedings the res must be within the jurisdiction of the court issuing the process in order to confer jurisdiction. 4. A domestic corporation has at all times its exclusive residence and domicile in the jurisdiction of origin, and it cannot be garnished in another jurisdiction for debts owing by it to home creditors, so as to make the attachment effectual against such a creditor in the absence of jurisdiction acquired over his person. 5. The law of a state cannot make a debtor, who is actually a non-resident, a resident, by so declaring, at least so as to bind
402 another jurisdiction by the declaration. 6. The legal proceedings or judgments of another state are recognized here only where jurisdiction has been acquired according to the

course of the common law in the foreign forum; and this although the statutes of that state purport to give its courts jurisdiction, in disregard of the principles and rules of general jurisprudence, which this state is bound to recognize."

National Bank v. Furtick, 2 Marv. (Del.) 35, 69 Am. St. Rep. 99, 42 Atl. 479, 44 L. R. A. 115, holds that foreign corporations cannot be summoned as garnishee in one state to reach a debt payable by it in another state. This proceeds upon the theory of situs at the residence of the creditor. Swedish-American Nat. Bank v. Bleecker, 72 Minn. 383, 71 Am. St. Rep. 492, 75 N. W. 740, 42 L. R. A. 283, embodies the same conclusion, based upon a different ground, namely, nonresidence of the garnishee corporation, the same as that upon which we put the decision in Pennsylvania R. R. Co. v. Rogers, 52 W. Va. 450, 44 S. E. 300, 62 L. R. A. 178. The syllabus says: "Our statute requires a foreign insurance company, before doing business in this state, to file a stipulation agreeing that any legal process affecting such company, served on the insurance commissioner, shall have the same effect as if personally served on the company. Held, such a stipulation filed by the garnishee does not give it a domicile in this state for all purposes, or bring into this state the situs of a debt which it owes elsewhere by reason of business transacted elsewhere, and such a debt cannot be seized in an action in rem in this state."

Aside from the Alabama decisions, none of these were railroad cases. In Alabama G. S. R. R. Co. v. Chumley, 92 Ala. 317, 9 South. 286, the Alabama court says: "Several statutes of Tennessee, regulating proceedings of garnishment and service of process upon corporations, were introduced in evidence; but we fail to find among them any statute providing for service of process upon foreign corporations in garnishment suits. It may be that the language is comprehensive enough to include proceedings by garnishment, when the property sought to be reached is in the jurisdiction of the state, though the garnishee may be a nonresident; but in the absence of evidence of any construction by the courts of Tennessee, we cannot interpret the statutes as intending to place within the jurisdiction of the state property which has no locality there." ⁴⁰³ Upon examination of the Tennessee statutes, it discovered no purpose or intent to make the foreign corporation in any sense a resident of Tennessee, and, therefore, the situs of the debt could not be, upon

either theory of that subject, within the state of Tennessee. As to the other cases, we might reach the same conclusion under our statutes, and be in perfect accord with Pennsylvania etc. R. R. Co. v. Rogers, 52 W. Va. 450, 44 S. E. 300, 62 L. R. A. 178, for the statute confers upon foreign railroad corporations rights and powers materially different from those conferred upon other foreign corporations. As to the latter, section 30 of chapter 54 of the Code says that, upon complying with certain requirements, they "shall have the same rights, powers and privileges, and be subject to the same regulations, restrictions and liabilities that are conferred and imposed" on corporations chartered under the laws of this state. In construing this language, we must not lose sight of other provisions concerning, and affecting the status of, foreign corporations. A ground of attachment in this state is, "That the defendant, or one of the defendants, is a foreign corporation, or a nonresident of this state": Code, c. 106, sec. 1. This evinces an intent to deny to them residence within the state. The statute has been so construed, not only here but in Virginia also. They are subject to the attachment laws: Quesenberry v. People's Bldg etc. Assn., 44 W. Va. 512, 30 S. W. 73; Savage v. People's Bldg. etc. Assn., 45 W. Va. 275, 31 S. E. 991; Cowardin v. Universal Life Ins. Co., 32 Gratt. 445. These decisions are probably sound in principle. The provision of means of obtaining jurisdiction of the person may well be held to have been intended to give a cumulative remedy and not to take away any of those already in existence.

But the language of that section applicable to railroads is much broader, indubitably subjecting them to the liabilities and according them all the rights of residents, except in so far as it has been qualified by the decision in *Rece v. Newport News etc. Co.*, 32 W. Va. 164, 9 S. E. 212, 3 L. R. A. 572, namely, that it does not deprive them of their rights in respect to federal jurisdiction. The language is: "Every railroad corporation doing business in this state under the provisions of this section, or under charters granted or laws passed by the state of Virginia, or this state, is hereby declared to be, as to its works, property, operations, transactions and business in this state, a domestic ⁴⁰⁴ corporation, and shall be so held and treated in all suits and legal proceedings which may be commenced or carried on by or against any such railroad corporation, as well as in all other

matters relating to such corporation." In view of this, can it be treated as a nonresident and its property made liable to attachment in every county through which it passes, for every sort of attachable claim that might arise? No such unreasonable assumption seems ever to have entered the mind of any person. Legislative intent to the contrary is made too plainly manifest. That would violate rights plainly conferred by the express language of the statute. It would not be treated as to its property, business, operations, and transactions within the state as domestic corporations are. While conferring upon it all the privileges and immunities incident to residence, the legislature endeavored to impose the liabilities incident thereto. Accordingly, the statute says they shall be held to be, and treated as, domestic corporations in all suits and legal proceedings which may be commenced or carried on by or against them. Garnishment is a legal proceeding, though possibly not a suit directly against the garnishee, as to which we need not determine. Nor are such suits and proceedings limited by the place of origin of the cause of action. In *Humphreys v. Newport News etc. Co.*, 33 W. Va. 135, 10 S. E. 39, the cause of action was damages for a personal injury which occurred in another state. This court held that the action was maintainable because service of process could be had in this state, but it did not note any distinction between citizenship and residence. It was unnecessary to do so, since service of process alone gave the requisite jurisdiction. To hold a railroad to be a nonresident for one purpose and a resident for another would be not only inconsistent but violative of the manifest purpose and intent of the legislature, disclosed by the statute above quoted.

The Baltimore and Ohio Railroad Company, and other corporations of its class, at the time of the decision of the case of *Mahany v. Kephart*, 15 W. Va. 609, were distinguished in their status from other foreign corporations, by a statute passed December 27, 1873: Acts of 1872-73, chapter 227, section 16. It declared that: "All railroad companies doing business in this state under charters granted or laws passed by the state of Virginia or ⁴⁰⁵ this state are hereby declared to be domestic companies or corporations, and shall be treated as such in all cases." The Baltimore and Ohio Railroad Company was necessarily included among those doing business under laws passed by the state of Virginia.

This provision, modified and combined with others enacted from time to time, finds a place now in section 30 of chapter 54 of the Code.

In view of it and of the reasoning of Judge Haymond in that case, we cannot say the decision is wrong or would have been wrong, had there been no appearance on the part of the defendant. Nor can we say now, in view of the existing statutory provisions adverted to, that the status of a railroad company doing business in this state within the meaning of those statutes is not equivalent to that of a resident of the state. On the contrary, we think it is, and, for that reason, it may be proceeded against as a garnishee to the same extent, and in respect to the same classes of debts, as natural persons residing in this state. Just here it is proper to say the use of the word "domicile" in the case of *Pennsylvania R. R. Co. v. Rogers*, 52 W. Va. 450, 44 S. E. 300, 62 L. R. A. 178, is inaccurate, as it is in some other cases, discussed in the opinion in that case, and in this, and is to be taken and applied in the sense of "residence." Nor can the *Pennsylvania Railroad Company*, upon the facts disclosed by the record in its case against *Rogers*, be consistently held to have the status of the *Baltimore and Ohio Railroad Company*, since it operates no line of road here, and has not put itself within the letter or spirit of the statute by merely having a soliciting agent in the state.

That this ruling may deprive the employ  s in other states of foreign railroad companies, doing business in this state, of the benefit of exemptions allowed them in such other states, cannot be permitted to alter the principles of law governing the case. *Stevens v. Brown*, 20 W. Va. 450, presented that feature to this court without avail. It went up to the supreme court of the United States in *Chicago etc. R. R. Co. v. Sturm*, 174 U. S. 710, 19 Sup. Ct. Rep. 797, 43 L. ed. 1144, with the same result. The doctrine of *Stevens v. Brown*, 20 W. Va. 450, is too well settled by authority of the highest character to permit any disturbance of it. Should the garnishee be compelled to make a double payment on account of the services rendered it, the fault will be, as we think, with the court of some other state, which can only compel the second ⁴⁰⁶ payment by refusing to give the judgments of the courts of this state the full faith and credit to which they are entitled under the federal constitution. For that, there is a plain remedy.

For the reasons aforesaid, the judgment will be affirmed.

ON REHEARING.

The correctness of the conclusion above stated, as to the status of a foreign railroad corporation doing business in this state, is vigorously resisted on the rehearing. As that is the pivotal question in the case, the argument demands attention. First, it is said the case of *Mahany v. Kephart*, 15 W. Va. 609, does not treat the Baltimore and Ohio Railroad Company as a domestic corporation, and that this view is precluded by certain expressions in the opinion, one of which is the reference to *Baltimore etc. R. R. Co. v. Gallahue's Admrs.*, 12 Gratt. 625, 65 Am. Dec. 254, saying: "However, it was not necessary to decide in that case whether the said railroad company could be sued or garnished upon contracts made in another state." That was because the contract sued on was a Virginia contract. But in *Mahany v. Kephart*, 15 W. Va. 609, the contract on which the main action was predicated was made in Baltimore, Maryland, and had come into the hands of a citizen of this state by assignment, and the labor for the value of which the railroad company was garnished was performed in Maryland. No matter, therefore, what the Virginia court had decided, this court did decide that the Baltimore and Ohio Railroad Company could be sued here for a debt, arising out of a contract made in another state, and could be held as garnishee as to wages due for labor performed in another state, and Judge Haymond said of the *Gallahue* case: "But I think on close examination of the opinion of the court it was not intended to restrict the right to sue or garnishee the said railroad company to Virginia contracts." The other expression relied upon has no reference whatever to the question now under consideration, as will appear from the connection in which it was used. Judge Haymond did say: "But I do not now definitely pass upon that question as it does not fairly arise in the case." The question referred to is whether, if the debt garnished had been expressly made payable in Maryland, this circumstance would have called for a different decision. The sentence immediately preceding the one last above quoted reads as follows: ⁴⁰⁷ "Neither the facts agreed nor the answer of the garnishee shows, or pretends, that there was any express agreement that the said one hundred and five dollars due Kephart should be paid in the state of Maryland; and if they did so show, I am not now prepared to decide that it would or should

affect the case or change my conclusion therein." What we decide here now is just what Judge Haymond then intimated as his opinion, namely, that such stipulation does not affect the case, and we say so because the garnishee is to be dealt with as a resident individual would be. The effect of such stipulation when the garnishee is a resident has been determined in the discussion of the question of situs, which need not be here repeated. In *Pennsylvania R. R. Co. v. Rogers*, 52 W. Va. 450, 44 S. E. 300, 62 L. R. A. 178, we said it did make a difference, because the garnishee was a nonresident. The contention here is that a railroad company doing business in this state is to be treated as a domestic corporation quoad only, "its works, property, operations, transactions and business in this state," and therefore cannot be sued on a contract or obligation arising out of, or pertaining to, its business in another state; and the contrary of this, we repeat, has been expressly decided in *Mahany v. Kephart*, 15 W. Va. 609, as well as in other cases, referred to in the opinion. Whether a resident may be discharged from garnishment by showing the debt to be payable in another state is an entirely different question now, and was such in *Mahany v. Kephart*, 15 W. Va. 609.

A further contention is that, by alteration of the statute, governing foreign railroad corporations doing business in the state, since the decision in *Mahany v. Kephart*, 15 W. Va. 609, the status of such corporations has been changed. The act of December 27, 1873, quoted in the opinion, was too broad. Its purpose went beyond the limits of legislative power, as was soon revealed by decisions of the federal supreme court. The legislature could not deprive the federal courts of their jurisdiction by declaring a foreign corporation to be a domestic one. It probably occurred to our legislators that, in some other respects, such corporations could not be domesticated. We could not annul or alter the charter of a corporation of another state or dissolve it. All we can do is to exclude it from the state or limit its powers and privileges here, and impose burdens and liabilities. We cannot have or exercise any extraterritorial power over them. Realizing this and seeing ⁴⁰⁸ the excessive and futile breadth of our statute, the legislature modified it. For what purpose and to what extent? Simply for the purpose of reducing it within the limits of its legitimate powers over

the subject matter, and to no greater extent. The evil intended to be overcome by the change is perfectly apparent. That is the best measure, or standard, by which to determine the extent of the change intended, and it falls far short of the subject matter of this discussion and contention. Surely it was never intended to deprive citizens of this state of the right to sue such corporations for debts due them, or for debts which they have the right to acquire by a legal proceeding, such as garnishment. Nothing in the language of the statute suggests this and it is not within the reason for the alteration made. Such a debt or right, held by a citizen of this state, no matter where it arose, is a matter relating to such corporation, and the statute says it shall be held to be, and treated as, a domestic corporation in all suits and legal proceedings which may be commenced or carried on by or against it "as well as in all other matters relating to such corporation."

Having carefully re-examined the case and considered the argument on the rehearing, we are convinced that the conclusions set forth in the opinion filed on the former hearing are correct, and the judgment then rendered will be now re-entered.

Affirmed.

The Situs of Debts for Purposes of garnishment is the subject of a monographic note to *National Bank v. Furtick*, 69 Am. St. Rep. 113-127. For recent cases on garnishment against foreign corporations, see *Boyle v. Musser-Sauntry Land etc. Co.*, 88 Minn. 456, 97 Am. St. Rep. 538; *Goodwin v. Claytor*, 137 N. C. 224, 107 Am. St. Rep. 479. The situs of a debt for the purpose of garnishment is, according to *Kansas City etc. Ry. Co. v. Parker*, 69 Ark. 401, 86 Am. St. Rep. 205, not only at the domicile of the debtor, but in any state in which the garnishee may be found, provided the law of the state permits the debtor to be garnished, and the court acquires jurisdiction over the garnishee through his voluntary appearance or actual service of process upon him within the state. In this case the supreme court of Arkansas holds that a citizen of one state may garnish a foreign railroad company operating within that state for a debt due one of its employes for labor performed therein, although he is a citizen of another state.

BAKER v. MONUMENTAL SAVINGS AND LOAN ASSOCIATION.

[58 W. Va. 408, 52 S. W. 403.]

INSURANCE, FIRE—Subrogation.—If a cestui que trust obtains insurance on the trust property for the payment of his debt secured by trust deed, and after loss the insurer pays the whole debt secured, he is entitled to an assignment from the trust creditor of the debt thus secured and paid and to recover thereon. (p. 1000.)

INSURANCE, FIRE—Subrogation.—If the owner of land subject to a trust deed given thereon to secure a debt by his vendor conveys such land, reserving a vendor's lien therein for the purchase money, such conveyance being subject to the deed of trust, and the trust creditor obtains insurance in such owner's name without notice that he has conveyed the land, and, after a loss the insurer in settlement thereof pays the whole trust debt, he is entitled to an assignment thereof and to be subrogated to the rights of the trust creditor. (p. 1000.)

Cunningham & Stallings, for the appellant.

R. H. Allen, for the appellee.

409 McWHORTER, J. The Vincents owned lot No. 37 (sometimes in the record designated No. 27) in the town of Thomas, Tucker county, and borrowed from the Monumental Savings and Loan Association \$600 in two sums, \$300 the 25th of August, 1896, and \$300 the 20th of January, 1897; and executed two deeds of trust at the dates mentioned upon the said lot and premises to secure the same. In 1897 Joseph Vincent, one of the parties, became the sole owner of the said lot and conveyed the same to B. Baker, the said Baker assuming the debts aforesaid. In 1898, Baker conveyed the same to Chester Brumbaugh for \$1,170, taking a check as the cash payment of \$390 from said Brumbaugh and his two notes at six and twelve months for \$390 each, reserving a vendor's lien to secure the purchase money. The check was not paid.

At April rules, 1901, Baker brought his suit in the circuit court of Tucker county against Clayton Brumbaugh, administrator of Chester Brumbaugh who had died, — Brumbaugh, father and heir at law of Chester Brumbaugh, and the Monumental Savings and Loan Association, defendants, for **410** the purpose of enforcing his vendor's lien. And at the October rules, 1901, said Baker filed an amended bill alleging

that the payments made by the Vincents and by himself upon the association's debt had entirely paid up the said debt, and making J. R. Collett, who had filed a mechanic's lien against Baker, a party to his suit, and also making H. J. Wagoner and E. J. Bond, trustees in the said deeds of trust, parties to the suit. The cause was referred to a commissioner to state an account ascertaining the lands owned by Chester Brumbaugh, deceased, the nature and condition of the title thereto, the liens thereon, their amounts and priorities and to whom owing. The commissioner reported that the said Brumbaugh had died seised of lot No. 37 in the town of Thomas, that the debt due the Monumental Savings and Loan Association amounting to \$366.50 with interest from March 5, 1902, was the first lien on said lot, and the debt due B. Baker, \$1,371.44 with interest from said fifth day of March, 1902, was the second lien on said property; that the amount due John R. Collett was \$75.57, to be paid out of the lien of Baker when collected. This report, not being excepted to, was confirmed on the seventh day of March, 1902, and a decree then entered to sell the said property to pay the said liens. The property was sold on the fifth day of March, 1903, by the commissioner appointed therefor and purchased by the plaintiff, B. Baker, for \$501, of which one-third, \$167, was paid by him in cash, and he executed to the commissioner his two notes of like sums of \$156 each payable in three and six months according to the terms of the decree. The sale was confirmed without exception to said report, by decree entered March 10, 1903, and the commissioner ordered to pay out of the cash payment the costs of the suit and sale, and the remainder to be applied by him to the payment of the debts as ascertained and decreed, and that he withdraw the notes and collect the deferred payments and "when collected to pay the same on the debts remaining unpaid in the priority as specified in the decree of sale entered in this cause on the seventh day of March, 1902." On the twenty-sixth day of June, 1902, the Monumental Savings and Loan Association, in writing, by two assignments of \$183.25 each, making together \$366.50, the amount of the lien of the said loan association, assigned all its right, title and interest in and to the two deeds of trust securing the said loans ⁴¹¹ of \$300 each, to the Scottish Union and National Insurance Company in satisfaction and settlement of the loss sustained by the Monumental Savings and Loan Association under insurance policies numbered respectively 2,455,593 and

2,652,177 issued by said insurance company in the name of B. Baker of Parsons, West Virginia, containing the usual mortgage clause in favor of said association, the building on said lot No. 37 having been destroyed by fire on the twelfth day of November, 1901.

At the May rules, 1903, Baker filed his bill in the circuit court of Tucker county against Clayton Brumbaugh, administrator of Chester Brumbaugh, the Monumental Savings and Loan Association, the Scottish Union and National Insurance Company, and J. P. Scott, special commissioner, enjoining and restraining them from collecting the two notes of \$167 each; and that the commissioner be required to retain all of said money then in his hands or to come into his hands from said notes, and that he be in the end directed to pay such cash then in his hands and the notes to be collected to the plaintiff; and that any further claim of the Monumental Savings and Loan Association or the Scottish Union and National Insurance Company be held to be void as against said special commissioner, and for general relief. The injunction was granted as prayed for. The Scottish Union and National Insurance Company filed its demurrer and answer, which demurrer was overruled by the court. Depositions were taken and the cause came on to be heard on the twenty-fifth day of March, 1905, upon the bill and answer of the Scottish Union and National Insurance Company and exhibits filed therewith, and the general replication thereto, former orders and decrees, upon the depositions duly taken and filed on behalf of the plaintiff, when the court held that the lien of the Monumental Savings and Loan Association on lot No. 37 was discharged by the payment to said association of the amount due it by the Scottish Union and National Insurance Company under the said policies of insurance; and the said defendant Scott, special commissioner, was restrained and enjoined from paying to the Scottish Union and National Insurance Company or the Monumental Savings and Loan Association, their agents or assigns, the money arising from the sale of the real estate in this cause; and it was decreed that said commissioner pay the ⁴¹² money in his hands or to come into his hands by virtue of the notes executed for the deferred payment of the purchase money as mentioned in the bill, to plaintiff Baker, except that he pay to John R. Collett the sum of \$75.57 by virtue of his mechanic's lien; and decreed plaintiff costs in this suit against the Scottish Union and National Insurance Company,

from which decree the Scottish Union and National Insurance Company appealed and assigned many grounds of error.

The only question really involved in the cause is, whether the appellant insurance company had a right to purchase from the Monumental Savings and Loan Association its lien for \$366.50 which had been reported by the commissioner as the first lien upon the lot No. 37, and so decreed to said association, and to be subrogated to the rights of said association under said decree or whether the payment of said sum to the association was a discharge of the lien. It is contended by counsel for appellant that the decree of March 7, 1902, fixing the priorities of the liens and making the amount in question the first lien and directing its payment in that order was *res adjudicata*, and it was too late to change the priorities and to disturb its relation. It is not a question of *res adjudicata*, as it would be if the purpose was to change its relation as a lien, but a question of the subsequent payment of the decree by the appellant company.

Plaintiff Baker conveyed the lot No. 37 to Chester Brumbaugh by deed dated December 10, 1898, reserving his vendor's lien for the purchase money, from which time he ceased to own the lot or have any other or further interest in it than his vendor's lien upon it. It is true he had an insurable interest in the property for the further security of his lien, but he took out no insurance upon it. After the policies first taken out by the Vincents expired, on the twenty-seventh day of January, 1900, and the fourth day of September, 1900, the Monumental association, without the knowledge that Baker had conveyed the property more than a year prior thereto to Chester Brumbaugh, took out two policies of insurance of \$300 each in the name of B. Baker in the appellant company, loss, if any, payable to the said Monumental association, as a further security for their said two loans. This the association had an unquestioned right to do for its own benefit. The fire which destroyed the property insured occurred November 12, 1901, ⁴¹³ and although the policies provided that if fire occur the insured should give immediate notice of any loss thereby in writing to the insurance company and make full proofs of loss within sixty days after the fire, plaintiff Baker complied with none of the requirements of said policies, never pretended to make any claim on account of said policies until after he had purchased the lot at judicial sale in March,

1903, nor until he filed his bill of injunction at May rules, 1903, eighteen months after the fire occurred. Indeed, it very clearly appears from the testimony of Baker that he knew nothing about the existence of the insurance policies upon which the money was paid by the appellant company for the decree assigned to it by the Monumental Savings and Loan Association. While he says in his examination in chief that he paid insurance premiums, on his cross-examination it is made to appear that what he paid on account of insurance premiums was on the insurance taken by Vincent, during which time the first fire occurred and he got \$200 out of it, and he knew nothing of any insurance afterward. He says he does not know that it was afterward insured; if it was, it was by his attorney. It is very certain that his attorney did not take out the insurance in question in the appellant company. The debt of the Monumental association was paid in full, or rather the appellant company paid for it the full amount of the debt. In *Carpenter v. Insurance Co.*, 16 Pet. (U. S.) 495, 10 L. ed. 1044, it is held: "By the Court: No doubt can exist that the mortgagor and the mortgagee may each separately insure his own distinct interest in property against loss by fire. But there is this important distinction between the cases: that where the mortgagee insures solely on his own account, it is but an insurance of his debt; and if his debt is afterward paid or extinguished, the policy ceases from that time to have any operation; and even if the premises insured are subsequently destroyed by fire, he has no right to recover for the loss, for he sustains no damage thereby; neither can the mortgagor take advantage of the policy, for he has no interest whatsoever therein; on the other hand, if the premises are destroyed by fire before any payment or extinguishment of the mortgage, the underwriters are bound to pay the amount of the debt to the mortgagee, if it does not exceed the insurance. Upon such payment, the underwriters are entitled ⁴¹⁴ to an assignment of the debt from the mortgagee, and may recover the same from the mortgagor. The payment of the insurance is not a discharge of the debt, but only changes the creditor": See 27 Am. & Eng. Ency. of Law, 263, and cases cited; *Dunbrack v. Neall*, 55 W. Va. 565, 47 S. E. 303; *Phenix Ins. Co. v. First Nat. Bank*, 85 Va. 765, 17 Am. St. Rep. 101, 8 S. E. 719, 2 L. R. A. 667; *Hogg's Equity Principles*, sec. 415.

For the reasons herein given, the decree of the circuit court of Tucker county is reversed and set aside, the injunction dissolved, and the plaintiff's bill dismissed.

Reversed.

The Right to Subrogation is the subject of an extended note to American Bonding Co. v. National etc. Bank, 99 Am. St. Rep. 474-533. This right is discussed with special reference to insurance companies at page 504 of this note, and in the note to Mobile Ins. Co. v. Columbia R. R. Co., 44 Am. St. Rep. 731-739.

STATE v. WOODROW.

[58 W. Va. 527, 52 S. E. 545.]

HUSBAND AND WIFE—Witnesses—Evidence.—A wife is not a competent witness against her husband in a prosecution for his crime not committed by personal violence upon her. (p. 1003.)

HUSBAND AND WIFE as Witnesses in Criminal Case.—A wife is not a competent witness against her husband in a prosecution against him for the murder of their infant child, though the pistol ball which killed the child wounded the wife while such child was in her arms. (p. 1004.)

INDICTMENTS cannot be Quashed on the ground that they rest in whole or in part on incompetent evidence received by the grand jury. (p. 1007.)

HOMICIDE.—Evidence of Experiment to test the strength of a child to fire a pistol is admissible to rebut evidence of one accused of murder that such child fired the pistol causing the homicide. (p. 1008.)

EVIDENCE—Declarations—Res Gestae.—A declaration which is merely a narrative of a past occurrence, though made ever so soon after the occurrence, is not part of the res gestae and cannot be received in evidence. (p. 1008.)

EVIDENCE—Declarations—Res Gestae.—A statement made by a person accused of murder at a point a quarter of a mile from the place of the homicide, when he was going for a doctor, just after leaving the spot, as to how the shooting took place, is not admissible in evidence as part of the res gestae. (p. 1008.)

HOMICIDE.—Instructions which introduce into a homicide case the degree of involuntary manslaughter, when there is no evidence whatever to show that degree of crime, are bad, and should not be given. (p. 1009.)

T. C. Reynolds, for the plaintiff in error.

C. W. May, attorney general, for the state.

⁵²⁷ BRANNON, P. William Woodrow was indicted in Mineral county for the ⁵²⁸ murder of his child, Ruth Eliza-

both Woodrow, and was sentenced to the penitentiary for eight years upon a verdict of murder in the second degree. The deceased was a baby of fourteen months age, and was in the arms of its mother, at her breast, when a pistol shot killed it, the ball passing through the baby's head, and wounding the mother, according to her evidence. The accused offered a plea in abatement to quash the indictment on the ground that his wife had been examined before the grand jury; but the plea was rejected. On the trial the wife of the accused gave evidence at the instance of the state against her husband, over his protest.

Was the wife a competent witness against him? Elliott on Evidence, volume 2, section 736, states the law thus: "When the husband or wife was the defendant in a criminal prosecution the other was, at common law, incompetent either for or against the accused. The marriage relation, however, must be a lawful one or the rule generally has no application. And if the offense was committed by husband or wife against the other, the injured party is usually a competent witness, either for or against the accused, both at common law and under the statutes." That late work of great practical value cites many authorities for its text. Bishop's New Criminal Procedure, volume 1, section 1153, says that: "If personal violence is inflicted on the wife by the husband, she from necessity may, or if required must, testify to it in a criminal proceeding against him for the battery; and he may do the like if she beats him." This ancient rule of the common law is stated in all the books. The sole question in this case is, Does this case come within the exception to the rule; that is, was the prisoner's act of shooting the child a crime against the wife? It was not violence to her person. It was not a crime against her person corporally. Such it has to be under this exception. It is true that there has been considerable difference of opinion as to what instances fall within this exception. Some cases hold that bodily violence to the wife is not the only case under the exception. For instance cases of bigamy and other cases have been held to fall within the exception. The books must be resorted to for full discussion. It will be found that though cases where no actual violence constituting assault and battery upon the wife have been held to fall within the reason of the exception, yet they are cases ⁵²⁹ which directly affect the legal right of the wife, rights going along with her per-

sonality or person, as an individual separated from all other persons. However, I can safely say that the great bulk of American decision is, that to come within the exception the case must be one of personal violence to the spouse: *Basset v. United States*, 137 U. S. 496, 11 Sup. Ct. Rep. 165, 34 L. ed. 762; *Baxter v. State*, 34 Tex. Cr. Rep. 576, 53 Am. St. Rep. 720; *Crawford v. State*, 98 Wis. 623, 67 Am. St. Rep. 829, 74 N. W. 537; *Commonwealth v. Sapp*, 90 Ky. 580, 29 Am. St. Rep. 405, 14 S. W. 834. And I repeat that those cases, like bigamy and others, that do not actually involve violence to the person, which are held within the exception, are cases where the wrong is to the individual particularly and directly injured by the crime for which the husband is prosecuted: *Dill v. People*, 19 Colo. 469, 41 Am. St. Rep. 254, 36 Pac. 229. But the instances mentioned—I mean the cases—not requiring actual violence to person are confined to a few states. The weight of authority is otherwise, requiring personal violence or a restraint of liberty to the wife, restraint of liberty being a wrong to her person: *Basset v. United States*, 137 U. S. 496, 11 Sup. Ct. Rep. 165, 34 L. ed. 762. The act must touch her person or her personal individual right as a person distinct and individualized from the balance of the community, to come under the exception spoken of. An enormous wrong this murder was to the mother in a moral point of view, in an emotional point of view, in a sentimental point of view, in a pathetic point of view, under emotions of the heart which move human beings, owing to the relation of mother and child. We are apt to consider this terrible crime as a greater one against the mother than to any other living human being; still, in a physical point of view, the homicide did not touch the person of the wife, but was only a crime against her as one member of the community; I mean in the eye of the law. Remember that Woodrow was tried for killing the child, not for shooting his wife. On a trial for shooting his wife, she could, under the exception stated, give evidence against her husband, and could prove, if material, not only the shooting of herself, but also the shooting of the child, as part of the *res gestae*; but on his trial for killing the child the fact that the one ball did violence to both mother and child does not alter the case. The homicide of the child is one distinct crime; the shooting of the mother another distinct crime. The close connection of the two in time and circumstances does not blend the results of the ball, and

530 make the killing of the child a personal or corporal violence to the mother. To come under the exception the crime must be against the mother in a legal point of view. The rule of evidence as to *res gestae* will not admit the wife as a witness. Under that rule the question is, not the competency of the witness proving the things done or said, but whether the things themselves are proper to go before the jury, even though proven by a competent witness; whereas, here it is a question whether the witness is a proper one to prove the things done or said, admitting those things to be proper evidence, if deposed to by a competent witness. Necessity, the want of another witness, is pleaded for the admission of the wife's evidence in this case. That was the parent of the common-law exception. But that necessity may often arise and call as loudly as in this case. Suppose the husband should kill a grown child in the privacy of the home, there being no other witnesses of the fact but the wife. Would this necessity admit her evidence? Suppose he would there kill the wife's grown sister or anyone else. Would she be competent? I say not. If there were other witnesses present, would she be competent? I suppose not, as the necessity would not then exist. Then, the evidence would be competent or incompetent according as there was, or was not, another witness than the wife. Though we concede that the necessity meant by law in this instance is not merely necessity for some witness, but the necessity to protect the spouse, still that would not admit the wife's evidence in this case. It is suggested that tender age of the person injured, causing incapacity to give evidence, calls for the wife's evidence. Does it depend on age? If so, the wife's competency or incompetency would rest on the age of the person injured. If a husband should kill a man in a field or highway, none but the wife of the murderer being present, would she be a competent witness against her husband? Surely not. Yet the cry of justice would be as loud in that case as in the present case. The necessity would be just as great. The accidental circumstance that no eye saw the deed but that of wife and husband would, in such case, just as much create a necessity for the wife's evidence as in this case. The ancient rule of the common law forbidding evidence of one spouse against the other stands intact to-day. Our code, in chapter 152, 531 section 19, reads thus: "In any trial or examination in or before any court or officer for a felony or misdemeanor,

the accused shall, at his or her own request (but not otherwise), be a competent witness on such trial and examination. The wife or husband of the accused shall also, at the request of the accused, but not otherwise, be a competent witness on such trial and examination." The object of this statute, in its latter clause, was to make the wife or husband a competent witness for the other, at his or her request. It is an enabling statute, because before it came neither could use the evidence of the other. It enlarges the right of the accused by giving him or her the right to introduce his or her spouse as a witness; but it does not enlarge the right of the state. Before that statute the state could not introduce the wife against the husband, or the husband against the wife; neither can it do so since that statute. That statute does not touch this case. Whether it has by the words, "but not otherwise," abolished the exception which the common law made to the rule excluding wife and husband, that is, the exception allowing them to give evidence of a crime done by one to the other, we do not say, because it does not arise in this case. If we view this instance as within the common-law exception, then we would have to decide whether the statute changed the common-law exception and made the wife incompetent. It may with force be said that the statute is very broad; that it makes one, and only one, exception to the rule of the incompetency of the spouse; that it only allows one to use the other as a witness; that the words, "but not otherwise," are an affirmative enactment, since they actually prohibit such evidence except in one, and only one, case. Reasons which may have operated in the legislature for branding such evidence as incompetent wholly can be suggested. In many instances the one spouse wants to get rid of the other, and may give false testimony to accomplish it. Also it would, in some cases, breed animosity and marital dissension. The legislature may have designed to utterly exclude its use in behalf of the state. If such was its design, it could scarcely have used more apt language than those prohibitory words. They are strong prohibitory words. Therefore, we conclude that the evidence of Woodrow's wife was improperly used against him.

⁵³² Next, as to the plea in abatement. The law is thus stated in 17 American and English Encyclopedia of Law, 1283: "The court will not look behind the return of the grand jury to set aside an indictment because that body received improper evi-

dence or the testimony of witnesses who were not competent to testify." Many cases there cited support this view. The Texas court said, in a case where a wife had been examined as a witness against her husband by a grand jury: "We cannot look behind the return of the grand jury and set aside an indictment because improper evidence has been received": *Dockery v. State*, 35 Tex. Cr. Rep. 487, 34 S. W. 281. Where the accused was examined by the grand jury it was held not to invalidate the indictment: *Mencheca v. State* (Tex. Cr.), 28 S. W. 203. Some of the cases cited by the Encyclopedia for its text above quoted are cases where the wife was before the grand jury giving evidence against her husband: *State v. Tucker*, 20 Iowa, 508, and *State v. Boyd*, 2 Hill, 288, 27 Am. Dec. 376, and *Dockery v. State*, 35 Tex. Cr. Rep. 487, just cited. There are authorities to the contrary. In the wilderness of conflicting cases a court in these days can, at best, only select that line seeming to it the better one. Where is the better reason? In the first place, my own experience as a practitioner and judge tells me, that it is not usual, under practice in this state, to challenge an indictment on either the ground of want of sufficient evidence to sustain it, or even the incompetency of evidence before the grand jury. It would be a practice of great inconvenience. Very plainly a court cannot go into the question of the weight and sufficiency of the evidence to sustain the indictment, and thus review the action of the grand jury. That would be for the court to usurp the office of the grand jury, and also to usurp the office of the petit jury, because the court is not the judge of the weight of the evidence, but the grand jury in the first instance is, and finally the petit jury. When once an indictment is returned a true bill, it has legal force; you cannot go behind the return; it is not void, and it only remains to try its truth. Where there is some legal evidence, though light, before the grand jury, the indictment cannot be quashed: *Wharton on Criminal Law*, sec. 508; *State v. Logan*, 1 Nev. 509; *State v. Morris*, 36 Iowa, 272. But how is it when the question is not one of sufficiency of evidence, but where incompetent evidence has been heard by the grand jury? The indictment ⁵³³ is not void. Often incompetent evidence is heard by grand juries, not merely incompetent matter, but incompetent witnesses. It would be an inconvenient and dangerous practice to institute preliminary investigation to ascertain what incompetent evidence was before the grand jury,

how much good and how much bad evidence, and what its weight. Where there is any competent evidence before the grand jury it cannot be quashed, though there may have been some incompetent evidence of a witness, say the authorities just cited. This proposition would hardly seem to require authority. The court cannot say on what the grand jury found its indictment, or how far the incompetent evidence operated, or on what members it operated. You cannot call each member and ascertain on what evidence he formed judgment. Next, take the case where the indictment rests alone on evidence of an incompetent witness. In such cases some authorities say that the indictment must go; but even here, why shall we not say that on the trial the state may furnish other evidence ample to sustain its indictment which was not before the grand jury? The indictment is only a charge, to be sustained by competent evidence on the trial. So the court said in *State v. Dayton*, 23 N. J. L. 49, 53 Am. Dec. 270. The accused can have the evidence, if incompetent, excluded on the trial. True, it is hard on him to be put to trial upon an indictment resting alone on incompetent evidence; but grand juries are not good judges of competency, and oftentimes do not consult the court. It would be very bad practice, endless inconvenience, to have a full preliminary trial of competence of evidence before the grand jury in many cases. How far would the practice go? Does the inconvenience to the accused justify the institution of such a practice? Are not his rights fully vindicated by his right to exclude improper evidence on the trial.

Therefore, we conclude that the plea in abatement was properly rejected.

The prisoner testified that his little boy less than three years of age often played with the pistol which killed the baby, and that on that fateful day he was playing with the pistol and discharged it and thus the baby was killed. The state, to repel this defense, to meet this evidence, gave evidence tending to show that the little boy had not capacity ⁵³⁴ to fire the pistol. This evidence was that when the hammer of the pistol had been pulled back by a witness, the little boy's finger was placed upon the trigger, and he was asked to pull the trigger and throw the hammer, but was unable to do so. The evidence was also that the little boy was asked to pull back the hammer, and was unable to do so. This evidence was proper to go before the jury to say whether this

defense of the prisoner was true or false. It is suggested that the little boy may not have exerted his full strength to lift the hammer or pull the trigger. This may, or may not, be so. It does not appear that the child refused to try, or did not try, to do so, but the evidence fairly shows that he did make the effort. Whether he used all his strength we cannot, we need not, say, since that is a question of probability or improbability before the jury, not a question of the admissibility of the evidence. In short, its weight was for the jury.

Error is assigned because the court refused to allow a witness to prove that the prisoner told him at a point a quarter of a mile from the place of the homicide, when going for a doctor, just after leaving the spot, how the shooting took place. It does not distinctly appear that the declaration was close enough in time or place to the transaction to be part of the *res gestae*. Where the declaration is merely a narrative of a past occurrence, though made ever so soon after the occurrence, it ought not to be received in evidence, as it is no part of the *res gestae*: *Corder v. Talbott*, 14 W. Va. 277; *Hawker v. Baltimore etc. R. R.*, 15 W. Va. 628, 36 Am. Rep. 825. The proposed evidence was merely the prisoner's story, not on the spot of the transaction, reflecting its truth, but after he had had time to make up the story. Furthermore, it does not appear what the witness would give in evidence as to how the shooting took place. What did Woodrow say to him as to how it took place? It does not appear. This is another reason for holding that the rejection of the evidence constitutes no error: *Sesler v. Rolfe Coal etc. Co.*, 51 W. Va. 318, 41 S. E. 216; *Greever v. Bank of Graham*, 99 Va. 547, 39 S. E. 159; *Kay v. Glade etc. R. R. Co.*, 47 W. Va. 467, 35 S. E. 973.

The defendant excepted to the refusal of an instruction saying that the jury could find a verdict of not guilty, or of involuntary manslaughter, or of manslaughter, or of murder in the second degree, or of murder in the first degree, with a recommendation of confinement in the penitentiary, or of ⁵³⁵ murder in the first degree. This instruction commenced with a verdict of not guilty. The usual course is to commence with murder in the first degree. Perhaps the court thought that the object was to give undue prominence to the verdict of not guilty. However, we do not see that this fact would render the written instruction objectionable. But the instruction is bad, because it introduced into the case the de-

gree of involuntary manslaughter, when no evidence whatever tended to show involuntary manslaughter. If the prisoner killed the child, the law would presume that the act was *prima facie* murder in the second degree. Involuntary manslaughter had nothing to do with the case under the evidence. Many cases say that an instruction should not be given when no evidence fits to the case, for the reason that it introduces before the jury a question not presented by the evidence. It is a wrong to the state, and often results in a defeat of justice. There is nothing in the evidence of this case to show facts entering into the legal definition of involuntary manslaughter.

Therefore, we reverse the judgment, set aside the verdict, and grant a new trial, and remand the case for such new trial.

Reversed.

Mr. Justice Poffenbarger Dissented solely on the ground that, in his opinion, the testimony of the wife was admissible on the trial of her husband in the present case. He first stated that by the common law husband and wife were not competent witnesses for or against each other as a general rule, but that there was an exception to the rule both at common law and under the decisions in the United States: "People v. Green, 1 Denio, 614; State v. Hussey, Busb. (N. C.) 123; Whipp v. State, 34 Ohio St. 87, 32 Am. Rep. 359; State v. Davis, 3 Brev. 3, 5 Am. Dec. 529; Goodwin v. State, 114 Wis. 318, 90 N. W. 170; Davis v. Commonwealth, 99 Va. 838, 38 S. E. 191. In the case last cited the rule is stated as follows: 'At common law the wife was a competent witness to testify against her husband in relation to offenses alleged to have been committed by him upon her.' Starkie on Evidence, volume 2 (part 1), 554, says: 'The wife is a witness *ex necessitate*, on a charge against her husband of violence committed on her person; so the dying declarations of the wife against her husband are admissible in the case of murder.' For the state, it is insisted that, under this exception to the common-law rule, the evidence of the wife is admissible under the circumstances of this case."

Judge Poffenbarger reviewed the West Virginia statute referred to in the principal opinion and reached the conclusion "that this statute works no change in the common-law exception which permits the wife and husband to testify against each other on criminal trials for offenses by one against the other.

"Whether the exception is broad enough to make the wife a competent witness against the husband under the circumstances of this case involves a consideration of the reason or principle upon which

that exception stands. All the authorities say it arises *ex necessitate rei*. What sort of necessity is its basis? In *Bently v. Cook*, 3 Doug. 422, Lord Mansfield said: 'That necessity is not a general necessity, as where no other witness can be had, but a particular necessity, as where, for instance, the wife would otherwise be exposed without remedy to personal injury.' In *Soule's Case*, 5 Greenl. 407, Mellen, C. J., said: 'From the general rule some exceptions have been established, founded on the necessity of the case. For instance, if a wife could not be admitted to testify against the husband as to threatened or executed violence and abuse upon her person, he could play the tyrant and brute at his pleasure, and with perfect security beat, wound and torture her at times and in places when and where no witnesses could be present nor assistance be obtained.' Wigmore on Evidence, section 2239, says: 'That was commonly placed on the ground of necessity—that is, a necessity to avoid that extreme injustice to the excluded spouse which would ensue upon an un-deviating enforcement of the rule.' In *Rex v. Wakefield*, 2 Lew. C. C. 1, 20, 279, Hullock, B., said: 'A wife is competent against her husband in all cases affecting her liberty and person; . . . it would be unreasonable to exclude the only person capable of giving evidence in certain cases of injury. Our law recognizes witnesses *ex necessitate*, and it would be strange indeed that the husband should be allowed to exercise every atrocity against the wife and her evidence not be admitted.'

"The nature of the necessity being thus disclosed, is it applicable to the case of a wrong done by either spouse to an infant child? Plainly, it appears that this necessity grows out of the privacy and seclusion in which such wrongs may be perpetrated. The husband is master of his home. The law terms it his castle. From it he may exclude all except members of his family. There he has the right to require the presence and continuance of his wife and children. In the secret recesses of his mansion they are bound by duty to stay. Against his will they are not entitled to have others present. He is entitled to the custody and control of his children. He may make them utterly dependent upon him for their support, by denying to strangers the right to give them employment and to receive them within their doors. His right to their custody is admitted to be superior to that of the mother, even when the parents are living separately from each other. Is it possible that the law will not permit the wife to reveal the brutality and inhumanity of the husband to children of such tender years as to make them incompetent as witnesses? If she cannot, what remedy is there in the law for their protection? If it is not a wrong against her, conceding that it is necessary to bring the act within the definition of a legal wrong against her, then it does not justify her separation from him, and she is compelled either to remain silent and submit to it, or forfeit her right to the support of her husband and to any share in his estate. For a wrong cruelly perpetrated upon her she may, under our

law, depart from her lord's castle without forfeiting her right to dower or her distributive share in his estate, but if she cannot do so for cruelty to her infant child without making such sacrifice, it seems to me that the necessity is even greater than in the case of direct cruelty to herself, as by beating, wounding and maltreating. If it does justify separation, then it must be, in law, a wrong done to her, and, therefore, strictly within the exception. To say it is not an injury and a wrong to her is to set at defiance the laws of nature. The lowest orders of the animal kingdom will not only protect their young, but will, as a rule, sacrifice life itself for their safety. Men and women who have the true natural instincts, and in whom the parental affection is normal, undepraved and unrestrained by viciousness, will make any sacrifice, even that of their personal safety and lives, for the protection of their children. No sacrifice can be greater than that of the child. In subjecting Abraham to the final and highest test of his faith, God required him to offer up his son; and the highest ideal of sacrifice is embodied in the scriptural declaration: 'God so loved the world that He gave His only begotten Son,' etc.

"Any interpretation of the common law which ignores natural rights is not to be entertained; for its object is the vindication of such rights. The general rule to which exception has been made is not predicated upon any natural, inalienable right, but merely upon public policy, and to say that public policy will, in any event, be carried to the extent of destroying a natural right, or falls short of the protection of such rights, is to carry it beyond reason. That the general rule disqualifying the husband and wife from testifying for or against each other does rest upon considerations of public policy is not open to question. All the decisions are to this effect. In *Soule's Case*, 5 Greenl. 407, Mellen, C. J., said: 'Reasons of public policy do not certainly extend so far in such cases as to disqualify her from being a witness against him.' Lord Hardwicke said in *Barker v. Dixie*, T. Hardw. 264: 'The reason why the law will not suffer a wife to be a witness for or against her husband is to preserve the peace of families.' Lord Kenyon said in *Davis v. Dinwoody*, 4 Term Rep. 678: 'Their being so nearly connected, they are supposed to have such a bias on their minds that they are not to be permitted to give evidence either for or against each other.' Irvin, J., in *Mills v. United States*, 1 Pinn. 73, said: 'But suffer or compel him to testify, and indelible disgrace may be fixed upon his family and he be made the subject of the deepest mortification which a sensitive being can endure. . . . Is a policy so fraught with mischief to those delicate relations of society to be established? Surely not. . . . The reason for the exclusion of husband and wife when called for or against each other being social policy and not interest, statutes abolishing incompetency resting on interest do not remove the common-law incompetency of husband and wife for or

against each other': Wharton's Criminal Evidence, sec. 400. If we were to examine all the cases on the subject, nothing better or more forcible than reasons of public policy could be found for the general rule disqualifying husband and wife from testifying. Some judges have said it is due to their unity. Grant it, and yet we have but a fiction rendered necessary for the working out of certain rights artificially created by the law. Are the natural, inalienable rights of life and liberty to be sacrificed or subordinated to mere reasons of public policy? If we say that disqualification goes so far as to prevent the wife from testifying against the husband concerning a wrong done to a helpless child, to whose voice the courts will not, and cannot, listen, we must say that reasons of public policy shall be paramount to natural right.

"The rules and principles governing society and the marital relation, as well as the law of nature, demand that parents have the custody of the persons of their children. No law can alter this without subverting the family relation which lies at the basis of all society. No law can clothe a child of extremely tender age with the power to testify, with any degree of certainty, as to the nature and extent of injury inflicted upon it. Hence, if husband and wife are not permitted to testify against each other as to offenses against such children, the law affords no adequate protection to their lives and liberty. If, therefore, it be conceded that an injury to such a child is not a wrong to the person or liberty of the mother or father, the principle of necessity affords independent ground for the admission of the testimony of either husband or wife against the other in respect thereto. The object of the law is to protect life, liberty and property and encourage the pursuit of happiness. The family relation, its sanctity and inviolability are necessary to the existence and perfection of society, and the law will not permit invasions of its sanctity nor disturbance or breach of its confidential relations, upon consideration of mere convenience, or in respect to light and trivial matters, but human life, liberty and immunity from great bodily injury are matters of such moment that the remedies afforded by the law must be adequate for the vindication of the right thereto under all circumstances. It must create no places in which wounding and murder may be perpetrated with impunity and without fear or possibility of detection and punishment. Husband and wife will not be dragged forth to testify against each other as to offenses against strangers, and divulge matters communicated in confidence, and take action calculated to engender hatred between them and produce discord and dissensions, subversive of the family relation. Their own happiness and the necessity of maintaining that relation for the benefit of society in general, as well as the protection of the helpless offspring of the union forbid this, because the public right against the offender may ordinarily be vindicated without it. But when the blood of husband, wife or helpless child is found on the door of the home, and wounds on the body of such

member of the family, the law must invade that home and permit the truth to be disclosed, else the enemy of the home and all society and violator of all laws, human and divine, must go unwhipped of justice. The law of necessity alters the general rule of competency under such circumstances. This is the force and effect of the common-law decisions, which permit the husband and wife to testify against each other on charges affecting their persons and liberty. They declare a principle of the common law, and the reason for the application of that principle here is imperious. . . . A case relied upon by the attorney general to sustain the competency of this evidence is *Clarke v. State*, 117 Ala. 1, 67 Am. St. Rep. 151, 23 South. 671, admitting the wife as a witness against her husband to prove him guilty of having murdered their child by beating her while enceinte so that the child, though born alive, afterward died, in consequence of injuries inflicted upon the mother. The exact ground upon which the evidence was admitted is debatable, since the court seems to have based its conclusion both on the ground of necessity independently of any wrong done to the wife and personal violence to her. The language is as follows: 'Whenever the element of personal violence is a necessary constituent of the offense, every reason exists upon which the exception rested originally, and for the sake of public justice the wife should be admitted as a witness.'

"Having thus considered the circumstances and the principles of law relating to them, I am firmly convinced (1) that the killing or wounding of a child, too young to protect itself by its testimony, is, in law, a wrong to the parent, affecting the person and liberty, and so making the parent a competent witness against the other spouse on his trial for the crime; and (2) that, independently of any wrong to the parent, he or she is a competent witness against his or her wife or husband, as the case may be, on trial for the offense, *ex necessitate rei*.

"*Sanders, J., Dissenting.* I do not agree that the evidence of the wife is incompetent, and, therefore, concur in the dissenting opinion of Judge Poffenbarger. I think the case entirely free from error, and would affirm the judgment."

The Competency of a Married Woman to testify for or against her husband in a criminal prosecution is considered in the monographic note to *State v. Burt*, 106 Am. St. Rep. 763-770. For subsequent decisions on this subject, see *Hoch v. People*, 219 Ill. 265, 109 Am. St. Rep. 327. In Texas, after a marriage ceremony is performed, no matter when or what the motive may have been, the woman is prohibited from testifying against the man, unless his offense is against her person: *Moore v. State*, 45 Tex. Cr. Rep. 234, 108 Am. St. Rep. 952.

CRAWFORD v. TURNER.

[58 W. Va. 600, 52 S. E. 716.]

HEIRS—Liability for Debt of Ancestor.—An heir is not personally liable for the debt of his ancestor as to assets which descend to him, and remain in kind unsold. (p. 1016.)

HEIRS—Liability for Debt of Ancestor.—An heir is personally liable for the debt of his ancestor to the extent of the value of assets or land which descends to him from such ancestor, and which the heir sells or conveys. (p. 1016.)

EQUITY JURISDICTION—Estates of Decedents.—A general creditor of a deceased person cannot maintain a bill in equity on a purely legal demand, unless he shows that he has exhausted his legal remedy, or that such remedy would be inadequate or unavailing. (p. 1016.)

EQUITY JURISDICTION—Liability of Heirs for Debt of Ancestor.—An heir may be sued in equity by any creditor of his ancestor to whom a debt is due for which the estate descended is liable, or for which the heir is liable in connection with such estate. (p. 1017.)

EQUITY JURISDICTION—Estates of Decedents.—A bill in equity by a general creditor of an ancestor, against his heirs and administrator, not seeking to charge the real estate of which the intestate died seised, is bad on demurrer if it fails to show that there are no assets in the hands of the administrator, or that such assets are insufficient to pay the debt, and if such bill is filed to subject the real estate of such decedent, it must be on behalf of such creditor and all other creditors, and it must appear therefrom that the personal property of the estate is insufficient to pay debts. (p. 1017.)

Trapnell & McDonald, for the appellant.

F. W. Brown, for the appellee.

601 SANDERS, J. David Crawford died, many years ago, in the county of Prince George, Maryland, unmarried and without lawful issue, and it was supposed at the time, intestate. After his death, his personal estate was distributed among his nearest of kin, one of whom was William F. Turner, a resident of Jefferson county, in this state. Before the administration of Crawford's estate had been completed, Turner died, and the remainder of his distributive share was paid to his administrator. Some years after the death of Crawford, and after the distribution of his estate, his will, bearing date October 25, 1859, was discovered, and probated in the orphan's court of Prince George county, Maryland, on the 16th of August, 1861. Authenticated copies of the will were recorded in the county of Clarke, Virginia, on the twelfth day of December, 1881, and in Jefferson county,

this state, on the 20th of October, 1886, on which last-named date J. Garland Hurst, sheriff of Jefferson county, qualified as administrator, with the will annexed, of David Crawford, deceased.

Turner was not one of the beneficiaries under the will of Crawford, and in October, 1886, the administrator of Crawford filed a bill in equity in the circuit court of Jefferson county against the administrator and heirs of Turner, and others, to recover the value of certain slaves and moneys, which he, Turner, in his lifetime, and his administrator after his death, had received from Crawford's estate, under the supposition that he was one of Crawford's distributees.

There are many reasons assigned why the decree of the circuit court should be reversed, but it will only be necessary to review the action of the court in overruling the demurrer to the bill. The bill charges that Turner died intestate, and that his heirs at law are two daughters, Ellen Bierne, wife of John S. Saunders, and Sydney Turner, wife of Daniel ⁶⁰² Swan, to whom descended from their father real estate of greater value than the claim sought to be recovered, and it also charges that Ellen Bierne Saunders has property and estate in Jefferson county, consisting of a valuable tract of land. Since the institution of this suit, Ellen Bierne Saunders died testate, and by supplemental bill, her devisees, being her four children, are made parties. And, also, during the pendency of the suit, Nathan S. White, administrator of Turner, departed this life, and Joseph Trapnell qualified as his administrator, with the will annexed, and Albert S. Davis, sheriff of Jefferson county, was appointed administrator de bonis non of William F. Turner, deceased, and by another supplemental bill they were brought before the court. While the bill alleges that real estate descended from Turner to his heirs, yet it does not state that this real estate which descended is the land sought to be subjected in this suit, and it does not show where the real estate is situated, whether in the county in which the suit is brought, or not, or, if disposed of, what disposition was made of it. It is true it is averred that Ellen Bierne Saunders is the owner of a tract of land, situated in Jefferson county, but it nowhere appears how she became the owner of this land, whether by inheritance from her father, or otherwise. The real estate of any person who dies intestate, by section 3, chapter 86, of the Code, is made assets for the payment of the decedent's

debts, and by section 5, chapter 86, of the Code, the heir is only made liable to the extent of assets descended, and liable to be subjected to discharge the ancestral obligations, and only then is such heir liable when he has sold the estate. If the assets remain in kind, unsold, there is no liability upon the heir, but the assets are liable to subjection. Is the property which the bill says descended from Turner to his heirs still held by them? If so, it must be subjected, and there is no liability upon the heirs; and if not, and it has been sold by the heirs, the bill must so charge before liability can be fixed upon them. The property of the heirs of Ellen Bierne Saunders, situated in Jefferson county, certainly, under the allegations of the bill, cannot be subjected to the payment of the debts of the ancestor, because it does not appear that this is the land that descended, or that the real estate which did descend to them has been sold or disposed of, and, therefore, ⁶⁰³ it fails to charge a liability upon the heirs. Section 6, chapter 86, of the Code, provides that an heir or devisee may be sued in equity by any creditor to whom a debt is due, for which the estate descended or devised is liable, or for which the heir or devisee is liable, in respect to such estate. It will, therefore, be observed if the estate descended or devised is liable to be charged with a debt, the heirs or devisees may be sued in equity, and the particular estate subjected to satisfy the same; but if the estate has been sold by the heir or devisee, then such heir or devisee is liable in respect to such estate to the extent and value of the estate inherited or devised.

This bill not being maintainable to subject the land of the heirs in Jefferson county, for the reasons given, then can it be maintained as a bill of a creditor against the administrator of the estate of Turner? This must be answered in the negative, upon the authority of *Hale v. White*, 47 W. Va. 700, 35 S. E. 884: "A general creditor of a deceased person cannot sustain a bill in equity on a purely legal demand, unless he shows that he has exhausted his legal remedy, or that such remedy, for some good cause, would be inadequate or unavailing." Not only is this so, but the bill makes no charge against the administrator, and only asks, in the prayer, for a settlement of his administration accounts. It is not claimed that the administrator has any funds in his hands, whatever, out of which the plaintiff's debt could be paid, nor is the bill filed under section 7, chapter 86, of the

Code, where it is provided that if the personal estate is insufficient for the payment of the debts of the decedent, that a creditor may institute and prosecute a suit on behalf of himself and the other creditors. The bill is not filed on behalf of the plaintiff and the other creditors; it does not charge that the personal estate is insufficient to pay the debts; in short, it says nothing in reference thereto, whether there is, or is not, such estate, and it does not seek to sell real estate of which Turner died seised. But, as has been noted, the bill does aver that real estate descended from Turner to his heirs, but it does not seek to charge and sell this land so descended, but the prayer is to sell the land of the heirs of Ellen Bierne Saunders. In *Hale v. White*, 47 W. Va. 700, 35 S. E. 884, the remedies of the creditor of the deceased person ⁶⁰⁴ are given as follows: "1. An action at law against the personal representative: Code, c. 85, sec. 19. 2. A separate bill in chancery to compel payment of his individual debt out of the funds in the hands of the personal representative, and discover the funds or estate liable to the payment thereof: Story's Equity Pleading, secs. 99-102; 2 Tucker's Blackstone's Commentaries, 425; *White v. Bannister's Exrs.*, 1 Wash. (Va.) 166; *Duval's Exr. v. Trent's Devisees*, 6 Munf. 29; *Clarke v. Webb*, 2 Hen. & M. 8. 3. A bill in behalf of himself and other creditors to ascertain and distribute both the real and personal estate. This is subject to the right of the personal representative to bring such suit within six months from his qualification: Code, c. 86, sec. 7. 4. A bill against an heir or devisee because of assets by descent: Code, c. 86, sec. 6."

It suffices to say that the plaintiff's bill does not come within either of the above classifications. The circuit court erred in overruling the demurrer. We therefore reverse the decrees complained of, and remand the cause, with leave to the plaintiff to amend his bill, if he so desires.

Reversed.

LIABILITY OF HEIR OR DEVISEE FOR DEBT OF ANCESTOR.

I. Generally, 1018.

II. Limitation of Liability, 1018.

III. Resort to Personalty, 1019.

IV. Resort to Realty, 1020.

V. Liens, 1021.

VI. Liability After Administration, 1022.

VII. Liability on Specialties, 1024.

VIII. Liability of Widow as Heir, 1024.**IX. Liability After Alienation, 1025.****X. Liability of Each Heir, 1025.****XI. Miscellaneous Liabilities, 1026.****I. Generally.**

At the common law an heir or devisee as such was not liable for the debts of the estate of the ancestor, but took the real estate free of any claim of general creditors. It was only as to debts of record and specialty debts of the ancestor in which the heir was specially named that he was liable. However, the distinction between the kinds of debts for which the heir is liable has been abolished by statute generally, and assets and land now descend to the heir or devisee subject to the debt of the ancestor, whether due by record, specialty or simple contract. The legislation, in many of the states in favor of creditors and against heirs, is extensive and minute in character, and a large majority of the decided cases arise under, and involve construction of, the various complicated statutory provisions: *Mackin v. Haven*, 187 Ill. 480, 58 N. E. 448; *Van Vuren v. Longstreet*, 108 Ill. App. 159; *Clevenger v. Matthews*, 165 Ind. 689, 76 N. E. 542; *Colson v. Brainard*, 1 Redf. Surr. 324; *Yancy v. Batte*, 48 Tex. 46. At the common law an heir or devisee was not bound by the contracts or debts of his ancestor or devisor unless expressly named: *Moore's Heirs v. Fauntelroy*, 3 A. K. Marsh. 360. The heirs or next of kin of a deceased person can be made liable upon his contracts or for his debts only in the cases and in the manner prescribed by statute: *Selover v. Coe*, 63 N. Y. 438. The obligation of an heir or devisee to pay the debt of the decedent does not rest on contract with such heir or devisee, but on his possession of property, personal or real, of such decedent: *Martin v. Jennings*, 52 S. C. 371, 29 S. E. 807. The heirs are not bound to pay the debts or discharge the obligations of the ancestor unless they have received property from the estate, and, if they have received assets, they are responsible for such debts or obligations only to the extent of their inheritance: *Bacon v. Thornton*, 16 Utah, 138, 51 Pac. 153. If land is devised to the children and heirs at law of the testator, and it does not appear that the devisees have taken possession of the real estate, or have accepted the devise to them, or promised to pay, or have paid, any portion of a debt owing by the testator, or sold the land, or any part of it, as heirs at law of the testator, they are not liable personally to pay such debt: *Wood v. Wood*, 26 Barb. 356.

II. Limitation of Liability.

The liability of heirs or devisees for the debts of their ancestor, either at law or in equity, is limited to what comes to them from him, whether the property which they thus receive is personalty or realty. This is a universal rule both at common law and under the

statutes: *Williams v. Ewing*, 31 Ark. 229; *Purcell v. Carter*, 45 Ark. 299; *Vanmeter's Heirs v. Love's Heirs*, 33 Ill. 260; *Branger v. Lucy*, 82 Ill. 91; *Tennant v. Neal*, 20 Ill. App. 571; *Van Vuren v. Longstreet*, 108 Ill. App. 159; *Bryan v. Blythe*, 4 Blackf. 249; *Leonard v. Blair*, 59 Ind. 510; *Buford v. Pawling's Exrs.*, 5 Dana, 283; *Barnett v. Hayden*, 5 J. J. Marsh. 108; *Sauer v. Griffin*, 67 Mo. 654; *Haines v. Haines*, 69 N. J. L. 39, 54 Atl. 401; *Whitaker v. Young*, 2 Cow. 569; *Coulter v. Selby*, 39 Pa. St. 358; *Green v. Rugely*, 23 Tex. 539. The responsibility of the heir for debt or covenant of his ancestor is to be measured not by the amount of the ancestor's estate which vested in him, but by the amount actually received by him: *Yancy v. Batte*, 48 Tex. 46. But the heir is liable to the extent of assets or land received for the whole claim of a creditor of the ancestor: *Points v. Frank*, 23 Ky. Law Rep. 975, 64 S. W. 637. However, the liability of the heirs for the debt of their ancestor is limited by the value of the estate descended, and they are not chargeable with interest on that value: *Ellis v. Gosney's Heirs*, 7 J. J. Marsh. 109. The heirs are so bound only to the amount of what the estate descending to them was worth at the death of the ancestor: *Changeur v. Gravier's Heirs*, 4 Mart., N. S., 68.

III. Resort to Personalty.

It is a general rule that an heir or devisee is under no legal liability to discharge the debt of his ancestor or devisor from whom he takes real estate, except when the personal estate of such ancestor or devisor is insufficient to pay such debt: *Danington v. Borland*, 3 Port. 9; *Elliot v. Patton*, 4 Yerg. 10; *Nix v. French*, 10 Heisk. 377; *McLean v. McBean*, 74 Ill. 134. It is never accurate to say that lands descending to heirs are charged with the debts of the ancestor, as they are only liable to be charged with their payment upon a deficiency of personal assets, and even this right may be lost by delay: *Bishop v. O'Conner*, 69 Ill. 431. The heirs are not liable for the debts of their ancestor as to lands descending from him, when he leaves personal estate sufficient to discharge his debts: *Guy v. Gericks*, 85 Ill. 428; *Tinker v. Babcock*, 107 Ill. App. 78; affirmed, 204 Ill. 571, 68 N. E. 445; *Pearce v. Calhoun*, 59 Mo. 271. The personal estate of a testator is the primary fund for the payment of his debts, and a resort to the realty cannot be had until the personal estate is exhausted. Hence, a creditor, before suing the heirs, should sue the personal representative, even though the personal assets are insufficient to pay all the debts, or in case the personal assets are insufficient he may sue the personal representative and the heirs of the deceased jointly, and then the assets in the hands of the personal representative must first be applied in payment of the judgment recovered: *Hoffman v. Wilding*, 85 Ill. 453. In the absence of a specific lien charged against the land descended, heirs are not liable as to it for the debts of their ancestor, when the latter leaves personal estate sufficient to discharge all his just debts and

demands, and it devolves upon those seeking to charge the heir with the ancestor's debt to allege and prove, not only the descent of real estate from such ancestor, but also either that there was no personal estate, or that it was not sufficient to discharge the debt: *Laughlin v. Heer*, 89 Ill. 119; *Schermerhorn v. Barhydt*, 9 Paige, 28; *Stuart v. Kissam*, 11 Barb. 271; *Selover v. Coe*, 63 N. Y. 438; *Armstrong v. Wing*, 10 Hun, 520; *Woodfin v. Anderson*, 2 Tenn. Ch. 331; *M'Loud v. Roberts*, 4 Hen. & M. 443.

A peculiar rule exists in South Carolina, as it has there been decided that the fact that the personal estate of the intestate is large and more than sufficient to pay his debts is no defense to an action against the heir to subject the real estate to the payment of his debts: *Mobley v. Cureton*, 6 Rich. 49.

Generally, the title to real estate descends to the heir subject to the debts of the ancestor, only when the personal estate is insufficient to satisfy them: *Lathrop v. Pollard*, 6 Colo. 424. And the creditor of a deceased person may reach the lands of a decedent in the hands of the heir or devisee only where the personal property is not sufficient for the payment of his debts: *Ryan v. Jones*, 15 Ill. 1. If the personal estate of a decedent is insufficient to pay his debts, a court of chancery will decree a sale of his real estate, devolving on his heirs, for the payment of such debts: *Tyson v. Hollingsworth*, 1 Har. & J. 469; *Gaither v. Welch's Estate*, 3 Gill & J. 259. In an action by a judgment creditor of a deceased to secure payment of his judgment from real estate which descended to the heirs at law, it is sufficient to allege and prove that the personal assets of the deceased were not sufficient to discharge the debt, and it is not necessary to show the inability of the creditor to collect his debt at law from the personal representative, next of kin, or legatees of the deceased: *Blossom v. Hatfield*, 24 Hun, 275.

If there is no personal estate left by a deceased ancestor, his creditor is entitled to subject the whole of the land descended, or its proceeds if it has been sold, to the payment of his debt, if the whole is necessary for that purpose: *Hinton v. Whitehurst*, 71 N. C. 66. If the lands of an intestate descend to his children, and there is no personal estate with which to pay his debts, the interest of each child in the lands of such intestate is subject to his indebtedness: *Keever v. Hunter*, 62 Ohio St. 616, 57 N. E. 454. If there are no personal assets of an ancestor for the payment of his debt, his real estate in the hands of his heir may be subjected to its payment: *Pyatt v. Waldo*, 85 Fed. 399.

IV. Resort to Realty.

We apprehend the rule to be universal that when the decedent leaves no personal property, or when the personalty left by him is insufficient to pay his debts, his heirs or devisees take his land descending to them subject to all of his debts, but beyond this the

heirs or devisees are not personally liable. This rule exists, however, solely by reason of the enactment of statutes. In other words, the liability of the land of a decedent to pay his debts depends upon the statutory provisions in relation thereto: *Springfield v. Hurt*, 15 Fed. 307. But under the statutes real property which has become vested in an heir or devisee upon the death of his ancestor may be subjected to the payment of the debts of the latter either at law or in equity: *Cockrell v. Coleman's Admr.*, 55 Ala. 583; *Tyson v. Brown*, 64 Ala. 244; *Turner v. Kelly*, 67 Ala. 173; *Williams v. Ewing*, 31 Ark. 229; *Johnson v. Johnson*, 80 Ga. 260, 5 S. E. 629; *Walbridge v. Day*, 31 Ill. 379, 83 Am. Dec. 227; *Lavery v. Woodward*, 16 Iowa, 1; *Ware v. Jones*, 19 La. Ann. 428; *Lippincott v. Smith* (N. J. Eq.), 60 Atl. 330; *Corell v. Weston*, 20 Johns. 414; *Fraud v. Magnes*, 17 Jones & S. 309; *Overturf v. Dugan*, 29 Ohio St. 230; *Martin v. Columbian Paper Co.*, 101 Va. 699, 44 S. E. 918. The assets of an estate, whether land or personalty, are generally considered a trust fund for the payment of the debts of the decedent, and may, by equitable action, be followed for that purpose into the hands of the distributees: *Carey v. Roosevelt*, 91 Fed. 567; *Chewett v. Moran*, 17 Fed. 820. On the death of the ancestor the land owned by him descends to his heirs, but they hold it subject to the payment of his debts in those states where it is liable for such debts, and the heirs cannot alien the land to the prejudice of creditors. In fact and in law they have no right to the real estate of their ancestor, except that of possession, until his creditors are paid: *Watkins v. Holman*, 16 Pet. 25, 10 L. ed. 873. It has been decided that lands of a decedent are not discharged of his debts simply because certain personalty of the decedent which came into the hands of his executor was wasted: *Smith v. Seaton*, 117 Pa. St. 382, 2 Am. St. Rep. 668, 11 Atl. 661. But, on the other hand, it has also been decided that waste of the personalty of an estate by an administrator or executor, accompanied by the insolvency of himself and his sureties, is no ground on which the creditors of the decedent can subject land descended to the heirs to the payment of debts of the estate: *Boring v. Jobe* (Tenn. Ch. App.), 53 S. W. 763.

V. Liens.

As a general rule, under the statutes the debts of a deceased person are a lien upon the lands of which he died seised, in default of personal assets to pay them, whether such lands are devised, or cast by descent, and such lien can be removed only by the payment of the debts or by lapse of time: *Brenham v. Story*, 39 Cal. 179; *Covell v. Weston*, 20 Johns. 414; *Ramsdall v. Craighill*, 9 Ohio, 197; *Blank's Appeal*, 3 Grant Cas. 192. While it must be admitted that the title of an heir by descent in the real estate of his ancestor and of the devisee of an estate unconditionally devised to him is, upon the death of the person under whom he claims, immediately devolved upon him, and that he acquires a vested estate, yet this still leaves

his title encumbered with all the liens which have been created by the deceased in his lifetime or by law at his decease. It is not an unqualified, though it may be a vested, interest, and it confers no title except to what remains after every such lien is discharged: *Wilkinson v. Leland*, 2 Pet. 627, 7 L. ed. 542; *Burton v. Smith*, 13 Pet. 464, 10 L. ed. 248; *Willis v. Watson*, 5 Ill. 64; *Wilson v. Wilson*, 13 Barb. 252; *Jewett v. Keenholts*, 16 Barb. 193. If debts of a testator are secured by mortgage on his real estate, the statutes of New York and some other states make such real estate in the hands of his heirs or devisees the primary fund for the payment of his debts and only the balance of the debt of each mortgagee, which cannot be collected by foreclosure and sale of the mortgaged premises, is to be allowed as a claim to be paid pro rata out of the proceeds of the personal estate of the decedent: *Johnson v. Corbett*, 11 Paige, 265; *Albertson v. Prewitt* (Ky.), 49 S. W. 196. Such statutes apply to cases of absolute intestacy as well as to cases where the mortgagor has disposed of the whole or a part of his estate by will: *House v. House*, 10 Paige, 158. Such statute, however, does not apply to an equitable lien growing out of a contract for the purchase of real estate, and in case of unpaid purchase money for real estate, the heir or devisee has a right to have that paid out of the personal estate of the decedent, or so much thereof as can be thus paid: *Wright v. Holbrook*, 32 N. Y. 587. In other jurisdictions, also, the heir is entitled, as against a distributee, to have the personal estate of his decedent applied in extinguishment of liens upon the land descended for purchase money, which the intestate, by contract with his vendor, agreed to pay either to the vendor directly or to some third person designated by the vendor in discharge of a pre-existing lien upon the land: *O'Connor v. O'Connor*, 88 Tenn. 76, 12 S. W. 447, 7 L. R. A. 33.

If a debtor dies, his land descends to his heirs subject to the lien of a docketed judgment against the debtor. Such lien, however, is subject to the right of the heirs to have the debt paid out of the personalty of the deceased, if there is enough for that purpose; but if there is not enough personalty to pay the debt, then the land may be sold for that purpose: *Murchinson v. Williams*, 71 N. C. 135; *Laidley v. Kline*, 8 W. Va. 218.

VI. Liability After Administration.

As a general rule, the creditor of a deceased person may follow the assets of his debtor into the hands of a distributee for the payment of his debt even after the administration of the estate is closed, and regardless as to whether such assets are real or personal property. The only limitation upon this right in many jurisdictions is that the creditor must sue upon his claim within the statutory term applicable to it, and if he does not do this his claim will be barred: *Caldwell v. Montgomery*, 8 Ga. 106; *Crockett v. Mitchell*, 88 Ga. 166, 14 S. E. 118; *Sevier v. Sargent*, 25 La. Ann. 220; *Brooks v.*

Lewis, 1 How. (Miss.) 207; Fripp v. Talberd, 1 Hill Eq. 142; Blinn v. McDonald (Tex. Civ. App.), 38 S. W. 384; Devine v. United States Mortgage Co. (Tex. Civ. App.), 48 S. W. 585; Haviston v. Medley, 1 Gratt. 96; Bullard v. Perry, 66 Vt. 479, 29 Atl. 787. In other jurisdictions a different rule prevails, and it is maintained that the final decree of distribution is a finality as to all of the creditors of the estate: Estate of Dall, Myr. Prob. 159; and that one who, by mistake, fails to get the benefit of a credit indorsed upon a note held against him by an administrator and does not discover the fact until after final settlement of the estate has no cause of action against the heirs or distributees: Dickey v. Tyner, 85 Ind. 100. After the estate has been fully administered, it has been held that a fund in the hands of the heir is not liable for the ancestor's debt, although the personal assets have been wasted by the executor and his sureties have become insolvent: Peck v. Wheaton's Heirs, 8 Tenn. 353.

If an heir takes possession of his ancestor's estate without any administration, he is liable, to the extent of the property thus received, for the debts of the decedent: Wyatt v. McLane, 37 Tex. 311; and he may be sued by the creditor directly therefor without any administration: Byrd v. Ellis (Tex. Civ. App.), 35 S. W. 1070. A suit in equity may be maintained against heirs where there has been no administration to compel them to pay a debt due from their ancestor out of the assets received by them from him: Adams v. Holcombe, Harp. Eq. 202, 14 Am. Dec. 719. The heirs or legatees of an estate, where all are of full age, may distribute the estate by consent when and how they please, so that they do not leave debts of the decedent unpaid, but they have no right, as against creditors, who are not parties to the arrangement, to depart from the due course of administration, whether at the time of so doing they know of the existence of debts or not: Amis v. Cameron, 55 Ga. 449. Although a creditor of the decedent cannot directly sue the heir, devisee or legatee for his debt, when there has been no administration, yet if such heir, devisee or legatee, without administration under the will, takes possession of any of the property of the decedent, he may be sued as executor de son tort, by an unpaid creditor: Wilson v. Davis, 37 Ind. 141; Leonard v. Blair, 59 Ind. 510; King v. Snedeker, 137 Ind. 503, 37 N. E. 396; Roe v. Swezey, 10 Barb. 247. If administration of an estate can be had, the heirs cannot be sued directly for the debt of their ancestor: Turman v. Robertson, 3 Wils. C. C. C. App. Tex., sec. 215. But where there is only one debt against the estate, and no necessity for administration, and the property has been divided among the heirs, the creditor can bring suit directly against them, and each heir is liable to the extent of the estate received by him: Buchanan v. Thompson's Heirs, 4 Tex. Civ. App. 236, 23 S. W. 328.

The heir is liable to the extent both of the personal and the real estate received from his ancestor for the liabilities of the

ancestor, and where such liabilities have not accrued until after the administration of the estate is closed, suit may be brought and maintained by the creditor against the heir, to the extent of the assets derived from the ancestor: *Payson v. Hadduck*, 8 Biss. 293, Fed. Cas. No. 10,862; *Long v. Mitchell*, 63 Ga. 769; *Succession of Thibodeaux*, 38 La. Ann. 716; *Davis v. Van Sands*, 45 Conn. 600, Fed. Cas. No. 3655.

VII. Liability on Specialties.

Both at common law and under the statutes the heir is personally liable on the covenants and specialties of his in which he is specially named and bound just so far and no farther as he has received property by descent, no matter whether such property consists of personalty or realty, the only condition being that the personalty must be first exhausted before resort can be had to the realty: *Hall v. Martin*, 46 N. H. 337; *Waller's Exrs. v. Ellis*, 2 Munf. 88; *Pyatt v. Waldo*, 85 Fed. 399. The liability of the heir when sued upon the specialty of his ancestor becomes established *prima facie* upon proving the specialty which by its terms expressly binds the heir, also proof of the death of the ancestor leaving property which descends to such heir: *Mackin v. Haven*, 88 Ill. App. 434. The heirs of a deceased co-obligor may be compelled in equity to pay the debt if the surviving obligor is insolvent: *Winslow v. Parkhurst's Heirs*, 1 Root, 268. The obligee in a bond executed by a person since deceased binding on himself and his heirs may, at common law, sue either the heir or the executor, at his election, and have execution against the lands of the deceased, unless they were specially devised or the heir had aliened them before action brought. The remedy now exists against the heir by force of statute although he has sold and conveyed the land: *Ticknor v. Harris*, 14 N. H. 272, 40 Am. Dec. 186. At common law the heir must be expressly named and bound in order that he may be held liable for the specialty of his ancestor: *Taylor v. Grace*, 2 Murph. 66.

VIII. Liability of Widow as Heir.

A widow who takes as heir or distributee either personalty or real estate from her deceased husband stands on the same footing as any other heir or devisee, and takes the property in like manner liable for her husband's debts: *McDearman v. Martin*, 38 Ark. 261; *Hewett v. Cox*, 55 Ark. 225, 15 S. W. 1026, 17 S. W. 873; *Sutherland v. Harrison*, 86 Ill. 363; *Chinn v. Stout*, 10 Mo. 709; *Merchants' Ins. Co. v. Hinman*, 34 Barb. 410, 15 How. Pr. 182. If the property of a deceased debtor, real and personal, exceeds the statutory exemptions both in value and extent, and the widow takes it as heir or distributee, of her husband, she takes it as a trust fund for the payment of his debts, and one of his creditors may maintain a bill in equity against her to enforce the payment of the debt: *Cameron v. Cameron*, 82 Ala. 392, 3 South. 148. If a widow inherits land from her deceased husband, she takes it subject to her husband's debts:

Fletcher v. Wormington, 24 Kan. 259. The same rule applies to a husband who succeeds to his wife's real estate under her will, as he takes title thereto subject to its liability to be applied to the payment of her debts: *Smith v. Seaton*, 117 Pa. St. 382, 2 Am. St. Rep. 668, 11 Atl. 661.

IX. Liability After Alienation.

If real estate is aliened bona fide by heirs or devisees before action brought to subject the estate of the ancestor to the payment of his debts, the land thus conveyed is not subject to sale for the payment of such debts, but the heir or devisee is personally liable for the value of the lands: *Ryan v. Jones*, 15 Ill. 1. If the heir has aliened the lands before the suit is brought, the recovery can be only for the value of the lands descending to him, in the condition in which they were at the time of the descent cast: *Haines v. Haines*, 69 N. J. L. 39, 54 Atl. 401. If the heir has aliened the lands descending to him while his ancestor's debt remains unpaid and enforceable, the heir is liable only to the amount of the actual value of such land: *Hauselt v. Patterson*, 124 N. Y. 349, 26 N. E. 937. The liability of an heir for the debts of the person from whom he has inherited or taken land by devise is measured by the property which has descended to him; to that extent it is personal, and if the property has been alienated before the commencement of a suit by a creditor of the deceased to acquire a statutory lien upon such property, such creditor is entitled to a personal judgment against the heir for its value: *Rogers v. Patterson*, 79 Hun, 483, 29 N. Y. Supp. 963. If some of the heirs of the deceased ancestor who leaves unpaid debts sell the lands descending to them, they are liable to the creditor for the whole of the price received and not for their aliquot shares of the debt itself, and those who still retain their several shares are liable for the present value of them: *Hinton v. Whitehurst*, 71 N. C. 66, 73 N. C. 157, 75 N. C. 178. If one of the heirs has aliened his share of the estate inherited to a bona fide purchaser, and has subsequently become insolvent, the remainder of the real estate of the ancestor in the hands of heirs who have not alienated it is liable for the ancestor's debt, not only for the proportionate share which each heir would at first have borne, but for the whole debt to be contributed by each of the remaining heirs in proportion to the value and extent of the land descended to them: *Ryan's Admr. v. McLeod*, 32 Gratt. 367.

X. Liability of Each Heir.

If heirs are proceeded against on account of property which they have received from their ancestor to subject it to the payment of their ancestor's debt, they are to be charged only with their pro rata share, and one cannot be made liable for the whole: *Dirmeyer v. O'Hern*, 39 La. Ann. 961, 3 South. 132; *Pearce v. Calhoun*, 59 Mo. 270. The extent of the liability of heirs at law of a deceased person for the debt of their ancestor, both at law and in equity, is the Am. St. Rep., Vol. 112—65

full amount of what came to them by descent, and a decree against them should not be several, but joint, requiring each to pay pro rata: *Cutright v. Stanford*, 81 Ill. 240.

The liability of the heirs is several and not joint, each heir being liable for what he receives from the ancestor, and not for what the other heirs receive: *Haines v. Haines*, 69 N. J. L. 39, 54 Atl. 401.

If heirs are proceeded against on account of a debt of their ancestor, they are not liable in solido, but only pro rata on account of assets descended, but the heir is liable for the debts of his ancestor to the value of the property descended, and he holds land inherited subject to the payment of the ancestor's debts: *Metcalf v. Larned*, 40 Mo. 572; *Whitaker v. Young*, 2 Cow. 569.

Heirs are not liable as joint debtors for the debt of their ancestor. Each is a debtor for himself, and not for another to the extent of his equitable proportion of the debt of the ancestor: *Kellogg v. Olmsted*, 6 How. Pr. 487; *Hauselt v. Patterson*, 124 N. Y. 349, 26 N. E. 937.

If one or more heirs become insolvent before the ancestor's debt is paid, the remaining heirs are liable for the whole debt, each in his proportion of the property inherited: *Cogswell's Heirs v. Lyon*, 3 J. J. Marsh, 38; *Ryan's Admr. v. McLeod*, 32 Gratt. 367.

XI. Miscellaneous Liabilities.

An heir or devisee is under no obligation to discharge the debt of his devisor or ancestor out of real estate which he takes, except when the personal estate of the deceased is insufficient to pay his debts. Hence the devise of real estate does not create any liability on the part of the devisee to pay the devisor's debt, it not being shown that he left no personal estate, and a promise by the devisee to pay such debt without any other consideration is void and cannot be enforced: *McLean v. McBean*, 74 Ill. 134.

Persons in possession of lands, claiming as heirs at law of a deceased person, are not personally liable for rents and profits received by their ancestor, under whom they claim, in the absence of a showing that any such rents and profits have come into their possession: *Noble v. Douglass*, 56 Kan. 92, 42 Pac. 328. But the creditor of the ancestor is entitled to receive the rents and profits actually received by the heirs from the land descended: *Hinton v. Whitehurst*, 71 N. C. 66.

A judgment in personam, under which no specific lien on real estate was acquired during the lifetime of the judgment debtor, cannot be revived and enforced against his heirs: *Miller v. Taylor*, 29 Ohio St. 257.

Heirs take property of their ancestor subject to its liability for unpaid or accumulating taxes, the collection of which is not barred by the statute of limitations: *Commonwealth v. Sweigart's Admr.*, 115 Ky. 293, 73 S. W. 758, 24 Ky. Law Rep. 2147; *Piatt v. St. Clair's*

Admr., 6 Ohio, 227, Wright (Ohio), 261. The heir is liable to the extent both of the personalty and the realty received from his ancestor, for the latter's contracts and liabilities, and where a claim does not accrue against the ancestor until the administration against his estate has closed, suit may be maintained against the heir to the extent of the property received from the ancestor. Hence if an assessment is made against stock owned by such ancestor subsequently to the close of administration on his estate, suit may be maintained in equity against the heir of such ancestor and recovery had to the extent of assets received: Payson v. Hadduck, 8 Biss. 293, Fed. Cas. No. 10862.

DUDLEY v. CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

[58 W. Va. 604, 52 S. E. 718.]

CARRIERS—Inspection—Conversion.—An inspection of goods at the point of destination, unauthorizedly permitted by the carrier, by and through which the consignee is prevented from consummating a contemplated sale of such goods, is not such a wrongful delivery by the carrier as to make him liable for the full value of the goods as for a conversion thereof. (p. 1029.)

CARRIERS—Unauthorized Inspection—Sale of Perishable Property.—If a carrier permits an unauthorized inspection of perishable goods at the point of destination, and the consignee, being notified of the danger of loss from decay, relies upon such unauthorized inspection as constituting a conversion, gives notice of his abandonment of the consignment and intention to claim the value thereof, the carrier has a right to sell the goods for the account of the owner and deduct its charges, and is liable only for the residue of the proceeds of the sale. (pp. 1030, 1031.)

CARRIERS—Right to Sell Perishable Property.—If goods shipped by carrier are of a perishable nature, and the consignee will not accept them, or there are other reasons requiring a sale thereof without delay, the carrier is justified in selling the goods. (p. 1031.)

CORPORATIONS, FOREIGN—Attachment Against.—If, in a suit against a foreign corporation in which its property has been attached and subsequently released upon giving a bond, the defendant appears and defends, and a personal decree is rendered against it for an amount previously tendered by it on account of the demand set up, but not paid into court, it is error to dismiss the attachment and release the bond. (p. 1032.)

V. B. Archer and W. Beard, for the appellant.

J. B. Hutchinson, for the appellees.

605 **POFFENBARGER, J.** Lysander Dudley has appealed from a decree of the circuit court of Wood county, in a suit instituted by him against the Chicago, Milwaukee and St. Paul Railway Company, because it allows him a smaller amount than he claimed, and, although decreeing the payment of money to him, discharged the attachment and released the bond, given for the forthcoming of the attached property, certain railroad cars, seized at Wheeling and Huntington.

The bill sought a decree for the value of two carloads of apples, shipped by the plaintiff over the Baltimore and Ohio Southwestern Railway and connecting lines to Elgin, Illinois, and consigned to the plaintiff himself, with directions to notify J. W. Sharp, of Chicago, Illinois, of the arrival of the cars at their destination. Expecting Sharp to accept and pay for the apples, plaintiff had made drafts upon him for their value, as per contract, attached the bills of lading to them, and discounted them at the First National Bank of Parkersburg, and said bank caused them, in due course of business, to be presented for payment at the office of Sharp.

Upon notice of the arrival of the cars, Sharp's agent was **606** allowed to inspect the apples, without producing the bills of lading or showing any title or right to the possession of them. Sharp had not then paid the drafts, nor did he afterward do so. His agent reported that the apples were not such as the plaintiff had agreed to deliver. He immediately notified Dudley, and, presumably the railway company also, for very soon afterward the agent of the company notified Dudley, by telegraph, of Sharp's refusal, and called upon him to arrange for disposition of the apples, and continued, by subsequent dispatches, from October 24, 1899, until November 3, 1899, to demand that he take care of them. Notice of the intention of the railway company to have them sold was given October 28th. The last telegram, dated November 3d, notified him that the apples were rotting on the track, and closed with the inquiry, "Shall we sell for your account?" To this Dudley replied as follows: "Have made claim against Baltimore and Ohio Southwestern Railroad for full value of cars; they were wrongfully delivered. If you sell, it will be as agent of the company and for its benefit." After a futile attempt to sell the apples at Elgin, the railroad company shipped them to Chicago, where

they were sold for the sum of \$397.93, which, after deducting freight charges of \$144.84, paid, except, as to its own, by the defendant, upon the guaranty of the Baltimore and Ohio Southwestern Railway Company, left \$253.09, which was tendered to the plaintiff, but refused by him, because he claimed a larger amount.

The theory of his claim, then presented, afterward asserted by this suit, and now urged here, as one ground of error in the decree, is that the conduct of the defendant railway company amounted in law, to a conversion of the apples to its own use. The argument to sustain this position treats the inspection, allowed to Sharp's agent, as an authorized delivery of the property to him. That a common carrier is liable for a wrongful delivery, if in any way at fault, is perfectly clear. Such act may be treated as a conversion. Common carriers are bound to exercise the highest degree of care in this respect. "No circumstances of fraud, imposition or mistake will excuse the common carrier from responsibility for a delivery to the wrong person": Hutchinson on Carriers, sec. 344. To the same general effect, see *North Pennsylvania R. R. Co. v. Commercial Nat. Bank*, 123 U. S. 727, 8 Sup. Ct. Rep. 266, 31 L. ed. 287, and ⁶⁰⁷ *Indianapolis etc. R. R. Co. v. Herndon*, 81 Ill. 143, cited by counsel for appellant. Of course this general rule, like all others, may be subject to some slight apparent exceptions, which need not be noticed here. But, if there was no delivery, the rule of law relied upon has no application. The property was never out of the possession of the defendant, until sold, or removed for sale, sometime after the inspection. Sharp's agent was simply permitted to enter the cars, set barrels out in his wagon, open them and examine the apples. Then they were put back in the car and it was resealed by the agent. It may be true that he had no right to do so, and that the defendant did wrong in permitting the inspection, no evidence of title or right to possession having been shown, but it is a non sequitur to say, upon these facts, there was a delivery. It may have been an unauthorized act of dominion over the property, but whose act was it? Clearly that of the railroad company, for the property was still in its actual and legal custody. It never parted with its possession. Not every wrongful act on the part of a common carrier authorizes an action against it as for a conversion. Where goods, intrusted to a common carrier, are injured

only, the owner's remedy is for damages for the injury, not their value: Hutchinson on Common Carriers, sec. 770a. For delay in delivery, the action must be for damages resulting, not the value of the property: Hutchinson on Common Carriers, sec. 328; Ryland and Rankin v. Chesapeake etc. Ry. Co., 55 W. Vt. 181, 46 S. E. 923. What is the nature of the plaintiff's injury here? Inspection did not injure the property, so far as disclosed. It prevented the consummation of a sale to Sharp. Can that constitute the basis of an action for the value of the property? That it could not is so obvious that no such claim is made, and this branch of the contention is founded upon the extremely fanciful theory of a technical delivery, for which no authority has been found.

Claim for the value of the property, as for a conversion thereof, is also predicated upon the sale of it. Whether sale could have been made for the charges for carriage, without a judicial proceeding by way of enforcement of the lien, seems not to have been raised. That depends upon whether there is an Illinois statute authorizing such sale. But it is said sale could not be made therefor in this instance because ⁶⁰⁸ the Baltimore and Ohio Southwestern Railway Company had guaranteed the charges. But if that agreement was a mere guaranty, and not an absolute undertaking to pay, it was the duty of the defendant company to collect its charges on the delivery of the property. If by due diligence it could not do so, it might fall back upon the guaranty. However this may be, there was a clear and undoubted right of sale in the defendant upon another ground. The property was perishable, and was then decaying and becoming less valuable every day. The owner having failed in the effort to make sale of the apples, as he expected, neglected to take them out of the possession of the company and take care of them. More than that, his telegram of November 3, 1899, could be construed as nothing more nor less than a notification that he would treat the apples as the property of the railroad company, sue for their value and leave them in the hands of the company. This he had no right to do, as has been shown. What could the defendant do under the circumstances? Could it allow the property to decay? Perhaps it was under no duty to protect the plaintiff from a loss of his own making. This we do not decide, but a clear and undoubted right it did have to sell the property under

such circumstances, and, after deducting its charges, pay the residue of the proceeds to the owner. It was still the custodian of the plaintiff's property and bound, as such, to do whatever was necessary to mitigate and prevent, as far as possible, the mutual loss, incident to the decay of fruit. "Where the goods are of a perishable character and the consignee will not accept them, or there are other reasons requiring a sale without delay, the carrier may be justified in selling the goods because of the necessity of the particular case": Elliott on Railroads, sec. 1571.

"But while in the possession of the goods in the character of carrier, he also stands for many purposes in the relation of agent for the owner; and it is a general rule of law that, although the powers of agent are ordinarily limited to the purposes for which they are employed, yet that emergencies may arise in which, from the necessities of the case, an agent may be justified in assuming extraordinary powers; and that his acts, done fairly and in good faith under such circumstances, though entirely beyond the scope of his ordinary powers, may be binding upon his principal. Such ⁶⁰⁹ emergencies sometimes occur, in the course of the business of the carrier, in which he becomes the agent of all concerned, and in which his acts, in the exercise of a sound discretion will be binding upon all the parties in interest; and, if the necessities of the case require that the goods be sold, he not only may sell, but it becomes obligatory upon him to do so, for the benefit of the owner. If, for instance, the consignee refuse to accept the goods and they are of a perishable character, and if stored would, from rapid decay, be totally lost to the owner, it would be the duty of the carrier to sell them on his account; and the same rule would apply if from any cause it became impossible to deliver the goods according to the directions of the owner or bailor, or to return them before they would inevitably perish from such inherent tendency, from damage received by them in the transit, or from any other cause": Hutchinson on Carriers, sec. 432.

If, as to the property so left on its hands, the railway company is to be regarded as a warehouseman, its right to sell the same, to prevent loss by the decay thereof, is equally clear. Any kind of imminent danger of loss or destruction will justify a sale in such case: Rea's Admx. v. Trotter, 26 Gratt. 585; Jordan v. Shireman, 28 Ind. 136.

The court erred, however, in discharging the attachment and declaring the bond released. Upon what theory this was done is not apparent, unless it was that the defendant had not only submitted itself to a personal decree by appearing and defending, but had also tendered the amount of the decree, except the interest, before suit was brought. No money was paid into court. The effect of a tender, when kept good, only prevents recovery of interest and costs. It does not pay the debt nor extinguish it. The defendant is a foreign corporation against which the plaintiff had the right to proceed by attachment, for the sole reason that it is such a corporation. The bond taken under the attachment afforded security for the payment of the amount of the decree, either absolutely or to the extent of the value of the property attached. It was a security regularly and properly obtained, so far as this record discloses. That the defendant is amply able to pay several thousand times the amount of the decree, constitutes no reason for releasing the security and sending ⁶¹⁰ the plaintiff to a foreign jurisdiction to procure satisfaction of his personal decree, in case the defendant should see fit to require him to do so.

For this error, so much of the decree appealed from as dismissed the attachment and released the bond must be reversed, annulled and set aside; but in all other respects it will be affirmed, with costs in this court to the appellant, as the party substantially prevailing.

Reversed in part.

A Consignee is Entitled to a reasonable opportunity to inspect goods forwarded by a carrier, to be paid for on delivery, before he accepts them, and the carrier may offer him such opportunity without becoming chargeable for the price: *Lyons v. Hill*, 46 N. H. 49, 88 Am. Dec. 189. See, too, *Thick v. Detroit etc. Ry. Co.*, 137 Mich. 708, 109 Am. St. Rep. 694.

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9. BANKS—Payment of Checks—Indorsement and Identification. Where a check is made payable to a designated person or bearer, a bank may pay it without indorsement or identification and not be chargeable with negligence. (Tenn.) *Farmers' etc. Bank v. Bank of Rutherford*, 817.

10. BANKS—Negligence in Paying Forged Check.—It is negligence for a bank to pay a forged check drawn on it in the name of one of its customers whose signature is well known to it, where the cashier does not examine the signature closely, which would have disclosed the forgery, but is thrown off his guard by indorsements on the paper. (Tenn.) *Farmers' etc. Bank v. Bank of Rutherford*, 817.

11. BANKS—Genuineness of Signature.—An Indorser of a check does not warrant to the drawee, but only to subsequent holders in due course, the genuineness of the signature of the maker. (Tenn.) *Farmers' etc. Bank v. Bank of Rutherford*, 817.

12. BANKS—Payment of Forged Check.—Where the drawee bank receives and pays a forged check which has been honored and indorsed by other banks and then holds it for thirty days or more, it cannot deny the genuineness of the signature and recover the amount of the check from the bank which cashed it and passed it on by indorsement to the other banks. (Tenn.) *Farmers' etc. Bank v. Bank of Rutherford*, 817.

13. BANKS AND BANKING—Liability to Pay Check.—The check of a depositor upon his banker, delivered to another for value, transfers to that other the title to so much of the deposit as the check calls for, which may be again transferred to another by delivery, and being presented to the banker, he becomes the holder of the money to the use of the holder of the check, and is bound to account to him for that amount, provided the person drawing the check has funds to that amount on deposit, subject to his check, at the time it is presented. (S. Dak.) *Turner v. Hot Springs Nat. Bank*, 804.

14. BANKS AND BANKING—Refusal to Pay Check—Right to Sue Bank.—The holder of a check, payment of which has been refused by the payee bank while it holds funds of the drawer sufficient to pay it, may sue the bank and recover the amount of the check. (S. Dak.) *Turner v. Hot Springs Nat. Bank*, 804.

See Gifts.

BASTARDY PROCEEDINGS.

1. BASTARDY—Child as Evidence.—In bastardy proceedings the child whose paternity is disputed is admissible in evidence to show a resemblance between it and its alleged father. (Conn.) *Shailer v. Bullock*, 87.

2. BASTARDY—Constancy of Declarations of Paternity.—In bastardy proceedings it is not essential to plaintiff's recovery that she should have been constant in her declarations that the defendant was the father of her child, nor that she should have made such declaration during her travail. (Conn.) *Shailer v. Bullock*, 87.

3. BASTARDY—Cross-examination of Defendant—Misconduct.—In bastardy proceedings the cross-examination of the defendant for the purpose of attacking his credit should be confined to such acts of misconduct as affect his character for veracity. (Conn.) *Shailer v. Bullock*, 87.

4. BASTARDY—Cross-examination of Defendant.—In bastardy proceedings, it is within the discretion of the trial court to fix a date anterior to which the cross-examination of the defendant as to his

prior misconduct shall not extend. Such discretion is of necessity very wide, and its exercise will not be reviewed unless clearly abused. (Conn.) *Shailer v. Bullock*, 87.

BIGAMY.

1. **CONSTITUTIONAL LAW—Power to Punish Bigamous Cohabitation Founded on a Marriage in Another State.**—The legislature has power to make criminal and provide for the punishment of cohabitation in the state founded on a bigamous marriage contracted beyond the state. (Mo.) *State v. Stewart*, 529.

2. **CONSTITUTIONAL LAW—Power to Designate as Bigamy Acts Which Were not Bigamous at Common Law or Under Previous Statutes.**—The legislature may designate as bigamy and provide for the punishment of a cohabitation in this state founded on a bigamous marriage contracted elsewhere. (Mo.) *State v. Stewart*, 529.

3. **INDICTMENT for Cohabitation Within the State Founded on a Bigamous Marriage Elsewhere.**—An indictment charging that defendant, at a time specified and within a designated county in the state of Illinois, unlawfully and feloniously married and took to wife one W. J., he, the defendant, then and there having a lawful wife living, to wit, L. W. S., and that the defendant afterward, on a date mentioned, within the state of Missouri, and from that date until another date specified, unlawfully and feloniously did abide and cohabit with said W. J., and her have to wife, the said former and lawful wife, the said L. W. S., being then and there still alive, substantially complies with the statute of Missouri making criminal a cohabitation in that state founded on a bigamous marriage contracted elsewhere. There is no merit in the claim that the indictment charges adultery only. (Mo.) *State v. Stewart*, 529.

BILLS AND NOTES.

In General.

1. **BILLS AND NOTES—Note Payable at Bank—Payment to Bank When Ineffective.**—The fact that a note is made payable at a particular bank does not of itself make the bank the agent of the payee or holder to receive payment, and payment to the bank of the amount due on the note made payable there, where the bank does not have possession of the note, nor authority to collect it, does not discharge the maker. In such case the bank is treated as agent of the maker and not of the holder. (Ark.) *State Nat. Bank v. Hyatt*, 50.

2. **BILLS AND NOTES—Payment—Agency—Estoppel.**—If one bank, on obtaining loans from another, customarily sends as security notes of its customers, and, when such notes are paid, sends the money to the lender, who returns the notes paid, there is no agency so as to bind the lender by the payment of a note to the borrower, and the lending bank is not estopped to deny the authority of the borrowing bank to collect one of such notes from the maker. (Ark.) *State Nat. Bank v. Hyatt*, 50.

3. **ACCEPTANCE OF AGREEMENT, When Presumed.**—If Persons Indorse Their Names on a Promissory Note After Its Execution in Consideration of an Extension of Time for Its Payment, the holder of the note may be presumed to have been satisfied with such names and to have assented to such extension if they continue to hold such note for several years without objection and without pressing for payment. (Vt.) *Lyndon Sav. Bank v. International Co.*, 900.

4. NEGOTIABLE INSTRUMENTS, When not Payable on Demand.—An agreement extending the time for the payment of a promissory note, no definite time being named, the delay to be until the holder was dissatisfied with his security, does not leave the note payable on demand. (Vt.) *Lyndon Sav. Bank v. International Co.*, 900.

Liability of Forger.

5. NEGOTIABLE INSTRUMENT, Forger of, Whether Liable to Third Person for Negligence.—One who, with intent to deceive any person to whom it may come, writes out what purports to be an instrument payable to bearer and to be signed by the proper officers of a municipal corporation, is not answerable for negligence in letting such writing go out of his possession to another from whom the plaintiff in the action, in the exercise of reasonable diligence, purchased the writing believing it to be genuine. (Mass.) *Costello v. Barnard*, 328.

Signer on Back of Paper.

6. NEGOTIABLE INSTRUMENTS—Signer on the Back of.—One not before a party to a note, who signs his name on the back of it, in blank, is prima facie a maker, and assumes the same obligations as if he wrote his name on the face of the instrument. It makes no difference that the signing is long after the making of the note and while it is in circulation. (Vt.) *Lyndon Sav. Bank v. International Co.*, 900.

7. NEGOTIABLE INSTRUMENTS.—The Relation Assumed by Persons Who Sign Their Names on the Back of a Promissory Note after its delivery is a question of fact and not of law. (Vt.) *Lyndon Sav. Bank v. International Co.*, 900.

8. NEGOTIABLE INSTRUMENTS—Persons Signing on Back of After Execution—When May be Held as Makers.—If, after a note has been executed, the holder or his agent approaches two persons and informs them that if they will fix the note so it will be lawful and safe in the judgment of the holder, the note may run so long as they keep the interest paid and he considers the security good, and they say that the estate of an indorser shall not be changed, and they will do anything required to make it all right without such indorser's name, and that they will put their names on the note, which they thereupon do, the jury is justified in finding that they signed such note as makers after execution, in consideration of an extension for the time of its payment. (Vt.) *Lyndon Sav. Bank v. International Co.*, 900.

9. NEGOTIABLE INSTRUMENTS—Consideration.—An Agreement to Extend the Time of Payment of a promissory note is a sufficient consideration for signing it on the back as makers after the execution. (Vt.) *Lyndon Sav. Bank v. International Co.*, 900.

Indorsers and Purchasers.

10. NEGOTIABLE INSTRUMENTS.—An Indorser is Liable to the Indorsee Whether the Latter has Used Due Diligence or not, if the maker had no property subject to execution, and diligence, therefore, must have been unavailing. (Ind.) *First National Bank v. Stapf*, 214.

11. NEGOTIABLE INSTRUMENTS, Transferee of Overdue, Title of.—If the holder of an overdue negotiable instrument, after first indorsing, transfers and delivers it to another for a special purpose,

who fraudulently sells and transfers it to a bona fide purchaser, the latter, notwithstanding the instrument is overdue, acquires a perfect title thereto as against the true owner. (Mass.) *Gardner v. Beacon Trust Co.*, 303.

12. NEGOTIABLE INSTRUMENTS Overdue, Purchaser of, Whether Put upon Inquiry.—One purchasing a negotiable instrument long overdue is not put upon inquiry for the purpose of inquiring whether the title of his vendor was procured by fraud from the former owner whose assignment appears thereon. (Mass.) *Gardner v. Beacon Trust Co.*, 303.

13. NEGOTIABLE INSTRUMENTS—Indorsement Under the Name of an Indorser Who has Waived Demand and Notice.—It cannot be said as a matter of law that indorsers waive demand and notice by placing their names under that of a prior indorser who, when it was executed, signed it as indorser and waived demand and notice. (Vt.) *Lyndon Sav. Bank v. International Co.*, 900.

14. NEGOTIABLE INSTRUMENTS.—The Relation to a Promissory Note of Persons Who Indorse It Long After Its Execution is to be determined by the agreement made between them and the holder of the note when they so indorse it. (Vt.) *Lyndon Sav. Bank v. International Co.*, 900.

15. NEGOTIABLE INSTRUMENTS—Indorsers not Discharged When.—An agreement with one of the makers of a note to receive and apply thereon dividends from property assigned for the benefit of creditors followed by such receipt and application does not release other makers. (Vt.) *Lyndon Sav. Bank v. International Co.*, 900.

See Banks and Banking; Limitation of Actions, 1.

BILLBOARDS.

See Municipal Corporations, 18.

BLASTING.

See Explosives.

BONDS.

See Municipal Bonds, 1, 2.

BOUNDARIES.

In General.

1. BOUNDARIES by Agreement.—By agreement, land owners may establish a final and decisive boundary between their lands, without regard to the line of the government survey. (Ark.) *Cox v. Daugherty*, 75.

2. BOUNDARIES—Instruction as to Evidentiary Value of Old Fence.—If the evidence concerning a disputed boundary is conflicting as to when a particular fence was built and as to whether it was afterward rebuilt on practically the same line, an instruction should be given on the evidentiary value of old fences. (Mich.) *Dawson v. Falls City Boat Club*, 363.

Navigable Streams.

3. BOUNDARIES of Navigable Streams, Changes in.—If one's land is bounded by a navigable river, it remains his boundary no matter how far it shifts, subject to be again shifted by accretion or recession. (Mo.) *Frank v. Goddin*, 493.

4. NAVIGABLE WATERS.—A Riparian Owner does not Own to the Middle or Thread of a Navigable River in Missouri, but only to low-water mark. (Mo.) Frank v. Goddin, 493.

See Landlord and Tenant, 1.

BOYCOTTING.

See Conspiracy.

BUILDING CONTRACTS.

See Contracts, 1.

BUILDING AND LOAN ASSOCIATIONS.

1. BUILDING AND LOAN ASSOCIATIONS, Transfers by, When Ultra Vires.—A transfer by a building and loan association of all its loans and securities, authorized by its board of directors, but not by its stockholders at a meeting called for that purpose, is without legal right and wholly ultra vires. (Mo.) Cobe v. Lovan, 480.

2. BUILDING AND LOAN ASSOCIATIONS, Trustees' Sales, When not Deemed Made by Authority of.—If one solvent building and loan association assumes to transfer all its notes and securities to another, the direction of the late president of the former that a trustee sell the property described in a trust deed given to secure the payment of one of such notes, when such president is acting as agent of the latter association, cannot be considered as the act of or authorized by, the association of which he was president and to which the notes and securities had been given. Especially is this true if the statute provides that the foreclosure of stockholders' mortgages shall be under the supervision of the board of directors. (Mo.) Cobe v. Lovan, 480.

BURGLARY.

1. BURGLARY—Consent of Owner of Building.—Where a detective informs the owner of a building that it is about to be burglarized by a designated person, and that he himself is to feign assistance in the crime to secure evidence of it and of other crimes, the passive acquiescence of the owner in the commission of the offense, without participation or encouragement on his part, is not such a consent thereto as can be urged by the burglar as a defense. (N. Dak.) State v. Currie, 687.

2. BURGLARY.—The Feigned Assistance of a Detective in a burglary is no defense to his associate, if the latter does every act essential to the crime; but what is done by the detective cannot be charged to the burglar, for the two are not acting together for a common purpose. (N. Dak.) State v. Currie, 687.

CABDRIVERS.

See Bailments.

CARRIERS.

Failure to Deliver Theatrical Scenery.

1. CARRIER, Damages Recoverable for a Failure to Deliver Theatrical Scenery.—If a carrier, on contracting to deliver theatrical scenery, is notified that it is to be used for certain exhibitions, and that the expenses of the owner in connection with such exhibitions

is large, the carrier, on proof of negligent delay in delivery, is liable for the ordinary gross earnings of the exhibition the giving of which was prevented, less the amount of expenses which the inability to use the property saved the owner. (Mass.) *Weston v. Boston etc. R. R. Co.*, 330.

Liability for Loss of Goods.

2. **CARRIERS—Liability for Loss of Goods.**—A common carrier is liable for the loss of goods intrusted to it, though not chargeable with negligence, unless it shows that such loss was caused by inevitable accident or uncontrollable event. (La.) *Lehman, Stern & Co. v. Morgan's Louisiana etc. Co.*, 259.

3. **CARRIERS—Liability for Loss of Goods.**—A carrier cannot escape liability for the loss of goods by merely proving that they, after being intrusted to him, have been lost or destroyed, but he must prove further that the loss was caused by an event purely accidental, impossible to prevent, and that he is not chargeable with any act of imprudence or negligence. (La.) *Lehman, Stern & Co. v. Morgan's Louisiana etc. Co.*, 259.

4. **CARRIERS—Loss of Goods by Fire.**—If goods in the hands of a carrier on a railroad platform in course of delivery are damaged or lost by fire, the cause of which is not shown, proof of usual and customary diligence to safeguard the goods will not avail the carrier as a defense, without further proof that the fire was purely accidental and impossible to prevent. (La.) *Lehman, Stern & Co. v. Morgan's Louisiana etc. Co.*, 259.

Inspection of Goods—Sale of Perishables.

5. **CARRIERS—Inspection—Conversion.**—An inspection of goods at the point of destination, unauthorizedly permitted by the carrier, by and through which the consignee is prevented from consummating a contemplated sale of such goods, is not such a wrongful delivery by the carrier as to make him liable for the full value of the goods as for a conversion thereof. (W. Va.) *Dudley v. Chicago etc. Ry. Co.*, 1027.

6. **CARRIERS—Unauthorized Inspection—Sale of Perishable Property.**—If a carrier permits an unauthorized inspection of perishable goods at the point of destination, and the consignee, being notified of the danger of loss from decay, relies upon such unauthorized inspection as constituting a conversion, gives notice of his abandonment of the consignment and intention to claim the value thereof, the carrier has a right to sell the goods for the account of the owner and deduct its charges, and is liable only for the residue of the proceeds of the sale. (W. Va.) *Dudley v. Chicago etc. Ry. Co.*, 1027.

7. **CARRIERS—Right to Sell Perishable Property.**—If goods shipped by carrier are of a perishable nature, and the consignee will not accept them, or there are other reasons requiring a sale thereof without delay, the carrier is justified in selling the goods. (W. Va.) *Dudley v. Chicago etc. Ry. Co.*, 1027.

Express Companies—Limitation of Liability.

8. **CARRIERS—Express Companies—Limitation of Liability—Public Policy.**—A stipulation in the contract of carriage of an express company that its liability shall be limited to a nominal amount, no matter how great the value of the package lost, is opposed to public policy and void. (Miss.) *Southern Express Co. v. Marks etc. Co.*, 466.

9. CARRIERS—Negligence—Limitation of Liability—Public Policy.—Stipulations in a contract of carriage by an express company that the negligence of the railroad company carrying the package, which is the subject of the contract, shall not be imputed to such express company, is opposed to public policy and void. (Miss.) *Southern Express Co. v. Marks etc. Co.*, 466.

Passengers in General.

10. CARRIERS—Persons Entitled to Become Passengers.—A railway company cannot refuse to receive as a passenger one who is capable of taking care of himself, and whose presence is not dangerous or hurtful or annoying to his fellow-passengers. (Ark.) *Price v. St. Louis etc. Ry. Co.*, 79.

11. CARRIERS.—The Relation of Carrier and Passenger does not Terminate Until the Passenger has reached his destination, alighted from the train, and had reasonable time in which to leave the place where passengers are discharged. (Ind.) *Glenn v. Lake Erie etc. R. Co.*, 255.

12. CARRIERS—Through Ticket.—If a passenger purchases a single ticket for the whole journey with nothing on its face to indicate that any part of the transportation is to be by means of another carrier, in case of injury to him on a ferry during the transportation, he need not show, in order to recover, that the railroad company selling him the ticket also operated the ferry. (Pa.) *Prethrow v. West Jersey etc. R. R. Co.*, 735.

13. CARRIERS—Passenger, Relation of, When Terminates.—If a passenger alights from his train and his journey is terminated, but he lingers about the station ten or fifteen minutes, not being detained by any business, he ceases to be a passenger, and cannot recover as such for injuries subsequently suffered in passing over the station grounds. (Ind.) *Glenn v. Lake Erie etc. R. R. Co.*, 255.

Intoxicated Passengers.

14. CARRIERS—Passengers—Intoxicated Persons.—A railway company is not required to accept as a passenger one without an attendant, who, from intoxication, is mentally or physically incapable of taking care of himself. (Ark.) *Price v. St. Louis etc. Ry. Co.*, 79.

15. CARRIERS—Drunken Passengers—Agency of Conductor in Accepting.—If the conductor of a passenger train accepts one as a passenger, unattended, who, from drunkenness, is unable to look after himself, the conductor in so doing is acting within the scope of his authority. (Ark.) *Price v. St. Louis etc. Ry. Co.*, 79.

16. CARRIERS—Acceptance of Drunken Passenger—Duty to Care for.—It is the duty of the conductor of a railway passenger train to pass upon the eligibility of those presenting themselves for transportation, and if he accepts a person as a passenger whom he knows to be unattended and to be insensible from intoxication, and thereby unable to protect himself from injury, the company owes such passenger the duty to exercise such care as may be reasonably necessary for his safety. (Ark.) *Price v. St. Louis etc. Ry. Co.*, 79.

17. CARRIERS—Acceptance of Drunken Passenger—Duty to Care for.—While a railway company is not an insurer of the safety of the person of one whom it receives as a passenger, unattended, knowing him to be at the time in an insensibly drunken condition, yet it is bound to exercise all the care that a reasonably prudent man would to protect one in such condition from the dangers incident to his surroundings and mode of travel, and it must, in such case, bestow

upon him such care and attention, beyond that given to the ordinary passenger, which reasonable prudence and foresight demand for his safety. (Ark.) *Price v. St. Louis etc. Ry. Co.*, 79.

18. CARRIERS—Acceptance of Drunken Passenger—Contributory Negligence.—The question of contributory negligence cannot arise where the undisputed evidence shows an unattended passenger to have been mentally or physically incapable of self-protection arising from his intoxication, where the railway company had knowledge of such condition when it accepted him as a passenger. (Ark.) *Price v. St. Louis etc. Ry. Co.*, 79.

Baggage of Passengers.

19. CARRIERS—Sample Case as Baggage.—If a railroad station agent knows that property checked as baggage is in fact a sample case of goods and the railroad company has formerly accepted and carried such case as baggage, it is liable for the value of the case and contents if they are lost in transit. (Miss.) *New Orleans etc. R. R. Co. v. Shackelford*, 461.

20. CARRIERS—Liability as for Baggage.—If a passenger presents to the carrier for transportation his goods and chattels and makes known what they are, or exposes them to view, or packs them in a way to give anyone concerned good reason to understand and know that they are not usually carried as baggage, and demands transportation of them as his baggage, and the carrier receives them and carries them accordingly, he will be liable for them as baggage, although he is not bound to receive and transport them as such. If he wishes to avoid responsibility for them as baggage, he must refuse to receive them as such. (Miss.) *New Orleans etc. R. R. Co. v. Shackelford*, 461.

21. CARRIERS—Loss of Baggage—Penalty.—A statute providing that if a railroad company carelessly or willfully injures, or allows to be injured or lost, any baggage, it shall be liable to the owner in a sum not less than double the amount of the actual damage, applies only to such luggage as is in a proper sense personal baggage, and does not apply to a drummer's sample case and its contents checked as baggage. (Miss.) *New Orleans etc. R. R. Co. v. Shackelford*, 461.

Passengers on Street Railway.

22. STREET-CARS, Passengers on, Persons Who are not.—One who entered a street-car, erroneously supposing it to be going to his destination, and who, on the conductor calling out that the car went to the stables only, tried to alight and was injured by its sudden starting, is not a passenger, because he had not been accepted as such at the time of the accident and had abandoned his intention of becoming a passenger, and he cannot maintain an action against the corporation operating the car if it has exercised ordinary care. (Mass.) *Robertson v. Boston etc. Ry. Co.*, 314.

23. STREET RAILWAYS—Passenger's Assumption of Risk.—A passenger who voluntarily rides on the running-board of a street-car takes upon himself the risk of his position. (Pa.) *Rice v. Philadelphia Rapid Transit Co.*, 738.

Passengers by Water—Unsafe Piers.

24. CARRIERS—Passengers—Negligence—Question for Jury.—If a passenger on a ferry-boat is injured by a collision between such boat and a bulkhead, the question of the negligence of the railroad company operating the ferry is a question for the jury. (Pa.) *Prethrow v. West Jersey etc. R. R. Co.*, 735.

25. CARRIERS OF PASSENGERS by Water, Duty of at Piers.—A passenger steamship company owes no duty to persons upon its piers awaiting the embarkation of passengers except to have such piers in a reasonably safe condition for access and for remaining or standing upon. (N. Y.) *Duhme v. Hamburg-American Packet Co.*, 615.

26. CARRIER OF PASSENGERS, When not Liable to Person Injured at Its Pier by the Breaking of an Appliance.—If a person goes to the pier of a steamship company, and while standing there for the purpose of meeting a relative who is expected to arrive, is injured by the parting of a wire rope or hawser, he cannot recover of the company if such hawser had been recently purchased, was in good condition, and of a size usual for the purpose for which it is used, and there is nothing beyond the happening of the accident to show that the company had been guilty of negligence or had failed in any duty it owed to the person injured. (N. Y.) *Duhme v. Hamburg-American Packet Co.*, 615.

See Bailments; Messenger; Corporations.

CHARACTER OF ACCUSED.

See Homicide, 15-17.

CHATTEL MORTGAGES.

CHATTEL MORTGAGES—Sale of Property—Construction of Statute.—The statute of a state providing that if a mortgagor in an unsatisfied chattel mortgage shall willfully sell or dispose of the mortgaged property without the mortgagee's written consent, he shall be guilty of larceny, embraces a sale in that state of chattels mortgaged to residents thereof, although the mortgage was executed, delivered and filed in another state by residents thereof. (S. Dak.) *In re Renshaw*, 778.

CHECKS.

See Banks and Banking; Payment.

CHILLING BIDS.

See Contracts, 4.

COMMERCE.

See Licenses, 2; Taxation, 4.

CONSPIRACY.

1. CONSPIRACY—Criminal.—Every Man has the Right to Employ His Talents, industry and capital as he pleases, free from the dictation of others; and if two or more persons combine to coerce his choice in this behalf, it is a criminal conspiracy. (Pa.) *Purvis v. United Brotherhood of Carpenters*, 757.

2. CONSPIRACY—Interference with Business Rights.—Every person has an absolute right, as between his fellow-citizens and himself, to carry on his business within legal limits according to his own discretion and choice, with any means which are safe and healthful, and to employ therein such persons as he may select, and with such right third persons have no right to interfere with intent to injure, is not to destroy, it, if their demands are not complied with. (Pa.) *Purvis v. United Brotherhood of Carpenters*, 757.

3. CONSPIRACY, CRIMINAL.—An attempt to coerce by unlawful means, by conspiring to injure and destroy property, is in itself

an unlawful act, no matter what end is to be accomplished. (Pa.) *Purvis v. United Brotherhood of Carpenters*, 757.

4. **CONSPIRACY—Coercion by Labor Union—Injunction.**—If a labor union attempts to injure a person in his business in order to coerce him into submission to the demands of such union requiring him to furnish the capital and his business to be controlled in its essential features by such union, which is in no way responsible for the capital invested or the losses entailed, such attempt is a conspiracy, and equity will restrain such interference by injunction. (Pa.) *Purvis v. United Brotherhood of Carpenters*, 757.

5. **CONSPIRACY—Coercion by Labor Union—Employment of Union Labor Alone.**—If a labor union by concerted action attempts to coerce an employer to employ only union workmen, upon certain terms and conditions, and to compel him to submit himself and his business to the control of such union, such attempt is an attempt to form a conspiracy, and will be enjoined at the suit of such employer. (Pa.) *Purvis v. United Brotherhood of Carpenters*, 757.

6. **CONSPIRACY—Coercion by Labor Union—Employment of Union Workmen.**—Declarations by a labor union that it intends to drive an employer out of business unless he unionizes his mill, together with notice to customers of such employer not to use the latter's materials unless he employs only union workmen, with threats of strikes in such customer's business, constitute such coercion and conspiracy as will be restrained by injunction. (Pa.) *Purvis v. United Brotherhood of Carpenters*, 757.

7. **CONSPIRACY—Coercion—Construction of Statute.**—A statute providing that labor unions may adopt ways and means to make their rules and regulations, by-laws and resolutions effective, sanctions no rules, regulations, by-laws or resolutions to commit wrong or coercion, or to form a conspiracy against an employer, his business or his customers. (Pa.) *Purvis v. United Brotherhood of Carpenters*, 757.

8. **CRIMINAL LAW.—An Indictment for Conspiracy** charging that the defendant did conspire, confederate and agree together to prevent, hinder and deter by violence and threats and intimidation certain manufacturers of granite from further engaging in the business of manufacturing granite, is sufficient. (Vt.) *State v. Duncan*, 923.

CONSTITUTIONAL LAW.

1. **CONSTITUTIONAL LAW.**—The Fifth Amendment to the Constitution of the United States Applies Only to Legislation by Congress and cannot be invoked to affect that legislation. (Ind.) *Barton v. Kimmerley*, 252.

2. **CONSTITUTIONAL LAW.**—No statute can be condemned as unconstitutional, unless in palpable conflict with some constitutional provision, state or national, and such conflict is not to be implied. (Miss.) *Hart v. State*, 437.

3. **CONSTITUTIONAL LAW—Power of the Legislature.**—The legislature of the state has power to enact any law not prohibited by the constitution of the state or that of the United States. (Mo.) *Ex parte Berger*, 472.

4. **CONSTITUTIONAL LAW.**—A Constitution will be Held to have been prepared and adopted in reference to existing statutory laws upon the provisions of which in detail it must depend to be set in practical operation. (N. Dak.) *Barry v. Traux*, 662.

5. **CONSTITUTIONAL LAW.**—Courts are Bound to Presume that the people adopting a constitution are familiar with the previous and

existing laws upon the subjects to which its provisions relate, and upon which they express their judgment and opinion in its adoption. (N. Dak.) *Barry v. Traux*, 662.

6. CONSTITUTIONAL LAW.—It is a Cardinal Rule of construction that a constitution must be so construed as to give effect to the intention of the people who adopted it, and, while it will be construed with reference to the doctrines of the common law, its intent will never be overruled by them. (N. Dak.) *Barry v. Traux*, 662.

See Bigamy, 1, 2; Executors and Administrators, 1; Game Laws; Licenses; Venue.

CONTRACTS.

1. BUILDING CONTRACT—Failure to Obtain Architect's Certificate—Pleading.—A builder who is unable to obtain a certificate from the architect showing the amount due, as his contract requires, cannot recover for work done and materials furnished on the common counts, but only on the contract, upon a declaration setting up the contract, averring performance as to furnishing the material and performing the work, and stating his reason for not furnishing the certificate. (Ill.) *Hart v. Carsley Mfg. Co.*, 189.

2. CONSIDERATION Does not Depend Upon Whether the Thing Promised Results in a Benefit to the Promisee or a Detriment to the Promisor. It is enough that something is promised, or the exercise of a present right is forborne. (Vt.) *Lyndon Sav. Bank v. International Co.*, 900.

3. CONTRACT Invalid in Part.—A Subscription to the Stock of a telephone company is unenforceable, if an essential part of the agreement is a lease of a telephone to the subscriber for a term of years, which lease is unenforceable for want of mutuality. (Mich.) *Co-operative Tel. Co. v. Katus*, 414.

4. CONTRACT TO CHILL Bidding at Bankrupt Sale.—Where one has made an assignment in bankruptcy, his agreement with another bidder not to bid at the trustee's sale of the property, entered into after bids have already been made and the sale is still open, is void on grounds of public policy. (Mich.) *Fisher v. Hampton Transportation Co.*, 358.

5. CONTRACT—Necessity of Pleading Invalidity.—When a court is asked to enforce a contract which, upon the complainant's own showing, is against public policy, relief will be denied him, although the invalidity of the contract is not pleaded. (Mich.) *Fisher v. Hampton Transportation Co.*, 358.

6. CONTRACTS—Rescission.—Money Paid upon a contract which is subsequently rescinded is never forfeited unless there is an express or implied contract to that effect, and upon such rescission the money paid must be returned to him who advanced it. (Conn.) *Pierce v. Staub*, 163.

See Damages.

CORPORATIONS.

Creation and Termination of Corporation.

1. CONSTITUTIONAL LAW—Special Statutes Extending the Life of Corporations.—The statute of Indiana purporting to extend the life of certain private corporations created by special act of the legis-

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lature is unconstitutional. (Ind.) *Clark v. American Cannel Coal Co.*, 217.

2. CORPORATIONS.—To the Existence of a Corporation It is Essential that there be a valid law under which a corporation with the powers assumed might be incorporated, a bona fide attempt to organize a corporation under such law, and an actual exercise of its powers. (Ind.) *Clark v. American Cannel Coal Co.*, 217.

3. CORPORATIONS—Termination of.—If the law under which a corporation is organized, or the special act relating to it, fixes a definite time when its corporate life must end, when that date is reached the corporation is ipso facto dissolved without any direct action on the part of the state or the members of the corporation, and no corporate powers can subsequently be exercised by it, except such as are given it for the purpose of winding up its affairs. (Ind.) *Clark v. American Cannel Coal Co.*, 217.

4. CORPORATION, Estoppel to Deny the Existence of, When Terminates.—Though a party dealing with a corporation may be estopped to deny its corporate existence at that time, the estoppel does not continue after the life of the corporation has terminated by the passing of the time fixed by law for its corporate existence. (Ind.) *Clark v. American Cannel Coal Co.*, 217.

5. CORPORATIONS De Facto.—After the Expiration of the Time Fixed for the Life of the Corporation, it is not a de facto corporation, and its corporate existence may be questioned collaterally. (Ind.) *Clark v. American Cannel Coal Co.*, 217.

6. CORPORATION, Power of to Sue Termination of.—If the time fixed by law for the existence of a corporation terminates, and also the time within which by law it must wind up its affairs, it has no power to sue. (Ind.) *Clark v. American Cannel Coal Co.*, 217.

Dissolution by Stockholders.

7. CORPORATIONS—Right of Majority to Dissolve.—If, before a corporation has progressed further than to effect a temporary organization, an older corporation, in order to prevent the new one from going into active business, proposes to enlarge its plant, increase its capital stock, and let in the members of the new concern on terms of equality, a majority of the stockholders of the new company, acting in good faith, are entitled, over the objections of the minority, to dissolve the corporation, and have a court decree such dissolution in order to avoid future complications and liabilities. (Tenn.) *State v. Chilhowie Woolen Mills Co.*, 825.

De Jure and De Facto Corporations.

8. CORPORATIONS.—The Corporate Existence of a De Facto Corporation can be Questioned Only in a direct proceeding brought for that purpose. (Ind.) *Clark v. American Cannel Coal Co.*, 217.

9. CORPORATIONS, Collateral Attack on, When Sustainable.—If There is No Law Under Which a Corporation De Jure May Exist, its nonexistence may be set up in a collateral proceeding. (Ind.) *Clark v. American Cannel Coal Co.*, 217.

10. CORPORATIONS—Unconstitutional Statute Purporting to Authorize.—There cannot be a Corporation De Jure under an unconstitutional statute. (Ind.) *Clark v. American Cannel Coal Co.*, 217.

Preferred Stock—Dividends.

11. CORPORATIONS, Preferred Stock, Contract in Favor of, When Valid.—An agreement that the preferred stock of a corporation is

to be paid out of the surplus profits arising from its business a dividend equal to six per cent per annum before any dividend shall be paid to the common stock is valid, binds all the stockholders, and is inviolable. (N. Y.) *Roberts v. Roberts-Wicks Co.*, 607.

12. CORPORATIONS—Preferred Stock, Dividends Agreed to be Paid to, Whether a Charge for all Time.—An agreement that the preferred stock of a corporation shall be paid a dividend of six per cent per annum out of the surplus profits arising from the business of the corporation is a charge on its profits for all time, and all arrears of such dividends must be paid out of such profits before any payment can be made to the common stockholders. (N. Y.) *Roberts v. Roberts-Wicks Co.*, 607.

13. CORPORATIONS, Preferred Stock, Reducing the Amount of, Effect of on Previously Accrued Right to Dividends.—If by agreement the preferred stockholders of a corporation are to be paid dividends of six per cent per annum out of the profits arising from its business, and the amount of the preferred stock is subsequently reduced, such reduction does not diminish the dividends to be paid up to the time the reduction takes place, though a stockholder acquiesces therein and accepts stock diminished in proportion thereto. The reduction leaves the affairs of the corporation just as before, except that it diminishes the capitalization. The dividends in default at the reduction continue in default until paid, and so long as the corporation is a going concern, the dividends accrued prior to the reduction remain payable whenever in the future the corporation accumulates profits from its business. (N. Y.) *Roberts v. Roberts-Wicks Co.*, 607.

14. CORPORATIONS—Preferred Stockholders, When Have No Right to Surplus Above the Amount of the Capital Stock.—If the capital stock of a corporation is reduced from three hundred thousand dollars to two hundred thousand dollars, and this leaves in the possession of the corporation a surplus of capital above the sum last named, such surplus cannot be regarded as profits arising from its business, nor as subject to appropriation in satisfaction of dividends due and unpaid to preferred stockholders under an agreement that they shall be paid a dividend of six per cent per annum out of the surplus profits arising from the business of the corporation. (N. Y.) *Roberts v. Roberts-Wicks Co.*, 607.

15. CORPORATIONS, Dividends, Power of Directors in Declaring. The directors of a corporation have a wide discretion in the management of its affairs, and their declaration of a dividend from the surplus assets, when honestly exercised, will not be interfered with by the courts, but they cannot by such declaration impair any right to such assets, as, for instance, the right of preferred stockholders to be paid therefrom. (N. Y.) *Roberts v. Roberts-Wicks Co.*, 607.

Ultra Vires Acts.

16. CORPORATIONS, Stockholders, Ratification by of Ultra Vires Acts by Taking Benefit Therefrom.—Where the acts of a corporation are ultra vires, but not mala prohibita nor mala in se, a stockholder who accepts some pecuniary benefit thereunder, with knowledge of the character of the acts, cannot subsequently maintain a suit previously commenced by him to enjoin the corporation from carrying out such acts and plans and to have them declared illegal and void, and it is not material that the plaintiff purported to sue in behalf of all stockholders similarly situated if none joined in the prosecution of the suit. (N. Y.) *Wormser v. Metropolitan St. Ry. Co.*, 596.

17. CORPORATION, Ratification by.—A Corporation is Estopped from Denying Authority to Make an Agreement Extending the Time

for the Payment of a Note if it receives the benefit of the forbearance and ratifies it by paying interest on the note. (Vt.) *Lyndon Sav. Bank v. International Co.*, 900.

Foreign Corporation—Service of Process.

See Attachment, 3; Garnishment, 2, 3.

18. CORPORATIONS, FOREIGN—Service of Process upon.—A statute requiring surety companies of other states or countries to appoint an agent upon whom service of process may be made does not provide an exclusive, but only an additional, mode of service. (La.) *In re Curtis*, 284.

19. CORPORATIONS, FOREIGN—Service of Process upon.—If a foreign corporation conducts business within the state at a permanent place of business, service of process at such place, upon its agent, in connection with a matter growing out of such business is good if like service would be good if made upon a domestic corporation. (La.) *In re Curtis*, 284.

20. CORPORATIONS, FOREIGN—Service of Process.—Any service which would be sufficient as against a domestic corporation may be authorized by statute to commence an action against a foreign or nonresident corporation. (La.) *In re Curtis*, 284.

21. CORPORATIONS, FOREIGN—Service of—Process.—In an action by a creditor seeking to obtain a personal judgment against a nonresident corporation not doing business within the state, the service of process upon its secretary while temporarily within the state will not support a judgment against the corporation. (La.) *Southern Sawmill Co. v. American Hard Wood etc. Co.*, 267.

22. CORPORATIONS, FOREIGN—Constitutionality of Statute Requiring to Appoint State Auditor Its Attorney.—A statute requiring every foreign or nondomestic corporation doing business within the state, by power of attorney duly executed by it, to appoint the auditor of the state its attorney in fact to accept service of process or notice in the state, and by the same instrument to declare its consent that service of any process or notice in the state on such attorney or his acceptance shall be equivalent to and shall be due and legal service of process on the corporation, and that it shall pay such auditor ten dollars a year for so acting, to be turned into the treasury of the state, does not conflict with the fourteenth amendment to the constitution of the United States nor any part of the constitution of the state. (W. Va.) *State v. Petroleum Co.*, 951.

See Messenger Corporations.

COVENANTS.

1. COVENANTS Against Encumbrances—Right to Passageway.—A provision in a deed amounting to a contract in favor of the grantor for a passageway to be kept open between the lands conveyed and those retained by him amounts to an encumbrance. (Mass.) *Bailey v. Agawam Nat. Bank*, 296.

2. A COVENANT Against Encumbrances is Broken as Soon as Made. (Mass.) *Bailey v. Agawam Nat. Bank*, 296.

3. COVENANTS Against Encumbrances, Damages for Breach of.—If an Encumbrance is of a Permanent Nature, like a perpetual servitude, such as the covenantee cannot remove, he is entitled to recover as damages a just compensation for the real injury resulting from its continuance, which should be estimated as of the date of the deed and not of the date of the trial. (Mass.) *Bailey v. Agawam Nat. Bank*, 296.

4. **COVENANTS—Knowledge of Lease on Premises.**—A purchaser of land on which there exists an unexpired lease may maintain an action for breach of covenant against encumbrances, notwithstanding his actual knowledge of the lease. (Tenn.) *Brown v. Taylor*, 811.

5. **COVENANTS—Counsel Fees in Case of Breach.**—A purchaser of land is not entitled, in his action for a breach of covenant against encumbrances in that there is an outstanding lease on the premises, to his counsel fees expended in an unsuccessful action to evict the tenant before the expiration of his term. (Tenn.) *Brown v. Taylor*, 811.

6. **COVENANTS—Measure of Damages for Breach.**—The measure of damages for the breach of a covenant against encumbrances, where there exists an unexpired lease on the premises, is, in the absence of special circumstances, the rental value of the property during the period the purchaser is kept out of possession. (Tenn.) *Brown v. Taylor*, 811.

CRIMINAL LAW.

Prohibition of Excessive Rate Interest.

1. **CONSTITUTIONAL LAW—Interest, Class Legislation Respecting, What is not.**—A statute making it criminal to take interest at a greater rate than two per cent per month is not class legislation prohibited by section 53 of article 4 of the constitution of Missouri, declaring that the legislature shall not pass any special law granting to any person any special or exclusive right, privilege or immunity. (Mo.) *Ex parte Berger*, 472.

2. **STATUTE Making Criminal the Taking of Excessive Interest, Construction of.**—A statute declaring that every person who shall take or receive, by means of commission or brokerage charges or otherwise, for the forbearance of the use of money any interest at a rate greater than two per cent per month shall be guilty of a misdemeanor, is not restricted to interest taken by means of the commission or brokerage but applies to all persons taking interest above the rate specified. (Mo.) *Ex parte Berger*, 472.

3. **CONSTITUTIONAL LAW, Excessive Interest, Statute Making Taking of Criminal.**—A statute making the taking of interest at a greater rate than two per cent per month criminal does not conflict with the fourteenth amendment to the constitution of the United States, nor with section 30 of article 2 of the constitution of Missouri, declaring that no person shall be deprived of life, liberty or property without due process of law. (Mo.) *Ex parte Berger*, 472.

Power to Enact Criminal Statutes.

4. **CONSTITUTIONAL LAW—Criminal Laws, Power to Enact.**—It is no objection to a criminal statute that the crime denounced was not indictable at the common law nor prohibited by any statute prior to that enacted. (Mo.) *Ex parte Berger*, 472.

5. **CRIMINAL LAW—What Acts Shall Constitute a Crime is a Matter Left to the Legislative Branch of the government, subject to the limitations imposed by the state and national constitutions.** (Mo.) *State v. Stewart*, 529.

Failure of Accused to Testify.

6. **CRIMINAL LAW—Failure of Accused to Testify.**—An instruction that the jury should not consider the failure of the defendant to

become a witness in his own behalf in arriving at a verdict is not erroneous. (N. Dak.) *State v. Currie*, 687.

See Venue; Witnesses.

CURTESY.

1. **HUSBAND AND WIFE.**—Curtesy is a Common-law Right Recognized by the Laws of New York, and it gives to a husband a life estate in the lands of which his wife dies seised. (N. Y.) *Collins v. Russell*, 569.

2. **HUSBAND AND WIFE.**—A Husband cannot be a Tenant by the Curtesy of an Estate Which His Wife Holds in Remainder and to the possession of which she never becomes entitled because there is a precedent life estate the tenant of which survives her. (N. Y.) *Collins v. Russell*, 569.

3. **HUSBAND AND WIFE.**—Tenancy by the Curtesy Does not Exist in Favor of a Husband as to lands in which his wife had an estate in remainder acquired by deed, where she never had any seisin of the lands during coverture, there being a preceding life estate which had not terminated at her death. (N. Y.) *Collins v. Russell*, 569.

DAMAGES.

In General.

1. **DAMAGES for Breach of Contract as Affected by the Knowledge of the Parties.**—It is always competent to show knowledge by the parties to a written contract of the circumstances on the basis of which it was made, for the purpose of showing what was within the contemplation of the parties at the time of making it, and such knowledge is competent on the question of what damages were in contemplation of the parties to it, whether a party seeks to recover ordinary or special damages. (Mass.) *Weston v. Boston etc. R. R.*, 330.

2. **DAMAGES, Value of the Use of Property as an Element of.** Where plaintiff is deprived of the use of property valuable for use, and the property is such that it cannot be replaced, the measure of damages in what such property is ordinarily worth for use. (Mass.) *Weston v. Boston etc. R. R. Co.*, 330.

For Breach of Contract of Sale.

3. **SALES—Breach and Rescission of Contract—Recovery of Purchase Money Paid.**—If a contract of sale provides for the payment of the price in installments and contains no provision for a forfeiture on default, and the buyer, after paying part of the installments, defaults, whereupon the seller, after giving various extensions, refuses to recognize any right of the buyer to the property, but disables himself from performing his part of the contract by transferring the property to other parties, and both parties thereafter treat the contract as at an end, there is in effect a mutual rescission of the contract, and the buyer is entitled to recover the installments paid by him under the contract. (Conn.) *Pierce v. Staub*, 163.

4. **SALES—Breach of Contract—Measure of Damages.**—The ordinary measure of damages for failure by a seller of goods to deliver them as agreed is the difference, if any, between the contract price agreed upon and their highest market price at the place and time agreed upon for the delivery. (Conn.) *Marshall v. Clark*, 84.

5. SALES—Breach of Contract—Measure of Damages.—In assessing damages for breach of a contract to deliver goods sold by a wholesale to a retail dealer, if there is no wholesale market price at the place of delivery, the market value should be determined by the wholesale market price at the time at the nearest convenient wholesale market, together with the cost of transportation from there to the place of delivery. (Conn.) *Marshall v. Clark*, 84.

6. SALES—Breach of Contract—Damages.—Knowledge by a wholesaler that his customer buys goods from him to resell at retail does not make the wholesaler liable for profits which the retailer might have made and he been able to receive and sell such goods. (Conn.) *Marshall v. Clark*, 84.

7. SALES—Breach of Contract—Damages.—Loss of customers by a retail dealer, and shrinkage in the value of similar goods brought to replace those ordered from a wholesaler, but not delivered by him, cannot be considered in estimating damages for a breach of the contract of sale. (Conn.) *Marshall v. Clark*, 84.

See Death.

DEATH.

DEATH OF ALIEN—Action for the Benefit of His Alien Family.—A statute declaring that there shall be a right of action in favor of the husband or wife of a decedent in all cases against persons wrongfully causing his death within the state is not rendered inapplicable by his alienage or that of his wife and next of kin, who are also aliens and nonresidents. (Ohio St.) *Pittsburgh etc. Ry. Co. v. Naylor*, 701.

DEEDS.

In General.

1. DEEDS, When not Testamentary in Character.—A conveyance to take effect upon the grantor's death is not testamentary in character and does not operate as a will merely. (Mo.) *O'Day v. Meadows*, 542.

2. CONVEYANCES.—An Estate in Futuro which is a contingent estate for the life of another may be created by a conveyance under the statute of Missouri without at the same time creating a particular state to support it. (Mo.) *O'Day v. Meadows*, 542.

3. DEEDS—Parol Evidence of Consideration—Depots.—The consideration named in a deed is only prima facie evidence, and parol evidence is admissible, not to defeat the deed, but to prove the real consideration therefor, and under this rule parol evidence is admissible to show that the consideration of a deed for a right of way is the erection of a railroad depot on the land. (Ark.) *St. Louis etc. R. Co. v. Crandell*, 42.

4. DEEDS—Evidence of Parol Contract in Connection With.—Evidence of a parol contract carried out by executing a conveyance in furtherance of it does not offend against the rule forbidding the altering, varying or adding to a written contract by parol. (Ark.) *St. Louis etc. R. Co. v. Crandell*, 42.

Description of Property.

5. DEEDS—Description.—It is essential to the validity of a grant that the thing granted should be so described as to be capable of being distinguished from other things of the same kind; but it is not necessary that the grant itself should contain such a description as without the aid of extrinsic testimony will show precisely what is conveyed (W. Va.) *Holley v. Curry*, 944.

6. DEEDS—Description.—A description in a deed omitting the county or state where the land is situated does not render the deed void for want of certainty of description, provided the deed contains or provides other means for identifying the land conveyed. (W. Va.) *Holley v. Curry*, 944.

Delivery After Death of Grantor.

7. DEEDS—Deposit for Delivery on Grantor's Death.—If a grantor delivers a deed to a third person to be delivered by him to the grantee on the grantor's death, the grantee takes an immediate estate subject to the life use of the grantor. (Conn.) *Grilley v. Atkins*, 152.

8. DEEDS—Deposit for Delivery on Grantor's Death.—Whether, in a given case, the delivery of a deed to a third person, to be delivered by him to the grantee after the grantor's death, is to be deemed a delivery in praesenti or not, is generally a question of fact depending upon the conduct and intention of the parties to the transaction. To constitute a delivery in praesenti, the grantor must deliver the deed to the third person for the benefit of the grantee ultimately and in some way express his intention to that effect, and the grantor must at the time of such delivery to the third person part both with the possession of the deed and with all dominion and control over it. (Conn.) *Grilley v. Atkins*, 152.

9. DEEDS—Deposit for Delivery on Grantor's Death—Revocation. A voluntary deed delivered absolutely to a third person to be delivered by him to the grantee upon the death of the grantor, cannot be revoked by the grantor without the consent of the grantee. (Conn.) *Grilley v. Atkins*, 152.

10. DEEDS—Deposit for Delivery After Grantor's Death—Revocation.—If a grantor delivers a voluntary deed to a third person, not his agent nor attorney, with directions to him to deliver the deed to the grantee on the grantor's death, and such third person accepts the deed and holds it in escrow, this constitutes a present delivery of the deed, which is irrevocable without the consent of the grantee. (Conn.) *Grilley v. Atkins*, 152.

See Covenants.

Note.

Definition of extradition, 106.

of privies and of privity, 24.

of tenancy by the curtesy, 572.

of tenancy by the curtesy initiate and consummate, 574.

DEPOTS.

See Railroads.

DESCENT AND DISTRIBUTION.

1. ESTATES OF DECEDENTS.—The Necessity for Administration of an estate of a decedent arises out of the common-law doctrine that his personal property descends to his executor or administrator. (Ohio) *McBride v. Vance*, 723.

2. ESTATES OF DECEDENTS, Title to Personal Property.—On the death of the owner of personal property, his title thereto does not vest in his heirs or legatees, but remains in abeyance until his executor or administrator is appointed. Hence, the sole heir of the holder of a promissory note cannot as such maintain any action thereon. (Ohio) *McBride v. Vance*, 723.

3. HEIRS—Liability for Debt of Ancestor.—An heir is not personally liable for the debt of his ancestor as to assets which descend to him, and remain in kind unsold. (W. Va.) *Crawford v. Turner*, 1014.

4. HEIRS—Liability for Debt of Ancestor.—An heir is personally liable for the debt of his ancestor to the extent of the value of assets or land which descends to him from such ancestor, and which the heir sells or conveys. (W. Va.) *Crawford v. Turner*, 1014.

Note.

Descent and Distribution, debts of ancestor, property in hands of heirs and devisees, when subject to, 1019, 1020.

liens to which property acquired by is subject, 1021, 1022.

personal liability of heir or devisee receiving property for debts of ancestor, 1017-1027.

personal property, close of administration, whether entitles heirs to maintain actions for, 735.

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personal property, long lapse of time without administration, whether entitles heir to maintain actions for, 734.

personal property, possession of, right of, in whom vests, 731.

personal property, states in which vests in heirs, 728.

personal property, title to, whether remains in abeyance until the appointment of an executor or administrator, 728, 734.

personal property, vests in executor or administrator, 727.

realty, when subject to debts of the ancestor or devisor, 1020, 1021.

DETINUE.

1. DETINUE—Essentials to Maintain.—To maintain an action of detinue the plaintiff must have property in the thing sought to be recovered of some value; it must be capable of identification, and he must be entitled to its immediate possession, while the defendant must have had possession at the institution of the action or some time prior thereto. (W. Va.) *Hefner v. Fidler*, 961.

2. DETINUE to Recover Note.—The action of detinue will lie to recover possession of a note. (W. Va.) *Hefner v. Fidler*, 961.

3. DETINUE to Recover Note—Fraud.—An action of detinue will not lie to recover the possession of notes given for the purchase price of property upon the discovery of such fraud as would entitle the maker of the notes to a rescission of the contract of sale. (W. Va.) *Hefner v. Fidler*, 961.

DISCOVERY.

EQUITY JURISDICTION—Discovery—Bills and Notes.—If, after the note of an applicant for insurance in payment of his premium is rejected by the insurer, a written agreement is entered into between the applicant and the insurance agent, whereby the note is reinstated as valid and forwarded by the insurer to his agent for collection, who, as president of a bank, buys the note for it, the directors of which have no knowledge of any equities against the note arising by reason of the agreement, equity has jurisdiction of a suit by the bank against such applicant, agent and insurer for a discovery of the contents of such agreement and for a decree for the amount of the note, when the applicant denies liability thereon, on the ground of the wrongful and fraudulent conduct of the insurer and his agent, after the making and execution of the agreement. (Miss.) *Enochs v. Mississippi Bank etc. Co.*, 443.

DIVORCE.

1. **HUSBAND AND WIFE—Domicile—Divorce.**—If a husband fails to provide a domicile for his wife, takes her to the home of her parents, and without further notice to her, leaves the state for an indefinite period of time, she is entitled to a divorce on the ground of abandonment. (La.) *Wilcox v. Nixon*, 266.

2. **DEED OF SETTLEMENT in Favor of Wife When not Rescinded or Avoided by Her Maintaining a Suit for Divorce and Alimony.**—A deed of settlement between a husband and wife in which he conveys to her or for her use certain property and makes provision for her support, and which she by its terms accepts in full satisfaction of her claims of every kind, whether for dower, alimony, or maintenance, is not rescinded nor made void by her bringing a subsequent action against him for divorce and alimony and procuring a decree awarding her both. He might have pleaded such deed in the divorce suit in bar of the claim of alimony, but his failure to do so and the resulting decree made without considering the deed do not annul it. (Mo.) *O'Day v. Meadows*, 542.

DOMICILE.

See Divorce, 1; Husband and Wife, 1.

DOWER.

1. **REDEMPTION, Right to Based on Inchoate Right of Dower.** A wife, by virtue of her inchoate right of dower, may, during the lifetime of her husband, maintain a suit to redeem from a mortgage and also from a foreclosure sale thereunder pursuant to a judgment to which she was not a party. (N. Y.) *Mackenna v. Fidelity Trust Co.*, 620.

2. **DOWER, Wife Having Right to, Whether Necessary Party to a Foreclosure.**—A wife has, through her husband, an interest in all real property of which he is seised during the marriage, and is therefore a necessary party to an action to foreclose a mortgage executed by him on such property. (N. Y.) *Mackenna v. Fidelity Trust Co.*, 620.

3. **DOWER, Right of Wife to Redeem from Judicial Sale, Limitation of to Her Dower Interest.**—If a wife has a right to redeem from a foreclosure sale because she was not a party to the action and judgment on which it was based, such right applies only to her dower interest, and the court may deny her the right to redeem if the purchaser will release her dower or pay her the value of her inchoate right of dower. (N. Y.) *Mackenna v. Fidelity Trust Co.*, 620.

DYING DECLARATIONS.

See Homicide, 12-14; Incest, 1.

EASEMENTS.

1. **EASEMENTS.—Personal Rights of Way**, not appurtenant to land, cease with the life of the grantee. (Conn.) *Graham v. Walker*, 93.

2. **EASEMENTS.—Personal Rights of Way** not appurtenant to land cannot be granted to the inhabitants of a certain territory or particular locality. (Conn.) *Graham v. Walker*, 93.

3. **EASEMENTS** May be Appurtenant to Land although the servient tenement is separated by other lands from the dominant tenement. (Conn.) *Graham v. Walker*, 93.

4. **EASEMENTS.—Right of Way by Prescription** may be appurtenant to particular land, although the servient and dominant tenements are separate and apart, and the way is accessible only by means of a highway upon which the respective tenements abut. (Conn.) *Graham v. Walker*, 93.

5. **EASEMENTS by Prescription.**—The use of an easement, which can be claimed as an appurtenance by prescription, must be so related to the use of the dominant tenement that its particular connection with the beneficial enjoyment of that tenement is not merely conjectural but direct and apparent. (Conn.) *Graham v. Walker*, 93.

6. **EASEMENTS—Right of Way by Prescription.**—A claim to a way by prescription appurtenant to a particular close cannot be maintained unless the prescriptive use is such as to make it reasonable to presume that the owner of the land over which the way is used knows that such use is in connection with and furtherance of the enjoyment of such close, and not under a claim of personal right or privilege. (Conn.) *Graham v. Walker*, 93.

7. **WAYS, Right to, When Reciprocally Created or Reserved.**—If a conveyance from M., the owner of a tract having two houses thereon, to H., after describing the land conveyed, provides that a passageway is to be kept open and for use in common between the two houses, ten feet in width, five feet of such passageway to be furnished by H. and five feet by M. from the land adjoining that conveyed, the conveyance shows an intention on the part of the parties to it that the rights in a passageway ten feet wide shall be rights of perpetuity and for the benefit of the two adjoining lots of land. (Mass.) *Bailey v. Agawam Nat. Bank*, 296.

8. **WAYS, Reservation of Rights of, When Restricted to the Life of the Grantor.**—A reservation in a conveyance of a right of way in favor of the grantor is restricted to his life, unless it contains the word "heirs." (Mass.) *Bailey v. Agawam Nat. Bank*, 296.

9. **WAYS, Right of by Exception.**—A right of way cannot be accepted by deed when there is not any way existing in law or in fact at the date of the conveyance. (Mass.) *Bailey v. Agawam Nat. Bank*, 296.

10. **WAYS, Rights of, When Reserved or Created by Contract.**—A clause in a conveyance purporting to provide that a passageway shall be kept open between the house retained by the grantor and the house conveyed by him operates as a contract perpetually binding on the grantee and his successors with notice, and subjects the land conveyed to a burden in favor of the land retained. (Mass.) *Bailey v. Agawam Nat. Bank*, 296.

11. **WAYS, Contracts for, Specific Performance of.**—If a provision in a conveyance amounts to a contract in favor of the grantor for a right of passageway, successors in interest of the grantee, who take with notice, are bound in equity to perform, and specific performance may be decreed against them. (Mass.) *Bailey v. Agawam Nat. Bank*, 296.

12. **WAYS, Right of, When not Restricted to Building in Existence.** A provision in a deed amounting to a contract for the keeping open and for use in common of a passageway ten feet in width between two houses, five feet to be furnished by the grantor and an equal amount by the grantee, is not limited to the life of the two dwellings on the lots at the execution of the deed, but is intended to be for the benefit of the two lots of land. (Mass.) *Bailey v. Agawam Nat. Bank*, 296.

EJECTMENT.

See Tenancy in Common.

ELECTIONS.

1. **ELECTIONS—Publication of Notice.**—If an official journal is published but once per week, a statute requiring that a notice of an election "shall be published for thirty days in the official journal of the parish," is complied with when such notice is published in such journal five consecutive Saturdays and the election is not held until thirty-two days after the first publication. (La.) Lower Terrebonne etc. Co. v. Police Jury, 291.

2. **ELECTIONS—Validity of Vote.**—A vote cast before the time appointed for the opening of the election polls has arrived and before the arrival of any of the election commissioners, cannot be counted as a legal vote, and is void. (La.) Lower Terrebonne etc. Co. v. Police Jury, 291.

3. **ELECTION OFFICERS.**—Bystanders who take it upon themselves to open election polls before the hour fixed by law for their opening has arrived are not de facto election commissioners and their act is void. (La.) Lower Terrebonne etc. Co. v. Police Jury, 291.

4. **ELECTION OFFICERS.**—There can be no de facto commissioner of election at a time not fixed by law for the holding of an election. (La.) Lower Terrebonne etc. Co. v. Police Jury, 291.

5. **ELECTION OFFICERS.**—Bystanders who take it upon themselves to open the election polls before the hour fixed by law for their opening has arrived cannot be deemed de facto election commissioners in a case of a voter who has himself appointed the regular election commissioners and has actual knowledge as to who the latter are. (La.) Lower Terrebonne etc. Co. v. Police Jury, 291.

ELECTRICITY.

1. **NEGLIGENCE—Defective Appliances—Injury to Third Person.** If a person is injured while attending church by the fall of an electric light, which an electric company has placed in the church under an agreement to keep it in repair and furnish electricity and carbons therefor, a complaint alleging that the light fell by reason of such company's negligence in failing to keep the light in proper repair is not open to demurrer on the ground that it fails to charge that such company was the owner of the church or of the light causing the injury. (S. Dak.) Fish v. Kirlin-Gray Electric Co., 782.

2. **NEGLIGENCE—Defective Appliances—Injury to Third Person.** If an electric company sells an arc light to a church under contract to furnish electricity for and keep such light in repair, and through its negligence in failing to properly repair the light after notice, it falls, injuring a person who is attending church services, the electric company is liable therefor. (S. Dak.) Fish v. Kirlin-Gray Electric Co., 782.

ELEVATORS.

See Negligence, 1, 8.

EMPLOYER'S LIABILITY.

See Master and Servant.

EQUITY.*Laches.*

1. **LACHES**.—A Suit in Equity to Recover Land is Barred by Laches when the defendant has not suffered because of the delay in bringing the suit, and the improvements placed by him on the land are of trifling character, and the taxes paid by him have been repaid by what he has gotten out of the land. (Mo.) *Lipsecomb v. Adams*, 500.

2. **LACHES—Estoppel**.—If heirs make no effort for thirty-five years to set aside an attachment sale of the land of their ancestor, who was cognizant of all the facts urged against the validity of such sale for eight years prior to his death, and which were open to such heirs for two years before they commenced suit, and the purchaser at the attachment sale, relying on his title thereunder, has expended a large sum in paying off tax liens on the land, such heirs are estopped by their laches from urging objections to such purchaser's title, which, if urged in time, might have been cured by amendment. (Ark.) *Williams v. Bennett*, 57.

3. **LACHES—Fraud**.—It is only when the opposing party misleads or the facts are successfully concealed, or other reasons render ignorance permissible, that laches are excused. (Ark.) *Williams v. Bennett*, 57.

Estates of Decedents.

4. **EQUITY JURISDICTION—Estates of Decedents**.—A general creditor of a deceased person cannot maintain a bill in equity on a purely legal demand, unless he shows that he has exhausted his legal remedy, or that such remedy would be inadequate or unavailing. (W. Va.) *Crawford v. Turner*, 1014.

5. **EQUITY JURISDICTION—Liability of Heirs for Debt of Ancestor**.—An heir may be sued in equity by any creditor of his ancestor to whom a debt is due for which the estate descended is liable, or for which the heir is liable in connection with such estate. (W. Va.) *Crawford v. Turner*, 1014.

6. **EQUITY JURISDICTION—Estates of Decedents**.—A bill in equity by a general creditor of an ancestor, against his heirs and administrator, not seeking to charge the real estate of which the intestate died seised, is bad on demurrer if it fails to show that there are no assets in the hands of the administrator, or that such assets are insufficient to pay the debt, and if such bill is filed to subject the real estate of such decedent, it must be on behalf of such creditor and all other creditors, and it must appear therefrom that the personal property of the estate is insufficient to pay debts. (W. Va.) *Crawford v. Turner*, 1014.

See Discovery; Infants, 3-6; Reformation of Contracts.

ESTATES OF DECEDENTS.

See Descent and Distribution; Executors and Administrators.

Note.

Estates of Decedents. See Descent and Distribution; Executors and Administrators.

EVIDENCE.

1. **EVIDENCE—Papers Treated as in Evidence but not so in Fact**.—If, at the trial, a paper is not formally offered in evidence, but is submitted to the jury and used by the court as if it were a part of

the case, it will, on appeal, be regarded as properly a part of the record. (Vt.) *Lavalley v. Ravenna*, 898.

2. EVIDENCE—Declarations—Res Gestae.—A declaration which is merely a narrative of a past occurrence, though made ever so soon after the occurrence, is not part of the *res gestae* and cannot be received in evidence. (W. Va.) *State v. Woodrow*, 1001.

3. EVIDENCE—Declarations—Res Gestae.—A statement made by a person accused of murder at a point a quarter of a mile from the place of the homicide, when he was going for a doctor, just after leaving the spot, as to how the shooting took place, is not admissible in evidence as part of the *res gestae*. (W. Va.) *State v. Woodrow*, 1001.

See Homicide; Witnesses.

EXECUTIONS.

See Exemptions.

EXECUTORS AND ADMINISTRATORS.

1. CONSTITUTIONAL LAW—Statutes Authorizing Administration Upon the Estates of Living Absentees.—The fourteenth amendment to the constitution of the United States does not deprive the legislature of a state of a power to provide for administration upon and settlement of estates of absentees. (Ind.) *Barton v. Kimmerley*, 252.

2. LIMITATION OF ACTIONS—Void Judicial Sales.—The fact that the property sold by an administrator was not described in the proceedings antedating the sale, nor in his deed, does not prevent the operation in favor of the purchaser of the statute requiring actions to be brought within five years from the confirmation of a sale. (Ind.) *Barton v. Kimmerley*, 252.

3. ADMINISTRATOR—Liability for His Debt to Estate.—There is no liability on the bond of an administrator for a debt owing from him to his intestate, if he was insolvent at the time of his appointment and has so continued throughout his administration, and if the statutes provide that "no executor or administrator shall be accountable for any debts due to the deceased, if it shall appear that they remain uncollected without his fault." (Mich.) *Sanders v. Dodge*, 399.

See Descent and Distribution.

Note.

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EXEMPTIONS.

1. **EXEMPTIONS.**—Two Horses used by a debtor in driving to and from his home to his place of business and devoted solely to the convenience and pleasure of the owner and his family cannot be denominated "work horses," and are not exempt from seizure on execution. (Miss.) *Tishomingo Savings Institution v. Young*, 454.

2. **EXEMPTIONS.**—Nonresidence.—A person entitled to have his personal property exempted from forced sale in one state does not forfeit such right, on the ground of nonresidence, until he begins to remove from his residence in such state, with intent to take up his residence elsewhere, and the fact that he may intend to leave the state permanently and has made complete arrangements to do so by delivering his personal property for shipment to a point outside the state does not forfeit his right of exemption, until he begins to remove his person from the state. (W. Va.) *Brown v. Beckwith*, 955.

3. **EXEMPTIONS.**—Nonresidence.—The elements of nonresidence in the law of attachment, and within the meaning of statutes conferring a right to exempt personal property from forced sale, are the same, and in either case a person does not become a nonresident until he begins the removal of his person from his place of residence in one state, with intent to acquire a residence in another. (W. Va.) *Brown v. Beckwith*, 955.

4. **EXEMPTIONS.**—An Order of Attachment is process against which the right to claim personal property as exempt from forced sale may be exercised. (W. Va.) *Brown v. Beckwith*, 955.

EXPERIMENT AS EVIDENCE.

See Homicide, 9.

EXPLOSIVES.

1. BLASTING—Liability of Railroad—Absence of Negligence.—A railroad company is liable to adjacent property owners for injuries thereto caused by blasting in the construction of its road, although the blasting is necessary and is done without negligence. (Tenn.) *Gossett v. Southern Ry. Co.*, 846.

2. BLASTING—Liability of Railroad—Personal Discomfort.—A railroad company is not liable for the noise and vibration occasioned by necessary and skillful blasting in the construction of its road, which merely causes an adjacent owner disquietude and alarm unaccompanied by sickness or physical injuries, but it is liable if such noise and vibration lessen the usable or rental value of his home to such an extent that the law will award damages therefor. (Tenn.) *Gossett v. Southern Ry. Co.*, 846.

3. BLASTING—Joint Liability of Railroad and Contractor.—If a cause of action for damages accrues to an adjacent property owner from blasting in the construction of a railroad, the liability of the contractor and the railroad company is joint, and there is no primary and secondary liability. (Tenn.) *Gossett v. Southern Ry. Co.*, 846.

EXPRESS COMPANY.

See Carriers, 8, 9.

EXTRADITION.

1. EXTRADITION—Proceedings on.—Under section 5278 of the Revised Statutes of the United States, relating to extradition, no hearing before the governor of the state to whom the requisition is addressed, and no notice to the person charged with crime is required as preliminary to the issue of a warrant for his arrest and surrender but the governor, before issuing the warrant, should be satisfied that there is probable cause to believe that at the time it is charged that the crime was committed such person was within the state from which the requisition proceeds. (Conn.) *Farrell v. Hawley*, 98.

2. EXTRADITION — Proceedings on — Evidence.—If extradition of a person is requested of the governor of a state, the latter, before issuing his warrant for the arrest of such person, need not take oral testimony, but may act on any proof satisfactory to him and having a reasonable tendency to show that the person required is a fugitive from justice from the demanding state. (Conn.) *Farrell v. Hawley*, 198.

3. EXTRADITION—Proceedings on—Reply.—An averment in a reply of a prisoner in custody under a warrant in extradition that no legal hearing or other judicial proceeding has been had to ascertain whether he is a fugitive from justice is insufficient on demurrer, without a statement of the facts which render the hearing illegal, and an averment that the prisoner was not present in the demanding state when the crime is alleged to have been committed is of no avail if it is admitted that the governor issuing the warrant had probable cause for believing that he was present. (Conn.) *Farrell v. Hawley*, 98.

4. EXTRADITION — Proceedings on — Conclusiveness of Governor's Finding.—The finding of a governor in extradition cases is not always and necessarily final, but it can be pronounced insufficient to support an arrest under the warrant only upon conclusive

proof that the prisoner was not in the state demanding him at the time when it is charged that the crime was committed, and that there was no evidence to the contrary before the governor worthy of consideration. (Conn.) *Farrell v. Hawley*, 98.

5. **EXTRADITION Proceedings—Presumption.**—In extradition proceedings it is presumed that the governor, who is asked to deliver up the fugitive, in issuing his warrant acted on sufficient evidence. (Conn.) *Farrell v. Hawley*, 98.

6. **EXTRADITION — Habeas Corpus — Bail.**—In habeas corpus proceedings to secure the release of one in custody under a warrant of extradition, it is within the discretion of the court, after remanding the prisoner, to refuse to admit him to bail. (Conn.) *Farrell v. Hawley*, 98.

7. **EXTRADITION—Sufficiency of Indictment—Burden of Proof.** In extradition proceedings of prisoners held pursuant to an indictment found in another state, the burden is on them in habeas corpus proceedings to show that such indictment is insufficient, by producing the statute under which it was found, or other competent evidence, and the fact that such statute was not submitted with the requisition papers will not warrant the presumption that it is the same as that of the state from which extradition is asked and under which the indictment would be insufficient. (S. Dak.) *In re Renshaw*, 778.

8. **EXTRADITION—Sufficiency of Indictment—Presumption.**—It is presumed that acts charged in an indictment found in another state, under which extradition of fugitives from justice is asked, are sufficient under the laws to constitute the crime charged. (S. Dak.) *In re Renshaw*, 778.

9. **EXTRADITION—Sufficiency of Indictment.**—In a case involving the surrender, under the acts of Congress, of a fugitive from justice, the objection cannot be sustained that the indictment is not framed according to the technical rules of criminal pleading, if it conforms substantially to the laws of the demanding state, and that must be determined in the forum of that state. (S. Dak.) *In re Renshaw*, 778.

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FRAUD.

FRAUD, Who Must Suffer From.—Where One of Two Innocent Persons Must Suffer in consequence of the fraud of another, the loss must fall upon the one who, by his trust and confidence, enabled the

perpetrator of the fraud to commit it. (Mass.) *Gardner v. Beacon Trust Co.*, 303.

FRAUDS, STATUTE OF.

1. **FRAUDS, STATUTE OF—Title to Land, When not Involved.**—An agreement changing the amount of oil to be paid by the lessee under a lease giving him the right to operate on a tract of land for gas and oil does not involve the title to land nor any estate or interest therein. (Ohio St.) *Nonamaker v. Amos*, 708.

2. **FRAUDS, STATUTE OF—Agreement, When Susceptible of Performance Within a Year.**—An agreement that the lessees under an oil lease may operate for gas and oil on condition that they will pay to the lessor one-sixth of the oil produced and saved may be susceptible of performance within a year, and, therefore, is not within the statute of frauds. (Ohio St.) *Nonamaker v. Amos*, 708.

3. **FRAUDS, STATUTE OF, Changing the Terms of an Oil Lease by Parol.**—If a written lease has been entered into giving the lessees the right to operate certain premises for oil and gas on condition that they pay the lessor one-sixth of all the oil produced and saved, and the lessees announce their intention to abandon the lease, as by its terms they have a right to do, and thereupon an oral agreement is entered into between them and the lessor that if they will further drill and operate the lands for oil the royalty shall be one-eighth instead of one-sixth, such agreement is not within the statute of frauds, and is therefore enforceable. (Ohio St.) *Nonamaker v. Amos*, 708.

4. **STATUTE OF FRAUDS—Parol Sale of Timber.**—Although a parol agreement to sell timber is invalid as a contract, it is good as a license, and timber cut before a revocation thereof becomes the property of the licensee. (Mich.) *Antrim Iron Works v. Anderson*, 434.

5. **STATUTE OF FRAUDS—Written Authority of Agent.**—It is not necessary that an agent in giving a license to cut standing timber should have written authority. (Mich.) *Antrim Iron Works v. Anderson*, 434.

6. **STATUTE OF FRAUDS.—An Agreement to Rent a Telephone** for a term of three years at a stipulated rental is within the statute of frauds, and, if signed by the telephone company only, is unenforceable for want of mutuality. (Mich.) *Co-operative Tel. Co. v. Katus*, 414.

FRAUDULENT TRANSFER.

FRAUDULENT TRANSFER—Relief of Parties.—A court of equity will refuse to interfere in behalf of a man who, in order to place his property beyond the reach of creditors, consents to the transfer of a business in which perhaps he has an interest, but which his wife assumes to own, to a corporation the stock in which is practically all owned by her. (Mich.) *Wipfler v. Detroit Pattern Works*, 430.

GAME LAWS.

1. **GAME LAWS.—The Nonresident's Right to Hunt**, except as otherwise provided by the act of 1904, must be taken to be a license to do so in conformity to the general game laws of the state. (Vt.) *State v. Niles*, 917.

2. **GAME LAWS—Statutes Applicable to Nonresident Hunters, Constitutionality of.**—The regulations of the statutes of Vermont ad-

mitting nonresidents to hunt on paying a license fee are within the police power of the state. (Vt.) *State v. Niles*, 917.

3. **GAME.**—No Person can Acquire an Absolute Property in Animals *Ferae Naturae*. The ownership of such animals is at most a qualified one. (Vt.) *State v. Niles*, 917.

4. **GAME**—General Property of All the People of the State.—The qualified property which may exist in animals *ferae naturae* belongs to all the people in common, and may be restrained by positive laws enacted for reasons of state or for the supposed benefit of the community. (Vt.) *State v. Niles*, 917.

5. **CONSTITUTIONAL LAW**—Game—Power of State to Grant or Deny Rights in.—The ownership of game being in the people of the state, the legislature, as the representative of the people, may withhold or grant to individuals the right to hunt and kill game, or qualify and restrain it, as, in the opinion of its members, will best subserve the public welfare. (Vt.) *State v. Niles*, 917.

6. **GAME.**—The Right to Discriminate Between Resident and Nonresident Hunters is found in the fact that the former have and the latter have not a qualified property in all wild game within the state. (Vt.) *State v. Niles*, 917.

GARNISHMENT.

1. **GARNISHMENT**—Situs of Debt.—For the purpose of garnishment, a debt is annexed to the person of the debtor and subject to garnishment wherever he is found, unless expressly made payable elsewhere. (W. Va.) *Baltimore etc. R. R. Co. v. Allen*, 975.

2. **GARNISHMENT**—Foreign Corporations.—Railroad companies incorporated in one state, but owning and operating railroads and having agents in another state, have the status of residents of the latter state, though not citizens of nor domiciled therein in the technical sense of such terms, and they are subject to garnishment in the latter state without reference to the jurisdiction in which the debts due from them were contracted or are payable. (W. Va.) *Baltimore etc. R. R. Co. v. Allen*, 975.

3. **ATTACHMENT and Garnishment**—Foreign Corporations.—The status of a railroad company incorporated in one state and doing business in another, within the meaning of attachment laws, is equivalent to a resident of the latter state, and it may be proceeded against as a garnishee, to the same extent, and in respect to the same classes of debts, as natural persons residing within the state. (W. Va.) *Baltimore etc. R. R. Co. v. Allen*, 975.

GIFTS.

GIFT OF BANK DEPOSIT by Husband to Wife.—If a man deposits his money in the name of his wife, and the bank-book is placed in her keeping, and all checks on the fund are signed by her, a gift to her is thereby effected which he cannot revoke, although his purpose in making the gift was to place the money beyond the reach of his creditors. (Mich.) *Wipfler v. Detroit Pattern Works*, 430.

GUARANTY.

1. **GUARANTY**—Acceptance.—If a guaranty is demanded and received as a condition of withholding judicial proceedings, which are withheld, there is a sufficient acceptance of the guaranty without other action. (La.) *Newman v. Scarborough*, 278.

2. **GUARANTY—Mistake in—Rights of Parties.**—If a person signing a guaranty thinks that he is signing for a certain amount, when in reality the guaranty is for a much larger amount, there is such error going to the substance of the contract as makes it binding only up to the amount about which there is no error, although such error was not induced by the person to whom the guaranty is given. (La.) *Newman v. Scarborough*, 278.

3. **GUARANTY—Mistake—Consent.**—Consent given in error to a guaranty is no consent, no matter by whom or what induced, and cannot give birth to a contract of guaranty in so far as such error enters into it. (La.) *Newman v. Scarborough*, 278.

4. **GUARANTOR OF LEASE, Agreement for Judgment With a Stay of Execution, When does not Release.**—If an action is pending against a lessee for unpaid rent and an agreement is entered into between him and his landlord for the entry of judgment by default, with a stay of execution for a time specified, this is not such an extension of the time for payment as releases the guarantor, if the time specified for the stay of execution does not exceed the time which the lessor could have procured by the ordinary course of proceeding in court had he not consented to judgment. (Mass.) *Bothfeld v. Gordon*, 341.

5. **GUARANTOR OF LEASE, When not Released by a Surrender.**—The surrender of the leased premises to the landlord and his acceptance thereof do not release the guarantor not consenting thereto, with respect to rent due, when a default had occurred in the payment of rent entitling the landlord to possession, and the lease was in a form which forbade an assignment. (Mass.) *Bothfeld v. Gordon*, 341.

GUARDIAN AND WARD.

1. **DE FACTO GUARDIAN—Right to Compensation.**—If the eldest son in a family, who is the only child of age, is appointed guardian of his brothers and sisters upon the death of their parents and takes charge of their persons and property, he will, notwithstanding he never qualifies because unable to procure a bond, be regarded in equity as their guardian, and therefore be entitled to a reasonable allowance for their support and maintenance. (Mich.) *Alexander v. Hillebrand*, 417.

2. **GUARDIAN—Settlement with Infant Ward.**—While a settlement by a guardian with his minor ward is not binding on her, it may be given weight as evidence of the state of their accounts and of the amount justly chargeable to her for her support. (Mich.) *Alexander v. Hillebrand*, 417.

3. **GUARDIAN AND WARD.—A Guardian May Sell and Transfer Past Due Negotiable Instruments** without first procuring an order or license from the probate court authorizing him to do so. (Mass.) *Gardner v. Beacon Trust Co.*, 303.

HABEAS CORPUS.

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HOMICIDE.

Murder and Manslaughter.

1. **HOMICIDE**—**Erroneous Instruction as to Murder Where the Jury Found Defendant Guilty of Manslaughter Only.**—Where the court erroneously instructs the jury that the defendant is guilty of murder in the first degree if he committed certain acts not admissible in evidence under the indictment, the defendant is entitled to a new trial, though he was convicted of involuntary manslaughter only. (Ind.) *Gipe v. State*, 238.
2. **HOMICIDE**.—**A Conviction of Involuntary Manslaughter cannot be Disturbed** on appeal because the evidence shows the defendant was guilty of murder. (Ind.) *Gipe v. State*, 238.
3. **HOMICIDE**—**Right of the State to Elect to Prosecute for Murder in the Second Degree.**—Under an indictment for murder in the first degree, the state, with the permission of the court, may elect to prosecute defendant for murder in the second degree. (Mo.) *State v. Feeley*, 511.
4. **HOMICIDE**.—**An Instruction Eliminating the Question of Murder in the Second Degree** may be refused if there is evidence sufficient to authorize an instruction on both degrees of murder. (Mo.) *State v. Feeley*, 511.
5. **HOMICIDE**.—**Instructions which introduce into a homicide case the degree of involuntary manslaughter, when there is no evidence whatever to show that degree of crime, are bad, and should not be given.** (W. Va.) *State v. Woodrow*, 1001.

Indictment.

6. **HOMICIDE.**—An Indictment Charging that the Killing was by Ways and Means Unknown to the jury is sufficient. (Ind.) Gipe v. State, 238.

7. **HOMICIDE.**—An Indictment Charging a Killing in One Manner Will not Support a Conviction for Killing in a Different Manner. (Ind.) Gipe v. State, 238.

8. **HOMICIDE.**—An Indictment for Murder by Throwing the Decedent into a Well will not Support a conviction for murder by putting her in such fear and agitation that she lost her reason, became insane, jumped into the well, and therefrom died, and it is prejudicial error for the court to instruct the jury that they may convict on the latter facts. (Ind.) Gipe v. State, 238.

Evidence of Experiment.

9. **HOMICIDE.**—Evidence of Experiment to test the strength of a child to fire a pistol is admissible to rebut evidence of one accused of murder that such child fired the pistol causing the homicide. (W. Va.) State v. Woodrow, 1001.

Evidence of Threats.

10. **HOMICIDE**—General Threats Having No Reference to the Deceased.—Language amounting to general threats having no reference to a homicide which occurred several hours afterward are not admissible as parts of the *res gestae*, but may be admitted to show general malice and a disposition on the part of the defendant to do a criminal act, though the person afterward, on the same day, killed by him was not known to him at the time of making the threats. (Mo.) State v. Feeley, 511.

11. **HOMICIDE**—Uncommunicated Threats as Evidence.—In doubt as to who was the aggressor in cases of homicide, or to throw light on the significance of the acts of the deceased, and what from them would be reasonable apprehension on the part of the accused, uncommunicated threats of the deceased against the accused are admissible in evidence. (Miss.) Sinclair v. State, 446.

Dying Declarations.

12. **EVIDENCE**—Dying Declarations.—The Character of a Wound May of Itself Warrant the Inference that the declarant was under a sense of certain and speedy death. (Ind.) Gipe v. State, 238.

13. **EVIDENCE**—Dying Declarations.—The Conclusion of the Trial Court that Declarations were Admissible as Dying Declarations is one which will not be disturbed on appeal, unless it is manifest that the facts did not warrant the conclusion. (Ind.) Gipe v. State, 238.

14. **EVIDENCE**—Dying Declarations.—If the decedent expresses a belief that he will not get well, and gradually grows worse until a physician on the next day abandons all hope of recovery, the trial court is justified in finding that the declarations subsequently made by such decedent were made under the sense of impending death and without hope of recovery. (Ind.) Gipe v. State, 238.

Character of Accused.

15. **HOMICIDE**—Reputation of Deceased When Drinking, Rebuttal of by Proof of General Reputation.—If the defendant in a prosecution for murder introduces evidence to show that the deceased was quarrelsome and dangerous when drinking, the prosecution is entitled to introduce in rebuttal evidence to prove the general repu-

tation of the deceased in the neighborhood where he lived for peace, quiet and good citizenship. (Mo.) State v. Feeley, 511.

16. HOMICIDE—Evidence of the Dangerous Character of the Deceased, Though not Known to the Accused.—Where there is doubt whether a homicide was committed maliciously or from a well-founded apprehension of danger, the defendant is entitled to show that deceased was a violent and desperate man, though this fact was not known to the defendant before the homicide. (Mo.) State v. Feeley, 511.

17. EVIDENCE of Character—Competency of Witness.—A witness who testifies that he knows the general reputation of an accused in the community for peace or violence, but that he has never heard it discussed, is competent to testify as to what such reputation is. (Miss.) Sinclair v. State, 446.

Self-defense—Motive.

18. HOMICIDE—Self-defense.—When one enters upon a difficulty for some unlawful purpose, such as gratifying malice, there can be no self-defense. (Mo.) State v. Feeley, 511.

19. HOMICIDE, Motives, Instructions on Question of, When not Necessary.—It is not error to fail to instruct a jury in a homicide case on the question of motive, if the defendant has testified that he shot the deceased because afraid that deceased was going to kill him, and in the instruction on the right to self-defense he was given the full benefit of such motive. (Mo.) State v. Feeley, 511.

HUSBAND AND WIFE.

1. HUSBAND AND WIFE—Domicile.—The domicile of the husband is that of his wife only when he provides a domicile where she may go and stay at her will. (La.) Wilcox v. Nixon, 266.

2. HUSBAND AND WIFE, Competency of to Contract With Each Other.—Under the statutes of Missouri a husband and wife may contract with each other as if unmarried, and her contracts with him are to be enforced just as if she had contracted with a third person. (Mo.) O'Day v. Meadows, 542.

See Witnesses, 1, 2.

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See Tenancy by the Curtesy.

INCEST.

1. INCEST—Dying Declarations of Woman.—In a prosecution for incest the dying declarations of the woman that the accused was responsible for her pregnancy are not admissible. (Mich.) People v. Stison, 397.

2. INCEST—Evidence Against Accused.—If, in the prosecution of a man for incest, it is shown that the woman went to a distant hospital under an assumed name, and that he corresponded with her while denying to her parents that he knew her whereabouts, evidence of her pregnancy and of his sending her money is admissible. (Mich.) People v. Stison, 397.

INDICTMENTS.

1. INDICTMENTS cannot be Quashed on the ground that they rest in whole or in part on incompetent evidence received by the grand jury. (W. Va.) State v. Woodrow, 1001.

2. INDICTMENT—Future or Impossible Date.—An indictment charging the crime to have been committed on the "12th day of July, 18903," should be quashed on motion. (Ind.) *Terrell v. State*, 244.

3. INDICTMENT—Time of Offense, When not Imperfectly Stated. An indictment charging the offense to have been committed on the "12th day of July, 18903," does not state the time of such offense imperfectly, and therefore does not fall within the provisions of a statute respecting indictments in which the time of the offense is imperfectly stated. (Ind.) *Terrell v. State*, 244.

4. INDICTMENT—Time of Committing Offense.—The time of the commission of an offense as stated in an indictment or information must appear to be anterior to its return or filing, but not so long prior thereto as to bring the case within the statute of limitations. (Ind.) *Terrell v. State*, 244.

See Homicide, 6-8.

INFANTS.

1. INFANT'S LIABILITY for Attorneys' Fees.—An infant is not liable to an attorney at law who, at the suggestion of the former's relatives, acts for him in the settlement of the estate of a deceased person, but is not employed either by the infant or the latter's guardian. (Mass.) *McIsaac v. Adams*, 321.

2. INFANTS, Necessaries for, What are not.—The services of an attorney at law not employed by a guardian, in connection with the settlement of an estate in which the infant is interested as a legatee, do not come within the term "necessaries" as used in reference to the liability of minors. (Mass.) *McIsaac v. Adams*, 321.

3. INFANTS—Impeachment of Decree—A Court of Equity may entertain an original bill on behalf of a minor to impeach a decree for fraud or for errors of law appearing upon the face of the record; and such a bill may be filed during minority, or within the period allowed after majority for the prosecution of a writ of error. (Ill.) *Teel v. Dunnihoo*, 192.

4. INFANTS—Impeachment of Decree—Intervening Rights.—Equity will not set aside a decree at the suit of a minor, if the court entering it had jurisdiction of the parties and the subject matter, and persons who were not parties have, in good faith and in reliance upon the decree, acquired interests in the subject matter of the suit. (Ill.) *Teel v. Dunnihoo*, 192.

5. INFANTS—Impeachment of Decree—Finding of Jurisdiction. Findings in a decree that the parties have been duly served with process, or have entered their appearance, are not overcome, on a collateral attack by minors, by the return of the sheriff upon a summons issued against Nona Stocks that he had served "Noma" Stocks, nor by a written appearance of other defendants from which it appears that Nona Stocks was a complainant, and not a defendant. (Ill.) *Teel v. Dunnihoo*, 192.

6. INFANTS—Reformation of Deed—Inoperative Decree.—If, in a suit to correct a deed by striking out the words "bodily heirs," the decree recites that such words were improperly inserted, but, instead of ordering them to be stricken out, directs a new deed to be made, the decree, and the master's deed executed in pursuance thereof, do not divest the title of the children of the grantee, vested in them by virtue of the words "bodily heirs," and are not to be considered in determining the children's right to partition, even as against subsequent purchasers. (Ill.) *Teel v. Dunnihoo*, 192.

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INJUNCTIONS.

1. **INJUNCTION—Publication of Photograph.**—An honest and innocent person is entitled to an injunction to prevent his photograph from being sent to, published or exhibited in a rogues' gallery. (*La.*) *Itzkovitch v. Whitaker*, 272.

2. **INJUNCTION—Irreparable Injury.**—To sustain an injunction against a trespass on the ground that the injury caused thereby is irreparable, the facts constituting such injury must be alleged and proved. (*W. Va.*) *Pence v. Carney*, 963.

See Conspiracy; Limitation of Actions, 3.

INSURANCE.*Fire Insurance.*

1. **FIRE INSURANCE—Explosion During Fire.**—An explosion which occurs in an insured building during the progress of a fire therein is regarded as a mere incident of the preceding fire, and the whole loss is within the risk assumed, although the policy excludes liability for loss by explosion. (*Tenn.*) *Hall v. National Fire Ins. Co.*, 870.

2. **FIRE INSURANCE—Explosion During Fire.**—If, while a building is burning, an explosion occurs therein which injures neighboring property without igniting it, a policy of fire insurance on the latter property which excludes liability for loss by explosion does not cover such injuries. (*Tenn.*) *Hall v. National Fire Ins. Co.*, 870.

3. **TRANSITORY ACTIONS—Jurisdiction of Actions for Insurance.**—The court of any state in which an action may be brought and process served on an insurer may exercise jurisdiction of an action to recover on an insurance policy, though made and delivered in another state where the property insured thereby was situated. (*Ohio St.*) *Hunter v. Niagara Fire Ins. Co.*, 699.

Life Insurance.

4. **LIFE INSURANCE—Death in Violation of Law.**—Where the aggressor in an assault is killed, there can be no recovery on his life insurance policy, which exempts the insurance company from liability while the insured is "violating the laws of the land." (*Mich.*) *Payne v. Union Life Guards*, 368.

5. **LIFE INSURANCE—Unintentional Self-destruction.**—Death caused by the voluntary taking of carbolic acid by an insured person, not with the intent to take his life, but to frighten his wife into giving him money, is not within a clause in the insurance policy

exempting the insurer from liability in case of suicide or self-destruction. (Mich.) *Courtemanche v. Supreme Court*, I. O. O. F., 345.

6. INSURANCE—Policy Procured for and Assigned to Another. A policy procured by a man on his own life; in which he has an insurable interest, for the benefit of one named therein who has not such interest and who makes no outlay in the matter, is not a wager, and such policy, though assigned without consideration to such person, is no wager. (Vt.) *Harrison v. Northwestern etc. Ins. Co.*, 932.

7. LIFE INSURANCE—Lapse and Reinstatement of Policy.—The failure of an insured to comply with the conditions of his policy as to the payment of premiums ipso facto forfeits all his rights thereunder, so that if the policy is subsequently reinstated with the consent of the insurer, it becomes a new contract as if then for the first time issued. (Tenn.) *Pacific Mut. Life Ins. Co. v. Galbraith*, 862.

8. LIFE INSURANCE—Lapse and Reinstatement of Policy.—If a life insurance policy, which provides that it shall be incontestable after two years from the date of its issue, is forfeited by reason of a default in the payment of premiums, but subsequently the insured obtains a reinstatement upon false warranties, the insurer may take advantage of such misrepresentations at any time within two years after the reinstatement. (Tenn.) *Pacific Mut. Life Ins. Co. v. Galbraith*, 862.

9. LIFE INSURANCE—Construction in Favor of Insured.—A policy of insurance is to be liberally construed in favor of the insured; and when words are used which may, without violence, be given two interpretations, that which will sustain the claim or cover the loss should be adopted. (Tenn.) *Pacific Mut. Life Ins. Co. v. Galbraith*, 862.

10. INSURANCE, LIFE—False Answers—Evidence.—If an application for life insurance contains a warranty of the truth of the answers given therein, and that such warranty and answers shall form the basis, and be part of the contract, and, if untrue in any respect, the policy shall be void; and further, that no statement made to any agent or other person and not contained in the application shall be considered as having been brought to the knowledge of the insurer, a willfully false answer contained in the application avoids the policy, whether written by the insured or the insurance agent, and in such case, in the absence of an allegation of fraud or mistake, parol evidence is not admissible to show that the insurance agent filled out the answers contained in the application, and that the applicant signed it at his request, without reading it, or that the applicant gave to the insurance agent a true answer to the questions in issue. (Pa.) *Rinker v. Aetna Life Ins. Co.*, 773.

Accident Insurance.

11. INSURANCE, ACCIDENT, Right to Change Classification After Issuing the Policy.—Under a policy insuring against injury by accident and agreeing to pay the insured a specified sum, except that if injured while engaged in an occupation classified by the association as more hazardous than that he had given, his insurance and weekly indemnity shall be so much only as the premium paid by him will purchase at the rate fixed for such increased hazard, the insurer cannot, by subsequent legislation, cut down the amount which the insured is entitled to recover, though injured while engaged in a different occupation from that in which he was engaged when insured, if the two occupations were at the issuing of the policy in the same classification. (Mass.) *Morse v. Fraternal Accident Assn. of America*, 337.

12. INSURANCE, ACCIDENT—Consent to Change of Classification, When not Inferable.—If the insurer, after issuing a policy insuring against accident, notifies the insured of a change of classification greatly lessening the amount of his indemnity, his assent to such change is not to be conclusively inferred where he did not expressly assent, nor forward his policy to have it rewritten as requested, and the dues and assessments paid and required to be paid were the same as before. (Mass.) *Morse v. Fraternal Accident Assn.*, 337.

13. ACCIDENT INSURANCE, When Covers Loss by Disease.—An accident policy insuring against loss of business time resulting from bodily injuries effected through external, violent and accidental means covers loss of business time from disease, if the disease was proximately caused by a bodily injury occasioned through external, violent and accidental means. (Ind.) *Aetna Life Ins. Co. v. Fitzgerald*, 232.

14. ACCIDENT INSURANCE—Definition.—The Word "Accident" as used in an accident policy should be given its ordinary and usual signification as being an event that takes place without one's forethought or expectation. (Ind.) *Aetna Life Ins. Co. v. Fitzgerald*, 232.

15. ACCIDENT INSURANCE, Interpretation of, When Should Favor the Insured.—When an injury approximately proceeds from a cause which falls within the limits of a policy according to the ordinary interpretation of the force of words, that interpretation is to be preferred rather than one which defeats the protection of the assured in a large class of cases. (Ind.) *Aetna Life Ins. Co. v. Fitzgerald*, 232.

16. ACCIDENT INSURANCE—Injury Resulting from Turning in Bed While Asleep.—If one, on going to bed, places his hand between the pillow and his head, and while asleep moves so that it rests on the edge of the bed rail, and on awakening finds the hand wholly numb, culminating in a difficulty technically termed periostitis, he is entitled to recover under a policy insuring against his loss of business time resulting from an injury effected through external, violent and accidental means. (Ind.) *Aetna Life Ins. Co. v. Fitzgerald*, 232.

17. ACCIDENT INSURANCE—Provision Requiring Immediate Notice, Construction of.—If a policy of accident insurance requires immediate notice of an injury, this amounts to the requirement of notice within a reasonable time. (Ind.) *Aetna Life Ins. Co. v. Fitzgerald*, 232.

18. ACCIDENT INSURANCE.—Note of Injury is not Waived by the Denial of All Liability nor by placing the denial solely on one ground, if, at the time of such denial, the period within which notice might be given by the terms of the policy had expired. (Ind.) *Aetna Life Ins. Co. v. Fitzgerald*, 232.

19. ACCIDENT INSURANCE—Notice of Injury, Question of Reasonable Time to Give, When for the Jury.—Where a notice of the injury was not given until fifty days after it was suffered, the question of reasonable time is for the jury in view of the evidence and the condition of the assured, and the appellate court cannot, therefore, regard as harmless an instruction that the insurer had waived its right to urge the not giving of the notice within a reasonable time by denying its liability and placing its denial on another ground. (Ind.) *Aetna Life Ins. Co. v. Fitzgerald*, 232.

See Reformation of Contract, 2; *Waiver*.

INTEREST.

1. **INTEREST.**—The Right to Take Interest was Created by an act of parliament in the reign of Henry VIII, and ever since, in England and in this country, this right has existed, in legal contemplation, as a creature of statutory enactment. (Mo.) Ex parte Berger, 472.

2. **CONSTITUTIONAL LAW.**—The Right to Regulate Interest by legislative enactment is conceded. (Mo.) Ex parte Berger, 472.

See Criminal Law, 1-3.

INTERSTATE COMMERCE.

See Commerce.

INTOXICATING LIQUORS.

1. **MUNICIPAL CORPORATIONS**—Ordinances Regulating Saloons.—Under statutes conferring power on cities to license, regulate, tax, or suppress tippling-houses and dramshops, and to regulate or prohibit ale and porter shops or houses and public places of habitual resort for tippling and intemperance, an ordinance forbidding the keeping of chairs or anything for persons, except the bartender or proprietor, to sit upon in saloons, is valid. (Ark.) Pate v. Jonesboro, 55.

2. **CONSTITUTIONAL LAW**—Sale of Intoxicating Liquor.—A statute making it a misdemeanor to act as the agent of either the purchaser or seller in effecting a sale of intoxicating liquor in any territory in which a sale thereof is prohibited is constitutional and valid. (Miss.) Hart v. State, 437.

3. **INTOXICATING LIQUORS**—Prohibiting Sale of.—The legislative department of the state, in the exercise of the police power, is vested with plenary power to regulate or absolutely prohibit the sale of intoxicating liquor within the state. (Miss.) Hart v. State, 437.

4. **INTOXICATING LIQUOR**—Sale of by Agent.—The state, in the exercise of its police power, has authority to prohibit absolutely the sale of intoxicating liquor within its limits, and to make any violation of such prohibition a criminal offense. It may also forbid anyone to assist in the commission of such offense and provide for the punishment of those who so aid or assist. (Miss.) Hart v. State, 437.

5. **CONSTITUTIONAL LAW**—Sale of Intoxicating Liquor—Interstate Commerce.—A statute making it a misdemeanor to act as the agent of either the seller or purchaser in effecting a sale of intoxicating liquor in any territory in which such sale is prohibited is not a violation of the interstate commerce clause of the constitution of the United States, nor does it create a discrimination between the citizens of the state and those of any other state. (Miss.) Hart v. State, 437.

6. **INTOXICATING LIQUOR**—Illegal Sale.—If a person engaged in the liquor business in one state takes orders for whisky in another, where its sale is prohibited under penalty imposed by statute, collecting the purchase price at the time, and subsequently delivering the whisky in such other state to an express company to be by it delivered to the purchaser, the sale is illegal and the seller guilty of a violation of such statute. (Miss.) Hart v. State, 437.

JUDGMENTS.

Collateral Attack.

1. **JUDGMENTS—Collateral Attack—Sale Under Attachment.**—If land is sold under judgment in attachment, the title of the purchaser cannot be collaterally attacked for irregularities in the proceedings which might have been cured by amendment. (Ark.) *Williams v. Bennett*, 57.

2. **JUDGMENTS—Sister State—Collateral Attack.**—If suit is brought on a judgment of a sister state and the land of the judgment debtor is attached, an objection that such judgment is not properly authenticated is not a ground for the vacation of a sale of the property under the attachment. (Ark.) *Williams v. Bennett*, 57.

3. **JUDGMENTS—Irregularities—Attack Upon.**—In a suit to recover land sold under a judgment in attachment, an objection that the bond for the sale was irregular, because plaintiff was dead at the time of the sale, cannot be raised for the first time on appeal. (Ark.) *Williams v. Bennett*, 57.

Conclusiveness and Res Judicata.

4. **JUDGMENT for Breach of Contract Precludes all Further Recovery.**—If there is a breach by the vendor of a contract for the sale of goods to be delivered and paid for in installments, and the vendee maintains an action therefor and recovers damages, he cannot maintain a subsequent action to recover for the failure to deliver later installments. To sustain such a recovery would be to allow the plaintiff to split a single cause of action into two or more, and this is not permissible. (N. Y.) *Pakas v. Hollingshead*, 601.

5. **JUDGMENTS—Res Judicata—Nonresidence.**—A finding of nonresidence on a motion to require security for costs in a pending action is not res judicata in another action between the same parties. (W. Va.) *Brown v. Beckwith*, 955.

6. **JUDGMENTS—Res Judicata—Landlord and Tenant.**—If a landlord files a bill in equity to set aside a judgment by default rendered against his tenant, and does not ask the court to pass on his title, but only to permit him to defend his title in an action at law, a dismissal of the bill for want of equity is not a bar to an action at law by the heirs of the landlord to recover the land. (Ark.) *Eldred v. Johnson*, 17.

7. **JUDGMENTS—Conclusiveness—Landlord and Tenant.**—A judgment in ejectment by default against a tenant is not, so far as the title to the land is concerned, conclusive against the landlord, or those claiming under him, when he is not made a party to the action, and especially is this true when he is a nonresident. (Ark.) *Eldred v. Johnson*, 17.

See *Infants*, 3-6.

Note.

Judgments. See *Landlord and Tenant*; *Res Judicata*.

JUDICIAL SALES.

1. **JUDICIAL SALE—Requiring Deposit to Secure Bid.**—If the successful bidder at a partition sale fails to make good her bid within the time prescribed therefor, and her default thus necessitates another sale, the master may require her, in case she becomes the highest bidder at the second sale, to put up a cash deposit at once to secure her bid; and if she fails to do so, he may sell to other bidders. (Ill.) *Vaughn v. Newman*, 203.

2. **THE RULE That He Who Seeks Equity Must Do Equity** does not extend to requiring him, as a condition to maintaining his suit, to satisfy an obligation having no connection therewith. Hence, in a suit to redeem from a judicial sale, the complainant, as a condition precedent to the relief claimed, may not be required to satisfy an independent judgment against him held by the defendant in the suit. (N. Y.) *Mackenna v. Fidelity Trust Co.*, 620.

See Contracts, 4; Dower; Executors and Administrators; Judgments, 1.

JURISDICTION.

See Venue.

JURY.

CONSTITUTIONAL LAW.—The ‘‘Right of Trial by Jury’’ secured by the constitution of North Dakota embraces all the substantial elements of the right of trial by jury as understood by the framers of the constitution and the people who adopted it. (N. Dak.) *Barry v. Taux*, 662.

See Venue.

LABOR UNIONS.

See Conspiracy.

LACHES.

See Equity, 1-3.

LANDLORD AND TENANT.

1. **LANDLORD AND TENANT—Unauthorized Agreement by Tenant as to Boundary.**—A landlord is not bound by an unauthorized agreement concerning the boundaries to his land signed by his tenant at will, and such agreement is not admissible in evidence to affect the landlord’s interest in the land. (Ark.) *Cox v. Daugherty*, 75.

2. **LANDLORD AND TENANT, Respective Interests of.**—The lessee is the absolute owner for the term granted, the landlord’s rights being confined to his reversionary interest. (Vt.) *Stern v. Sawyer*, 890.

3. **LANDLORD AND TENANT, Effect of Sale by the Former.**—Upon a conveyance by the lessor, his reversionary interest and his right to the rent pass to the purchaser, but the estate and rights of the lessee are not affected. (Vt.) *Stern v. Sawyer*, 890.

4. **LANDLORD AND TENANT—Damages for Holding Over.** Compensation or indemnity is the proper measure of damages to the landlord for detention of the premises by the tenant after the expiration of his term. Judgment in such case should be for the possession and such damages. (Pa.) *Murtland v. English*, 747.

5. **LANDLORD AND TENANT—Option to Extend Lease.**—If a lessee for years has the privilege of renewal for a like term longer, on three months’ notice, a mere holding over is not an acceptance of the option when the required notice is not given. (Pa.) *Murtland v. English*, 747.

See Guaranty, 4, 5; Judgments, 6, 7; Principal and Surety.

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- rent, installments of, whether separate actions are maintainable for, 36.
- rent, judgment in favor of landlord for or for an installment thereof, effect of, 35, 36, 38.
- right to make landlord a party to suits by or against tenants, 31, 32.
- summary proceedings, estoppel of judgment in, to what extends, 35.
- summary proceedings, judgment in against tenant, effect of, 34, 35.
- summary proceedings, judgment in favor of tenant and against landlord, effect of, 33, 34.

LIBEL AND SLANDER.

1. **SLANDER—Mitigation and Justification.**—Under the North Dakota statutes, the defendant in an action for slander or libel may answer by way of justification and mitigation—either or both—or may plead mitigating circumstances in connection with a general denial. (N. Dak.) *Wrege v. Jones*, 679.

2. **SLANDER—Presumption of Malice—Evidence.**—The fact that the law raises a presumption of malice from the publication of words actionable per se does not render incompetent evidence upon the question of actual malice. (N. Dak.) *Wrege v. Jones*, 679.

3. **SLANDER—Presumption of Malice.**—The malice which by legal fiction is presumed to exist from the publication of words actionable per se is legal malice as distinguished from actual malice or malice in fact. (N. Dak.) *Wrege v. Jones*, 679.

4. **SLANDER.—The Absence of Actual Malice** will not defeat an action for slander and prevent the injured person from recovering his actual damages. (N. Dak.) *Wrege v. Jones*, 679.

5. **SLANDER—Exemplary Damages—Evidence of Motive.**—If actual malice is charged in a complaint for slander, and punitive damages are claimed for the injury, the presence of actual malice becomes a vital question; therefore the defendant may testify directly to his intent or motive, and also as to the facts and circumstances which are pleaded and were known to him when he uttered the slander. (N. Dak.) *Wrege v. Jones*, 679.

See Setoff and Counterclaim.

LICENSES.

1. **CONSTRUCTION of the Word "Provisions."**—A statute permitting the sale of provisions without a license does not apply to tea or coffee. (Mass.) *Commonwealth v. Caldwell*, 334.

2. **CONSTITUTIONAL LAW, State Regulation of Foreign Commerce, What is.**—A statute permitting the sale by peddlers of agricultural products of the United States without a license, but forbidding the unlicensed sale of agricultural products of other countries is unconstitutional, because it amounts to a regulation of foreign commerce. (Mass.) *Commonwealth v. Caldwell*, 334.

LIMITATION OF ACTIONS.

In General.

1. **LIMITATION OF ACTIONS—Agreement to Waive.**—The makers of a promissory note may stipulate therein that they will

waive the statute of limitations. (Vt.) *Lyndon Sav. Bank v. International Co.*, 900.

2. LIMITATION OF ACTION, the Cause for Which Accrued in Another State.—By the statute of Ohio a cause of action accruing in another state and barred by its laws is also barred by the laws of Ohio. (Ohio St.) *Hunter v. Niagara Fire Ins. Co.*, 699.

3. LIMITATION OF ACTIONS, Injunction, Effect of in Stopping the Running of.—An injunction which prevents the commencement or prosecution of an action does not suspend the operation of the statute of limitations, nor does it estop from pleading the statute one who was not instrumental in obtaining the injunction. (Ohio St.) *Hunter v. Niagara Fire Ins. Co.*, 699.

Matters of Pleading.

4. STATUTE OF LIMITATIONS—Application to Matters of Pleading.—A statute of limitations requiring suits for personal injuries to be brought within two years does not apply to matters of pleading, and should not be given that effect indirectly by holding that an imperfect statement of a cause of action is no statement at all. (Ill.) *North Chicago St. R. R. Co. v. Aufmann*, 207.

5. STATUTE OF LIMITATIONS—Amendment of Pleadings.—If the statute of limitations declares that actions for personal injuries shall be brought within two years, and an employé brings such an action within that time against his employer, charging, in one count, want of sufficient assistance and incompetency of other employés, thus stating a good cause of action in a defective manner, to which a demurrer is sustained, whereupon, within two years after the injury, he files an amended declaration of one count, alleging the incompetency of other employés, additional counts, which state no other cause of negligence than those charged in the original or in the amended declaration, may be filed after the expiration of two years. (Ill.) *North Chicago St. R. R. Co. v. Aufmann*, 207.

New Promise or Acknowledgment.

6. LIMITATION OF ACTIONS—New Promise or Acknowledgment, Will as.—The making of a will containing a legacy of a specified amount, with a statement that the same is in consideration of services rendered by the legatee in the care of testator's mother and child, is not an acknowledgment of a legal obligation, and does not remove the bar of the statute of limitations. (Ohio St.) *McNeal v. Pierce*, 695.

7. LIMITATION OF ACTIONS.—New Promise.—A provision in an equitable mortgage that it is given to secure to one person, as the executor of another, the payment of whatever amount a third person may owe him as executor on a settlement, is not sufficient to constitute a new promise removing the bar of the statute of limitations. (W. Va.) *Holley v. Curry*, 944.

8. LIMITATION OF ACTIONS—New Promise.—An acknowledgment in writing, to operate as a new promise to remove the bar of the statute of limitations, must be a clear and definite acknowledgment of a precise sum, plainly importing a willingness and liability to pay, not in any wise conditional, nor by way of compromise or attempt at settlement. (W. Va.) *Holley v. Curry*, 944.

See Adverse Possession; Executors and Administrators, 2.

MASTER AND SERVANT.*Relation of Master and Servant.*

1. **MASTER AND SERVANT.**—A Master is One who stands to another in such a relation that he not only controls the result of the work of such other, but also may direct the manner in which such work shall be done. (Pa.) *McColligan v. Pennsylvania R. R. Co.*, 739.

2. **MASTER AND SERVANT.**—A Servant is one who is engaged to render personal services to his employer otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the direction and control of the latter. (Pa.) *McColligan v. Pennsylvania R. R. Co.*, 739.

3. **MASTER AND SERVANT.**—The Relation of Master and Servant Exists where the employer has the right to select the employé, the power to remove and discharge him, and the right to direct both what work shall be done and the manner in which it shall be done. (Pa.) *McColligan v. Pennsylvania R. R. Co.*, 739.

4. **MASTER AND SERVANT**—Contract of Bailment.—If a railroad company owning cabs leases them to drivers for a fixed sum per day under agreement that the driver shall assume all liability for damages to persons or property, shall not use any one horse longer than a certain time, that he shall not use intoxicating liquor, and shall conform to established rates and regulations, the company reserving the right to cancel the lease for breach of conditions, the contract is one of bailment, and does not create the relation of master and servant between the driver and the company. (Pa.) *McColligan v. Pennsylvania R. R. Co.*, 739.

Contracts of Employment.

5. **CONTRACTS, No Recovery Under by One Who Fails to Perform.**—One who voluntarily fails to complete a piece of work to be done under a special contract for an entire sum is without remedy. (Mass.) *Sipley v. Stickney*, 309.

6. **CONTRACTS, Willful Failure to Perform a Stipulation not Going to the Essence of.**—A willful default in the performance of a stipulation not going to the essence of the contract bars all recovery. Hence, if one employed to carry on a farm, whose duty it is to render true accounts of its expenses, intentionally deceives his employer by holding back certain bills, such employé cannot recover either under his contract or upon a quantum meruit, though his breach of duty has not caused any loss to his employer. (Mass.) *Sipley v. Stickney*, 309.

Liability of Master to Servant.

7. **MASTER AND SERVANT**—Assumption of Risk—Dangerous Work.—An employé who performs dangerous work under the orders of his employer, or under his promise to furnish a safe place or a sufficient number of employés, does not assume the risk incident to the service, unless the danger is so imminent that no man of ordinary prudence would engage in the work. (Ill.) *North Chicago St. R. R. Co. v. Aufmann*, 207.

Liability of Master for Acts of Servant.

8. **EMPLOYER'S LIABILITY for Act of Driver in Inviting Child to Ride.**—The owner of a wagon who places it in charge of a skillful driver is not liable for the death of a child who climbs on the vehicle at the invitation of the driver and is killed in alighting therefrom, if

the driver is without authority to extend such invitation and his act is not within the scope of his employment or in furtherance of his employer's business. (Tenn.) *Foster-Herbert Cut Stone Co. v. Pugh*, 881.

9. MASTER AND SERVANT—Assault by Servant—Scope of Authority.—If a railroad section boss is directed by the company to build a fence on property not owned by it, and a servant of the owner of such property at her request goes to such section boss and forbids him to erect such fence, whereupon one of the section crew, at the command of such boss, commits an assault upon such servant, the assault is not within the scope of the authority of either the section boss or one of his crew, and the railroad company is not liable therefor. (S. Dak.) *Waler v. Great Northern Ry. Co.*, 794.

10. MASTER AND SERVANT—Acts Outside Scope of Employment.—A servant cannot bind his master to respond to damages, unless it is shown that the act done by the servant causing the injury was an act which was expressly or by necessary implication within the line of his duty under his employment. (S. Dak.) *Waler v. Great Northern Ry. Co.*, 794.

See Messenger Corporations.

MESSENGER CORPORATIONS.

1. A CORPORATION Carrying on a General Messenger Business is not a Common Carrier, where it merely furnishes boys, on request, to carry messages or perform such other services as the persons to whom they are sent may require of them. (Mass.) *Haskell v. Boston Dist. Messenger Co.*, 324.

2. CORPORATIONS Engaged in Furnishing Messengers, Duties and Liabilities of.—A corporation engaged in the general messenger business impliedly contracts that the messengers furnished by it are suitable and proper persons for the performance of the ordinary duties of messengers, so far as the exercise of ordinary care in the selection and employment of them will enable it to procure such persons, and for a failure to take due precautions in these particulars the corporation may be held liable, either for negligence or upon an implied contract, to any person who suffers from the misconduct of the messenger whom it has furnished. (Mass.) *Haskell v. Boston Dist. Messenger Co.*, 324.

3. MESSENGER BOY Corporations, Liability of for Money Intrusted to Messenger.—A corporation furnishing messenger boys is not liable for moneys intrusted to them by the persons to whom they are furnished. (Mass.) *Haskell v. Boston Dist. Messenger Co.*, 324.

4. EVIDENCE—Knowledge of Messenger Corporation.—Evidence is not admissible in an action against a messenger service corporation to show that it and its agents know that the messengers furnished by them to customers were sometimes intrusted by the latter with money and other property. (Mass.) *Haskell v. Boston Dist. Messenger Co.*, 324.

MINORS.

See Infants.

MONEY RECEIVED.

AN ACTION for Money Had and Received Lies Whenever the defendant has money in his possession which, ex aequo et bono, be-

longs to the plaintiff, and it is not material how the money came into the hands of the defendant if the plaintiff is entitled to receive it. (Ind.) *Porter v. Roseman*, 222.

MONOPOLIES.

1. **MONOPOLY—Agreement Legal in Part.**—Parts of an agreement, legal when considered by themselves, are illegal if they are merely steps to accomplish an illegal monopoly. (Mich.) *Hunt v. Riverside Co-operative Club*, 420.

2. **MONOPOLY—Change in Agreement to Avoid Suit.**—The parties to an unlawful monopoly cannot defeat an action against the association which they have organized in furtherance of their undertaking by eliminating, on the eve of the action, some of the objectionable features of their agreement, if the illegal object or purpose remains. (Mich.) *Hunt v. Riverside Co-operative Club*, 420.

3. **MONOPOLY—Decrease of Prices.**—It is no answer to the illegality of a monopoly that it has lowered prices. (Mich.) *Hunt v. Riverside Co-operative Club*, 420.

4. **MONOPOLY—Incomplete or Imperfect Monopoly.**—To vitiate a contract or arrangement as creating a monopoly, it is not necessary that the monopoly should be complete or perfect. (Mich.) *Hunt v. Riverside Co-operative Club*, 420.

5. **MONOPOLY—Agreement to Fix Prices.**—An agreement between dealers to keep the selling price of their commodities at a fixed or graduated figure is void at common law as against public policy. (Mich.) *Hunt v. Riverside Co-operative Club*, 420.

6. **MONOPOLY—If All the Wholesale Dealers** in plumbers' supplies and the great majority of the master plumbers in a city organize a club, the rules of which provide that the wholesalers shall sell to master plumbers only, and charge members a fixed scale of prices and nonmembers higher prices, and that the master plumber members shall purchase all their supplies from the wholesale members of the club, and be governed, in making estimates on jobs, by price lists furnished by the club, and submit their estimates to the secretary before putting in bids, a monopoly is thereby created which violates the anti-trust statutes of Michigan. (Mich.) *Hunt v. Riverside Co-operative Club*, 420.

7. **MONOPOLY—Fixing Price of Labor.**—An agreement fixing and regulating the price of labor is not prohibited by the anti-trust statutes of Michigan. (Mich.) *Hunt v. Riverside Co-operative Club*, 420.

8. **MONOPOLY—Action by Prosecuting Attorney.**—Where a prosecuting attorney institutes an action to enjoin the violation of an anti-trust law, the objection that he does so without authority, or without proving his authority, is a formal objection only, which cannot be made for the first time on appeal. (Mich.) *Hunt v. Riverside Co-operative Club*, 420.

9. **MONOPOLIES—Trade Combinations.**—If corporations supplying gas to the same community make an agreement to parcel out between them the territory supplied, giving to each the exclusive right to sell gas in certain territory, fixing prices and prohibiting a change thereof except by mutual consent, binding one corporation to use for public consumption only gas produced by the other, and prohibiting any one of the corporations from producing from that section of the country in which the other produces gas, such agreement tends to create a monopoly, is void, and cannot be enforced. (W. Va.) *Charleston Gas Co. v. Kanawha Gas Co.*, 936.

10. MONOPOLIES.—Trade Combinations, the object of which are to obtain control of a particular branch of business, are conspiracies, and all contracts for the accomplishment of such end are void, regardless of the extent of such combinations. (W. Va.) *Charleston Gas Co. v. Kanawha Gas Co.*, 936.

11. MONOPOLIES—Trade Combinations.—Any combination of competing corporations, the necessary consequence of which is the controlling of prices, or limiting production, or suppressing competition, in such a way as to create a monopoly, is contrary to public policy and void. An agreement tending to prevent competition and create a monopoly is void as against public policy. (W. Va.) *Charleston Gas Co. v. Kanawha Gas Co.*, 936.

See Conspiracies.

MORTGAGES.

1. MORTGAGE as Evidence of Indebtedness.—If the execution and genuineness of notes secured by mortgage sought to be foreclosed are denied, the recital of their execution and delivery in the mortgage is alone insufficient after the maturity of the notes, to prove the existence of the indebtedness secured by the mortgage. In the absence of the production of such notes by the person claiming under them they are presumed to be paid. (S. Dak.) *Bruce v. Wanzer*, 788.

2. MORTGAGES—Existence and Genuineness of Mortgage Notes—Burden of Proof.—If the execution and genuineness of notes secured by mortgage are denied, when the mortgage is sought to be foreclosed, the burden is on the mortgagee to prove the existence of the notes, or to account for their nonproduction, and that they were in fact executed by the maker or mortgagor. (S. Dak.) *Bruce v. Wanzer*, 788.

3. DEED of Trust—Equitable Mortgage.—A writing purporting to be a deed of trust, executed, acknowledged and recorded as such, but with no seal attached to the signature of the grantor, though void as a deed of trust, may constitute a valid equitable mortgage. (W. Va.) *Holley v. Curry*, 944.

4. DEEDS OF TRUST—Description of Debt.—A deed of trust or other writing charging real estate to secure a debt must in some way describe and identify the debt it is intended to secure. Substantial and not literal accuracy is all that is required. The description of the debt must be correct as far as it goes, and must be full enough to direct attention to the sources of correct information, and be such a description of the debt as not to mislead or deceive as to its nature or amount. (W. Va.) *Holley v. Curry*, 944.

5. MORTGAGES—Equitable—Description of Debt.—An equitable mortgage stating that it is given to secure to one person as executor of another the payment of whatever amount a third person may owe him as executor on a settlement, sufficiently describes the debt to secure such amount as such party may owe on a settlement of accounts, except such items as are barred by limitation at the time of the making and delivery of such equitable mortgage. (W. Va.) *Holley v. Curry*, 944.

6. MORTGAGES—Effect of Partial Release.—If, after conveyance of mortgaged premises by the mortgagor by deed containing a covenant against encumbrances, the mortgagee, without notice of such deed, releases a portion of the mortgaged premises from the lien of the mortgage without the knowledge or consent of the mortgagor,

the latter is thereby released and discharged from further liability for the mortgage debt. (Pa.) *Meigs v. Tunncliffe*, 769.

See *Chattel Mortgages*.

Note.

Mortgage, indebtedness, recitals of in, whether constitute evidence of, 793.

payment of debt secured by, whether should be presumed from the nonproduction of the note described therein, 793.

MUNICIPAL CORPORATIONS.

Municipal Bonds.

1. **MUNICIPAL BONDS**—**Issuance**—**Election**—**Qualification of Voters**.—The word "elector," when used in a statute relating to the issuance of bonds by municipal corporations and providing that they shall not be issued unless authorized by a majority of the "electors," means voters who have registered so as to entitle them to vote at municipal elections, or at any election held in pursuance of the constitution and laws of the state. (Miss.) *Greene v. Village of Rienzi*, 449.

2. **MUNICIPAL BONDS**.—**Bona Fide Holders** of municipal bonds, relying upon the face of the record, will be protected against any informalities or irregularities in the proceedings authorizing their issuance, or from mistakes or lack of wisdom on the part of the authorities issuing and negotiating them. (Miss.) *Greene v. Village of Rienzi*, 449.

Taxation for Bridge Beyond City Limits.

3. **MUNICIPAL CORPORATIONS**—**Taxation**.—**The Validity of a Contract** of a municipal corporation which can be fulfilled only by a resort to taxation depends upon the power to levy and collect a tax for that purpose. (N. Dak.) *Manning v. Devils Lake*, 652.

4. **MUNICIPAL CORPORATIONS**—**Construction of Bridge**.—**A City cannot Impose a Tax** to raise funds for the construction of a bridge which is not located on a legal street or highway. (N. Dak.) *Manning v. Devils Lake*, 652.

5. **MUNICIPAL CORPORATIONS**—**Taxation**.—**The Incidental and Indirect Benefits** which accrue to the inhabitants of a city from the promotion of its commercial interests will not sustain the power the power of taxation. (N. Dak.) *Manning v. Devils Lake*, 652.

6. **MUNICIPAL CORPORATIONS**—**Taxation for Bridge Outside of City**.—The construction and maintenance of a bridge outside the limits of a city to provide the people of an outlying district a convenient mode of reaching town and thereby increase the trade of the business men of the city, rather than to provide for the convenience of the inhabitants of the city itself, will not justify the exercise of the power of taxation. (N. Dak.) *Manning v. Devils Lake*, 652.

Ordinance Affecting Street Railways.

7. **MUNICIPAL ORDINANCE**, **Arbitrariness of**.—If a municipal ordinance restricts the right of dominion which the owner may otherwise exercise without question not according to any universal rule, but assumes to make the absolute enjoyment of his own depend upon the arbitrary will of the city, such ordinance is invalid, because it fails to furnish a universal rule of action, and leaves the right of property to the will of such authorities, who may exercise it so as to give exclusive profits or privileges to particular persons. (Ind.) *City of Elkhart v. Murray*, 228.

8. MUNICIPAL ORDINANCE Requiring a Street Fender to be Approved by the Common Council.—An ordinance making it unlawful to run a street-car not equipped with a designated fender or one equally good, "to be approved by the common council or its street committee," undertakes to vest an arbitrary discretion which the council or its committee may exercise or not at pleasure, and is therefore void. (Ind.) *City of Elkhart v. Murray*, 228.

Liability of City in General.

9. MUNICIPAL CORPORATIONS, Liability of.—Before a municipal corporation can be held liable for causing an injury, it must appear that some duty incumbent on it to perform had been neglected or improperly discharged. The act, the commission or omission of which is charged as the cause of the injury, must have been within the scope of its powers, as provided by its charter or by some positive enactment of law. (N. Y.) *O'Donnell v. City of Syracuse*, 558.

10. A MUNICIPAL CORPORATION Acts in a Governmental Capacity to the Extent that it exercises its powers in matters of public concern, and it acts in a private capacity in so far as it exercises its powers under its by-laws for private advantage in matters pertaining to the municipality as proprietor of various works and properties. (N. Y.) *O'Donnell v. City of Syracuse*, 558.

11. A MUNICIPAL CORPORATION is not Answerable for the Nonexercise, or for the Manner of Its Exercise, of Those Discretionary Powers which are of a public or legislative character. (N. Y.) *O'Donnell v. City of Syracuse*, 558.

12. A MUNICIPAL CORPORATION is Liable for the Nonperformance, or the Manner of Its Performance, of Its Corporate Duties having relation to its special interests, and which duties are absolute and perfect and not discretionary, and in the performance of which the plaintiff has an interest. (N. Y.) *O'Donnell v. City of Syracuse*, 558.

Liability for Obstruction of Stream.

13. MUNICIPAL CORPORATIONS, Liability of for Streams Which Have Been Declared Public Highways.—A declaration in a statute that a creek flowing within the limits of a city is a public highway does not impose any peculiar duty on the municipality which will make it answerable for injuries due to its failure to control such creek or keep it in a safe condition or free from obstructions not caused by the municipality. (N. Y.) *O'Donnell v. City of Syracuse*, 558.

14. MUNICIPAL CORPORATIONS, Liability of for Bridges Across Streams Within Their Limits.—Where a municipal corporation is authorized, and it is its duty, to construct bridges across a stream flowing through the city limits, it is not answerable for any consequential damages occasioned by a bridge impeding the flow of the stream. (N. Y.) *O'Donnell v. City of Syracuse*, 558.

15. MUNICIPAL CORPORATION, Liability of for Damages Due to the Overflow of a Stream Connected with Its Sewer System.—The duty of a city in respect to a watercourse flowing through its limits and which it uses as an outlet to its sewer system to make provisions obviating the danger of overflow is governmental and discretionary in its character. Hence, it is not answerable to a citizen whose property is injured by the overflow of such stream, though the overflow was made greater and the injury inflicted thereby more serious by the fact that such watercourse was used as an outlet of the sewer system, and its waters were polluted and caused to inflict additional damage thereby. (N. Y.) *O'Donnell v. City of Syracuse*, 558.

Liability for Obstruction of Streets.

16. **MUNICIPAL CORPORATIONS.—Knowledge or Notice by a Policeman** of the obstruction of a sidewalk is not imputed to the city. (Ohio St.) *City of Columbus v. Penrod*, 716.

17. **MUNICIPAL CORPORATIONS.—Liability of for Granting Permission to Use Part of Street for Placing Building Materials.**—A municipality granting permission to use part of a street as a place for depositing material for the constructing of a house on an abutting lot does not thereby license any act in the street which, but for the permission, would be illegal and a nuisance, nor impose the duty on the city of seeing that the place is guarded, nor render it answerable to a person injured in consequence of the omission to guard such place with bars or lights, unless it had express or implied notice of such omission and was therefore guilty of negligence. (Ohio St.) *City of Columbus v. Penrod*, 716.

Liability for Billboards.

18. **MUNICIPAL CORPORATION.—Liability for Billboard on Private Property.**—If the owner of an opera-house maintains a billboard on his own land between the building and the street, and the wind blows the board against a person who is passing, the city is not answerable for his injuries. (Mich.) *Temby v. City of Ishpeming*, 392.

See *Intoxicating Liquors*.

MURDER.

See *Homicide*.

NAVIGABLE WATERS.

See *Boundaries*, 3, 4.

NEGLIGENCE.*In General.*

1. **ELEVATOR COMPANY.—Liability for Destruction of Grain.** Where an elevator company contracts to clip oats at its elevator and reship them in the same cars in which they are received, but instead of so doing uses the cars for other purposes and keeps the grain in the elevator, where it is destroyed by the burning of the building, the use of the cars for another purpose is not the proximate cause of the loss of the grain, nor does it amount to conversion thereof. (Mich.) *McLane v. Swift & Co. v. Botsford Elevator Co.*, 384.

2. **NEGLIGENCE.—Question for Jury.**—In an action to recover for personal injury alleged to have been caused by negligence, if there is substantial conflict in the evidence, it is proper for the court to submit the questions of negligence and contributory negligence to the jury upon proper declarations of law. (Ark.) *Price v. St. Louis etc. Ry. Co.*, 79.

Dangerous Appliances and Premises.

3. **NEGLIGENCE.—Wagon Attractive to Children.**—A wagon constructed with the bed below the axles for use in hauling stone is not so dangerous and attractive to children as to require the owner to take special precautions for their protection in his use thereof. (Tenn.) *Foster-Herbert Cut Stone Co. v. Pugh*, 881.

4. **NEGLIGENCE.—Use of Premises—Care Toward Children.**—The owner of land is not required, in using it for legitimate purposes,

to guard against every possible danger to children, and to children whose presence upon the premises could not reasonably have been anticipated he owes no duty to keep his land free from dangerous conditions. (Conn.) *Fitzmaurice v. Connecticut Ry. etc. Co.*, 159.

5. NEGLIGENCE—Use of Premises—Trespassing Children.—If an owner of land has no reason to anticipate that a young and unattended trespassing child might come into his dump-yard and upon or near a pile of hot ashes or soot therein, he is not liable for an injury to such child caused by its climbing upon or falling into such ashes or soot. (Conn.) *Fitzmaurice v. Connecticut Ry. etc. Co.*, 159.

Proximate Cause.

6. NEGLIGENCE—Proximate Cause.—If a motorman on a street-car negligently runs over and cuts a fire hose while it is conveying water to a burning residence, thus shutting off the supply of water and causing the firemen to lose control of the fire and the loss of the furniture in such residence, the street-car company is liable for such loss on the ground that the cutting of the hose was the proximate cause of the loss. (Ark.) *Little Rock etc. Co. v. McCaskill*, 48.

7. NEGLIGENCE—Proximate Cause.—If a person negligently cuts off the hose through which firemen are throwing a stream of water upon a burning building, and thereupon the building and its contents are consumed for want of water to extinguish it, his act is to be regarded as the direct and efficient cause of the injury. (Ark.) *Little Rock etc. Co. v. McCaskill*, 48.

8. NEGLIGENCE—Proximate Cause.—Where an Elevator Company neglects to clip and ship oats at the time agreed upon with the owner, as a result of which they remain in its elevator, where they are destroyed by the accidental burning of the building, the negligence of the company in failing to ship the grain promptly is not the proximate cause of its loss. (Mich.) *McLane, Swift & Co. v. Botsford Elevator Co.*, 384.

Res Ipsa Loquitur.

9. NEGLIGENCE—Res Ipsa Loquitur—Application of Doctrine of. The doctrine of *res ipsa loquitur* does not apply in cases where the accident or injury, unexplained by attendant circumstances, might as plausibly have resulted from the negligence on the part of the passenger as the carrier, nor to an injury to a passenger that comes by reason of conditions that are personal or peculiar to him, and not by reason of any management of or accident to, or condition in the train itself over which the carrier has conclusive control, but the doctrine does apply when the injury is of such nature that it could not well have happened without the carrier being negligent, or when it is caused by something connected with the equipment or operation of the road over which the company has entire control. (Ark.) *Price v. St. Louis etc. Ry. Co.*, 79.

10. THE OPERATION of the Doctrine of Res Ipsa Loquitur Where Relations are not of a Contractual Nature, can only be where there are actually shown facts and circumstances in the nature of the defendant's undertaking and of the accident itself from which the jury are able, if not compelled, to draw the inference of negligence. It was not intended that this doctrine should exempt the plaintiff from the burden of proving, affirmatively, negligence, or circumstances making negligence a legitimate, if not an irresistible, inference. (N. Y.) *Duhme v. Hamburg-American Packet Co.*, 615.

See Blasting; Death; Electricity.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEW TRIAL.

NEW TRIAL.—Power of the Supreme Court to grant a new trial will not be exercised, except in clear cases of wrong or injustice which the lower court should have remedied. (Pa.) *Murtland v. English*, 747.

NOTICE.

NOTICE.—A Purchaser of Real Property is Charged With Notice of the Contents of a trust deed on which his title depends and of the constitution and by-laws of the building and loan association referred to in the deed. (Mo.) *Cobe v. Lovan*, 480.

OFFICERS.

OFFICERS DE FACTO.—The acts of de facto municipal officers are valid. (Miss.) *Greene v. Village of Rienzi*, 449.

See Elections.

OIL.

See Property.

OIL LEASE.

See Frauds, Statute of.

PARTNERSHIP.

1. **SURVIVING PARTNER**—Right to Compensation.—The rule that a surviving partner is not entitled to compensation for his services in winding up the partnership, applies only to cases where the business is immediately put an end to and no further work is done, except to close up the matter of account between the partners, pay the debts, and distribute the surplus. (Tenn.) *Condon v. Callahan*, 833.

2. **SURVIVING PARTNER**—Right to Compensation.—If a partnership enters into a contract to do construction work on a railroad, and one of the partners dies soon after the commencement of the undertaking, the surviving partner is entitled to compensation for his services in carrying out the contract and completing the work. (Tenn.) *Condon v. Callahan*, 833.

3. **SURVIVING PARTNER**—Credit for Employment of Engineer.—If partners undertake to do railroad construction work, and one of them, with the consent of the other and of his representatives after his death, employs an engineer of the railroad to perform services not in conflict with the duties owed by him to the railroad company, such company having knowledge of the employment, the surviving partner is entitled, upon completing the construction contract and winding up the business of the firm, to a credit for his expenditure for the engineer's services. (Tenn.) *Condon v. Callahan*, 833.

4. **PARTNERSHIP**—Division of Profits.—Where a partnership contract to do railroad construction work provides that if one partner subcontracts work from the firm he shall be dealt with as other subcontractors, the partnership is entitled, as against a partner taking a subcontract from it, to the same average profit that it realizes on the work of other subcontractors. (Tenn.) *Condon v. Callahan*, 833.

5. SURVIVING PARTNER—Liability for Interest.—A surviving partner, is not liable for interest on partnership funds continued on deposit by him in a bank, awaiting a settlement of the affairs of the firm and not yielding him any profit. (Tenn.) *Condon v. Callahan*, 833.

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PARTITION.

1. PARTITION OF BUILDING—When Should be by Sale.—The partition of a hexagonal building consisting of stores on the ground floor and flats above should be by a sale of the property, rather than by a physical division which contemplates the erection of a dividing wall and the tearing out and changing of the interior partitions of the building to adapt it to ownership in severalty. (Mich.) *Gilman v. Boden*, 356.

2. PARTITION SALE—Rights of Occupying Tenant to Crops.—If one in possession of property, with no claim or rights other than as a tenant in common, plants a crop after a decree of sale in partition has been rendered, and when she knows that in a few days the land will be sold thereunder, she receives more than she is entitled to, and will not be heard to complain, when the master reserves and gives to her one-half of the growing crop. (Ill.) *Vaughlin v. Newman*, 203.

PAYMENT.

PAYMENT—Check as—Delay in Collection.—If a creditor receives the check of a third person, not signed or indorsed by the debtor, in payment of his debt, drawn on a bank in another place, and does not attempt to collect it nor forward it for collection until five days after its receipt, and by reason of such delay alone the check is not paid, the negligence of the creditor in not transmitting the check for collection on the day following its receipt constitutes the check an absolute payment of the debt. (S. Dak.) *Manitoba Mortgage etc. Co. v. Weiss*, 799.

See Accord and Satisfaction.

PEDDLERS.

See Licenses.

PERPETUITY.

WILLS—Rule Against Perpetuity—When not Offended.—A devise of land by a woman to her husband providing that the property shall, after his death, revert to her heirs, but only after their payment to his heirs for improvements on the land, does not create a perpetuity, for the heirs of the testatrix referred to are those living at the time of her death, and the payment is to be made within their lifetime. (Ill.) *Hill v. Granelli*, 182.

PERSONAL PROPERTY.

See Property; Replevin.

PHOTOGRAPH.

See Injunction, 1.

PLEADING AND PRACTICE.

1. **PLEADING.**—Though an Excuse for not Performing a Condition is for some purpose equivalent to performance, yet it is not the same thing, and in pleading, therefore, performance must never be averred by one who relies upon an excuse for not performing, but he must state his excuse. (Ill.) *Hart v. Carsley Mfg. Co.*, 189.

2. **PLEADING AND PRACTICE.**—Matters Occurring Pendente Lite may be asserted as a defense to an equitable action, as where the plaintiff, after instituting suit to enjoin certain acts, knowingly accepts benefit therefrom and thereby becomes estopped from claiming that they were illegal or unauthorized. (N. Y.) *Wormser v. Metropolitan St. Ry. Co.*, 596.

3. **PLEADING AND PRACTICE**—Answer, When Sufficiently Discloses Equitable Defenses.—An answer in an action of ejectment which pleads facts showing that a trustees' deed is void is good though it does not ask to redeem or pray for equitable relief. (Mo.) *Cobe v. Lovan*, 480.

POSSESSION OF PROPERTY.

See Assault and Battery.

PRINCIPAL AND AGENT.

1. **AGENCY.**—A Principal is Bound by the Apparent, and not the actual or express, authority given his agent, where third persons have in good faith relied thereon, whether the agency is a general or special one. (Mich.) *Antrim Iron Works v. Anderson*, 434.

2. **AGENCY.**—An Instruction to the Jury that they may find that a principal has ratified his agent's act, when there is no evidence justifying such a charge, is not erroneous, if the authority of the agent in the premises is established by undisputed testimony. (Mich.) *Antrim Iron Works v. Anderson*, 434.

3. **MONEY, Title to, not Acquired by Conversion of.**—If a clerk takes money of his employer and applies it to the payment of the former's debt, such clerk acquires no title to the money so converted and transfers none to the person so receiving it. (Ind.) *Porter v. Roseman*, 222.

4. **MONEY Wrongfully Paid by an Agent in Satisfaction of His Own Debt, Right of His Principal to Recover.**—If an agent applies money of his principal to the payment of the agent's debt, the creditor receiving such money acquires no title thereto, though, when receiving

it, he does not know that it is not the money of his debtor. (Ind.) *Porter v. Roseman*, 222.

5. **MONEY Wrongfully Paid by Agent, Right to Recover Though the Identical Money cannot be Traced.**—It is not necessary for a principal, in order to recover money wrongfully paid by his agent in satisfaction of the latter's death, to trace the identical money. It is sufficient to show that it went into the bank account of the person sought to be held liable therefor. (Ind.) *Porter v. Roseman*, 222.

PRINCIPAL AND SURETY.

1. **SURETYSHIP.**—A Surety for the Payment of Rent of leased premises is discharged by a sale of a part thereof by the lessor, the lessee remaining a tenant of the residue only, though the lease reserved the right of the lessor to sell the whole on six months' notice. (Vt.) *Stern v. Sawyer*, 890.

2. **SURETYSHIP for the Payment of Rent.**—The Sale by the Lessor of Part of the Leased Premises and the Surrender Thereof to the Purchaser Discharges a Surety for the payment of rent, though the lessee retains the use of all that is of value to him. (Vt.) *Stern v. Sawyer*, 890.

3. **SURETYSHIP for the Payment of Rent, Lessee's Waiver Does not Bind Surety.**—If a lessee takes possession of the leased property before the lessor repairs or furnishes it as covenanted for in the lease, and thereby waives the breach of the covenant, this waiver does not bind a surety for the payment of rent, but, on the contrary, releases him. (Vt.) *Stern v. Sawyer*, 890.

PRIVATE WAYS.

See Easements.

PROBATE LAW.

See Descent and Distribution; Equity; Executors and Administrators; Wills.

PROCESS.

See Corporations, 18-22.

PROPERTY.

PERSONAL PROPERTY, Petroleum Oil, When is.—Petroleum oil when it reaches a well and is produced on the surface becomes personal property and belongs to the owner of the well. (Ohio St.) *Nonamaker v. Amos*, 708.

PUBLIC LANDS.

PUBLIC LANDS.—A Patent to Swamp Lands cannot be Collaterally Attacked by proof that the acreage included within the boundaries is much greater than that designated in the patent. (Mo.) *Frank v. Goddin*, 493.

RAILROADS.

1. **RAILROADS**—Contract to Maintain Depot—Breach by Abandonment—Defense.—In an action against a railroad company for a breach of its contract to keep and maintain a railway depot or station on certain land, it is no defense that such land is outside of city limits, and that the railway company may, under statutory pro-

visions, be required to move its station within such limits when the station erected on the land under the contract has been voluntarily abandoned and removed by the railway company, and not removed in obedience to the mandate of the statute. (Ark.) St. Louis etc. R. R. Co. v. Crandell, 42.

2. RAILROADS—Contract to Maintain Depot—Breach by Abandonment.—If a railroad company contracts with a land owner to maintain a station on his land outside of city limits, the fact that it is thereafter required to erect a station within the city limits in compliance with a statute does not of itself relieve it from maintaining the station on such land owner's land, nor from liability for voluntarily abandoning and removing such station. (Ark.) St. Louis etc. R. R. Co. v. Crandell, 42.

See Carriers; Explosives.

REFORMATION OF CONTRACTS.

1. CONTRACTS—Reformation.—Parol Evidence is inadmissible to reform a written contract, according to the intention of the parties, unless the declaration specially sets forth fraud or mistake as a ground for such reformation. (Pa.) Rinker v. Aetna Life Ins. Co., 773.

2. INSURANCE, LIFE—Reformation of Contract—Fraud or Mistake.—If the declaration upon a life insurance policy is in the ordinary form, it is error to admit parol evidence that the insurance agent, either by fraud or mistake, inserted a clause in the policy different from that agreed upon. (Pa.) Rinker v. Aetna Life Ins. Co., 773.

See Infants, 6.

REPLEVIN.

Growing Strawberry Plants attached to the soil are personal property, and the subject of replevin. (Ark.) Cannon v. Matthews, 64.

RES GESTAE.

See Evidence, 2, 3.

RES JUDICATA.

See Judgments, 4-7.

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See Landlord and Tenant.

ROGUES' GALLERY.

See Injunction, 1.

SALES.

1. **CONTRACT for the Delivery of Goods in Installments, What is a Breach of.**—If the seller of goods to be delivered and paid for in installments refuses to deliver an installment, this amounts to a repudiation and breach of the contract for which the buyer may recover damages. (N. Y.) *Pakas v. Hollingshead*, 601.

2. **CONTRACT to Deliver Goods in Installments, Successive Recoveries for Breaches of.**—One who contracts for goods to be delivered and paid for in installments cannot, on the breach of the contract by the refusal to deliver some of the installments, elect to treat the contract as in force and maintain successive actions from time to time as installments of goods were to be delivered. (N. Y.) *Pakas v. Hollingshead*, 601.

3. **CONDITIONAL SALE, Right of Vendor to Recover for Property Destroyed Before Title Passes.**—There may be a recovery by the vendor for property sold and delivered on condition that the title shall not pass till full payment is made, when without the fault of the purchaser the property is destroyed before the price falls due. (Vt.) *Lavalley v. Ravenna*, 898.

4. **OPTION—Evidence of Acceptance.**—Where a buyer claims that he mailed a letter and also sent a telegram to the seller accepting an option to purchase hides, both of which should, in due course of the transmission of such messages, have reached their destination before the expiration of the option, but the seller testifies that neither of them did reach him before that time, the evidence presents a question of fact for the jury as to when the letter and telegram were received. (Mich.) *Kibler v. Caplis*, 388.

5. **OPTION—Evidence of Acceptance.—The Mere Sending of a telegram and a letter accepting an option to buy hides is not a sufficient acceptance, unless the seller is actually notified of the acceptance within the time limited therefor.** (Mich.) *Kibler v. Caplis*, 388.

6. **OPTION—Parol to Show Manner of Payment.**—If an option to buy hides is unambiguous, though it is silent as to the time and manner of payment, parol evidence is not admissible to show that at the time the option was given it was agreed that a down payment of a certain amount should be made. (Mich.) *Kibler v. Caplis*, 388.

7. **OPTION—Performance of Conditions by Seller—Payment.**—If an option to purchase hides requires that they shall be banked overnight, trimmed of meats, cleaned of manure, and shaken over barrels and swept, and thus made ready for weighing and delivery, the buyer is not required to pay the purchase price in advance of the doing of these acts by the seller. (Mich.) *Kibler v. Caplis*, 388.

8. **OPTION—Evidence of Market Value of Hides.**—In an action for the breach of an option for the sale of hides in Detroit, a trade paper containing the market value of hides in Chicago is admissible in evidence. (Mich.) *Kibler v. Caplis*, 388.

See Damages, 3-7; Judgment, 7.

SALOONS.

See Intoxicating Liquors.

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SELF-DEFENSE.

See Homicide, 18, 19.

SETOFF AND COUNTERCLAIM.

1. **SLANDER**—Setoff of One Slander Against Another.—A statute permitting a defendant to plead as a counterclaim “a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff’s claim” does not authorize one slander to be set up as a counterclaim against another, although both were uttered at the same time and place as a part of the same conversation. Each slander constitutes a separate “transaction.” (N. Dak.) *Wrege v. Jones*, 679.

2. **SETOFF, When Allowable in Equity**.—A court of equity will take cognizance of cross-claims between litigants, though wholly disconnected and wanting in mutuality, and set off one against another whenever it becomes necessary to effect a clear equity and prevent irremediable injustice. (Ind.) *Porter v. Roseman*, 222.

3. **SETOFF**.—The Nonresidence of the Plaintiff is a Good Ground for the interposition of an equitable setoff by the defendant. (Ind.) *Porter v. Roseman*, 222.

SLANDER.

See Libel and Slander.

SPECIFIC PERFORMANCE.

SPECIFIC PERFORMANCE, Denial of for Want of Mutuality.—A contract providing that one of the parties thereto may purchase of the other specified lands at a price designated will not be specifically enforced where, by its terms, it does not obligate anyone to make the purchase. (Mo.) *Lipscomb v. Adams*, 500.

STATUTE OF FRAUDS.

See Frauds, Statute of.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

1. **CONSTITUTIONAL LAW**—Statutes, Provision Respecting Enactment, When Mandatory.—The provision of the constitution of New York that no bill shall be passed or become a law unless it shall have been printed and upon the desks of the members in its final form at least three calendar legislative days prior to its final passage is mandatory. (N. Y.) *People v. Reardon*, 628.

2. **STATUTES, Provision Requiring to be Printed and on the Desks of the Members Three Days Before Enactment, Construction of**.—The provision of the constitution of New York that no bill shall be passed unless it shall have been printed and on the desks of the members in its final form at least three calendar legislative days prior to its final passage is complied with if, on being introduced, it is printed and placed on the desks of members of both Houses in its final form for three consecutive days prior to its passage in the House in which it originated. It need not, on being sent to the other House, be again printed and placed on the desks of its members for three days more before it can be enacted. (N. Y.) *People v. Reardon*, 628.

3. STATUTES, Construction of.—Where the words of a statute are plain, explicit and unequivocal, the court is not warranted in departing from their obvious meaning. (Ohio St.) Pittsburgh etc. Ry. Co. v. Naylor, 701.

STREET RAILWAYS.

1. STREET RAILWAYS—Use of Street.—If a street railway company obtains permission from a municipality to use a certain street, the municipality reserving the right to grant the "common use" of such street to another street railway company, in common with the first, it cannot require a later company, to whom it grants permission to use the same street, to so lay its tracks as to "straddle" the tracks of the first company, when the street is amply wide enough to accommodate two parallel tracks. (Pa.) Commonwealth v. Bond, 745.

2. STREET RAILWAYS—Use of Streets.—If a street railway company is granted permission to lay its tracks in a street, a later permission to another street railway company to lay a part of its track on the track of the first company is an unconstitutional taking of the property of the latter without compensation. (Pa.) Commonwealth v. Bond, 745.

See Carriers; Municipal Corporations, 7, 8.

STRIKES.

See Conspiracy.

SUBROGATION.

1. INSURANCE, FIRE—Subrogation.—If a cestui que trust obtains insurance on the trust property for the payment of his debt secured by trust deed, and after loss the insurer pays the whole debt secured, he is entitled to an assignment from the trust creditor of the debt thus secured and paid and to recover thereon. (W. Va.) Baker v. Monumental Savings etc. Assn., 996.

2. INSURANCE, FIRE—Subrogation.—If the owner of land subject to a trust deed given thereon to secure a debt by his vendor conveys such land, reserving a vendor's lien therein for the purchase money, such conveyance being subject to the deed of trust, and the trust creditor obtains insurance in such owner's name without notice that he has conveyed the land, and, after a loss the insurer in settlement thereof pays the whole trust debt, he is entitled to an assignment thereof and to be subrogated to the rights of the trust creditor. (W. Va.) Baker v. Monumental Savings etc. Assn., 996.

SURETYSHIP.

See Principal and Surety.

TAXATION.

1. TAXATION, Classification for the Purposes of.—The legislature has power to classify as it sees fit by imposing a burden on one class of property and no burden at all on another. The remedy for injudicious action is in the hands of the people, not of the court. (N. Y.) People v. Reardon, 628.

2. TAXATION on Sales of Shares of Stock.—A statute imposing a tax on all sales or agreements to sell, or memoranda of sales, or deliveries or transfers of shares or certificates of stock in any domestic or foreign association, company, or corporation of two cents on each

one hundred dollars of face value or fraction thereof is not invalid as creating a classification not permitted by the constitution, nor because it fixes the amount of the tax regardless of the value of the certificates sold or of the sums for which they are sold. (N. Y.) *People v. Reardon*, 628.

3. TAXATION of Sales of Stock in Foreign Corporations Owned by Nonresidents.—A statute imposing a tax on the transfer or sales of stock in any corporation of two cents on each one hundred dollars of face value is not unconstitutional as authorizing, as applied to stock of foreign corporations owned by nonresidents, the taxation of property without the jurisdiction of the state. (N. Y.) *People v. Reardon*, 628.

4. INTERSTATE COMMERCE—Tax on Transfers of Stock of Corporations.—A statute imposing a tax on transfers or sales of stock of any corporation of two cents on each one hundred dollars of the face value thereof does not violate the commerce clause of the constitution of the United States. (N. Y.) *People v. Reardon*, 628.

5. CORPORATIONS, FOREIGN—Taxation of Credits.—If a non-resident corporation is located within the state and conducts business therein, through its local agent, duebills, notes and other papers taken by it in the course of its business and collectible within the state are subject to taxation therein. (La.) *Monongahela River etc. Co. v. Board of Assessors*, 275.

6. TAXATION of Credits.—It is within the power of the law-making authority of the state to tax any indebtedness which has taken a concrete form. (La.) *Monongahela River etc. Co. v. Board of Assessors*, 275.

7. TRADING STAMPS, Excise Tax on Business Conducted by.—A statute undertaking to levy an excise tax on the business of selling, giving, or delivering trading stamps, checks, coupons, or similar devices in connection with the sale of articles is unconstitutional. The right to transact business in this manner is not a commodity within the meaning of the provision of the state constitution authorizing taxes to be levied on commodities. (Mass.) *O'Keeffe v. City of Somerville*, 316.

See *Municipal Corporations*, 3-6.

TELEGRAPHS AND TELEPHONES.

ADDITIONAL SERVITUDE—Telephone Poles.—Poles erected in a public street and the wires strung thereon for use in the operation of a public telephone system do not constitute an additional servitude on the fee to the soil for which compensation to the owners must be made. (Tenn.) *Frazier v. East Tennessee Tel. Co.*, 856.

See *Frauds*, Statute of, 6.

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TENANCY IN COMMON.

EJECTMENT BY COTENANT—Extent of Recovery.—The recovery of a tenant in common in an action of ejectment against defendants, in without right, is confined, both in right and possession, to his undivided interest in the property. (Tenn.) *Williams v. Coal Creek Mining etc. Co.*, 878.

THREATS.

See Homicide, 10, 11.

TRADES UNIONS.

See Conspiracy.

TRADING STAMPS.

See Taxation, 7.

TRIAL.

1. **TRIAL—Argument of Counsel.**—On a murder trial, remarks by the prosecuting attorney in his argument that every lawyer who deserves the name knows that the case was reversed by the supreme court on the merest technicality, and on account of the absence of a witness, where the record shows by affidavits on file that the witness was present at the trial, are reversible error, when properly objected to and not corrected. (Miss.) *Whit v. State*, 460.

2. **TRIAL—Credibility of Witness Question for Jury.**—If the testimony of the sole witness to a transaction is contradicted in material points by contradictory statements, the jury is entitled to pass upon the question of what really occurred. (Mich.) *Payne v. Union Life Guards*, 369.

3. **PRACTICE.**—Delay in Acting on Motions to set aside a verdict as against the evidence is immaterial when the undisputed facts show that the action taken by the trial court was well founded. (Conn.) *Marshall v. Clark*, 84.

4. **TRIAL—Conflicting Instructions.**—If both parties submit written requests to charge, some of which are absolutely conflicting, it is error for the court to read the whole of such requests to the jury as the law of the case, without adequate comment or reference to such conflict. (Conn.) *Shailer v. Bullock*, 87.

5. **TRIAL—Instructions.**—An Incorrect Statement of Law contained in the last words of the court's charge to the jury is not cured by a correct statement of the law given in the first part of such charge. (Conn.) *Shailer v. Bullock*, 87.

TROVER AND CONVERSION.

See Principal and Agent.

TRUSTS.

1. **TRUSTS—Taking Effect in Future—Consideration.**—Before a trust can be enforced, where no consideration moves from the cestui

que trust, it must be an executed or fully declared trust, to take effect in praesenti. (Mich.) *Fisher v. Hampton Transportation Co.*, 358.

2. **TRUSTS—Purchase of Bankrupt's Estate.**—An agreement between two persons, after one of them has parted with the title to his property by assigning it to a trustee in bankruptcy, to the effect that the bankrupt shall not bid at the trustee's sale of the property, but that the other shall bid it in and hold it in trust to pay specified obligations, and after making such payments shall assign it to whomsoever the bankrupt may designate, is without consideration, and the transaction does not amount to an executed trust, but rather a promise to make a gift in futuro. (Mich.) *Fisher v. Hampton Transportation Co.*, 358.

3. **TRUSTEES' SALE, Estoppel to Deny Title Based upon.**—The holder of real property is not estopped, as against one acquiring title by a quitclaim deed under a trustees' sale for a nominal consideration, from showing that the transfer of the note to secure which the deed was given was ultra vires, and the sale thereunder consequently void. (Mo.) *Cobe v. Lovan*, 480.

See Mortgages, 3-5.

USURY.

See Criminal Law, 1-3.

VENDOR AND VENDEE.

See Frauds, Statute of; Notice.

VENUE.

1. **CONSTITUTIONAL LAW—Change of Venue.**—The "Right of Trial by Jury" secured by the constitution of North Dakota is the right of trial by jury with which the people who adopted it were familiar and which had obtained a fixed meaning in the criminal jurisprudence of the territory prior to and at the time of the adoption of the constitution; and that right gave the prosecution, as well as the defendant, the right to change the place of trial when necessary to secure a fair and impartial trial. (N. Dak.) *Barry v. Traux*, 662.

2. **CONSTITUTIONAL LAW—Change of Venue—Prosecution.**—At the common law the right of trial by a jury in the county of the offense was a general one, not unconditional, but always subject to the exception that the indictment might be removed and the trial take place in another county, either upon the application of the prosecution or the defendant, when necessary to secure a fair and impartial trial, and without substantial difference between felonies and misdemeanors, except as to the degree of proof necessary to procure the change. (N. Dak.) *Barry v. Traux*, 662.

3. **CONSTITUTIONAL LAW—Change of Venue by Prosecution.**—The statute of North Dakota which provides for a change of the place of a criminal trial to another county upon the application of the state's attorney, when a fair and impartial trial cannot be had in the county of the offense, does not violate the right of trial by jury as secured by the constitution. (N. Dak.) *Barry v. Traux*, 662.

WATERS AND WATERCOURSES.

Water Companies.

1. **WATER AND WATERWORKS—Rules and Regulations.**—A rule of a water company or owner that charges for water shall be to

the owner of the property and not to the tenant, and that if the water charge is not paid the water shall be cut off and not connected again until the delinquent charge is paid, and which prevents a new tenant, on tendering water charges, from getting necessary water unless he pays a delinquent charge against the property, is void as being unreasonable. (Miss.) *Burke v. City of Water Valley*, 468.

2. WATER AND WATERWORKS—Duty to Supply Water.—A waterworks company or owner cannot refuse to supply a new occupant of a building with necessary water, unless he pays an unpaid water bill contracted by a former occupant or owner of the building. (Miss.) *Burke v. City of Water Valley*, 468.

Riparian Rights.

3. RIPARIAN RIGHTS—Use of Water for Power.—As against a lower an upper proprietor having riparian rights has clearly the right to use the water for power, and this involves the right to detain it long enough, and to discharge it in such manner as will make it useful, but such detention and discharge must be reasonable under all the circumstances of the particular case. (Conn.) *Hazard Powder Co. v. Somerville Mfg. Co.*, 144.

4. RIPARIAN RIGHTS—Reasonable Use of Water.—The question in a given case whether the use of water by an upper riparian owner is reasonable is essentially one of fact, but the conclusion of the trial court upon the question of reasonable use may be reviewed by the appellate court. (Conn.) *Hazard Powder Co. v. Somerville Mfg. Co.*, 144.

5. RIPARIAN RIGHTS—Reasonable Use of Water—Evidence.—Upon the question of reasonable use of water by an upper riparian owner, evidence of the custom and usage of other persons carrying on the same business on the same or a like stream in reference to the length of the time of working runs is admissible. (Conn.) *Hazard Powder Co. v. Somerville Mfg. Co.*, 144.

6. RIPARIAN RIGHTS—Reasonable Use of Water—Evidence.—When the question of reasonable use of water by a riparian owner under given circumstances is in issue, the usage, custom, habit, or conduct of others under similar circumstances is relevant as evidence upon that issue. (Conn.) *Hazard Powder Co. v. Somerville Mfg. Co.*, 144.

Surface Waters.

7. SURFACE WATERS—Drainage on Land of Another.—One may deepen the depression in the rim of a natural basin on his land, through which the water naturally passes upon the land of his neighbor, so as to entirely drain the basin and discharge upon the servient estate large quantities of water which otherwise would never have reached it. (Ill.) *Fenton etc. R. R. Co. v. Adams*, 171.

8. SURFACE WATERS—Changing Course and Increasing Discharge—Debris.—Where the natural course of water across a dominant estate is from a ravine to a basin and thence through a depression in the rim of the basin to the servient estate, the owner of the dominant estate may construct a ditch on his land which cuts out the basin and carries the water directly to its natural outlet upon the servient estate, although debris and large quantities of water which otherwise would have remained in the basin are thereby cast upon the servient estate. (Ill.) *Fenton etc. R. R. Co. v. Adams*, 171.

9. SURFACE WATERS—Changing Place of Outlet.—One who changes the natural course of waters on his premises must restore the water to its natural channel within the limits of his own land, and

see that the water passes from his land upon the land of his neighbor at the precise place where it would naturally do so, and at no other place. (Ill.) *Fenton etc. R. R. Co. v. Adams*, 171.

Percolating Waters.

10. **WATERS, PERCOLATING.**—All subterranean waters not existing in a well-defined and known channel are deemed to be percolating. (W. Va.) *Pence v. Carney*, 963.

11. **WATERS.**—Subterranean Waters are Presumed to be Percolating until it is shown that they exist in a known and well-defined channel. (W. Va.) *Pence v. Carney*, 963.

12. **WATERS—Subterranean Channel Water.**—The underground waters which the law recognizes as existing in underground bodies or streams in well-known and defined channels, are those only which are known to so exist, or ascertainable or discoverable from surface indications, or other means, without subsurface excavations for that purpose. (W. Va.) *Pence v. Carney*, 963.

13. **WATERS—Percolating—Use of.**—The use by the owner of land who searches therein, discovers, and produces percolating water, is limited to a reasonable and beneficial use of such water, where to use it otherwise would deprive the adjacent and neighboring lands of the enjoyment of the percolating or natural spring water therein. (W. Va.) *Pence v. Carney*, 963.

14. **WATERS—Percolating—Right to Use.**—A land owner has no right by anything done on his land to waste, whether through malice or indifference, the percolating waters there found, or which he therein develops or brings to the surface by means of ditches or wells, with or without pumping apparatus, if by such waste the neighboring land owner is deprived of percolating water which otherwise would be within his land and which he there has a necessity for using. (W. Va.) *Pence v. Carney*, 963.

15. **WATERS — Percolating—Diversion.**—The temporary pumping to a reasonable extent of percolating water from a well being sunk by the owner on his land in good faith for the purpose of completing the well for a legitimate use and the casting of such water upon his own land, is not such unreasonable use of such water as will sustain an injunction, although such pumping may temporarily decrease the supply of water to a natural spring on adjacent land. (W. Va.) *Pence v. Carney*, 963.

Accretions.

16. **ACCRETIONS—Conflict of Laws.**—Each state in the Union may settle for itself the title to lands formed by accretion within its boundaries. (Mo.) *Frank v. Goddin*, 493.

17. **ISLANDS Formed in Place of Land Washed Away.**—If the shore line is washed away and the space thus created becomes a river bed on which new land forms, such new land does not necessarily belong to the owner whose lands were washed away. If added to his shore line by accretion or reliction, it will belong to him. If, on the other hand, a nucleolus appears in the channel off the shore, which swells to a nucleus, and thereafter, by reason of alluvium accruing thereto, reaches the dignity of an island, it does not inure to the riparian owner. (Mo.) *Frank v. Goddin*, 493.

18. **ISLANDS and Their Appurtenant Alluvium Formed in Navigable Rivers** belong to the respective counties within which they appear and are subject to disposition as swamp lands. (Mo.) *Frank v. Goddin*, 493.

19. ACCRETION to Lands Patented by Specific Boundaries.—A patent for swamp lands, though it describes them by specified boundaries, is subject to the chance both of avulsion and imperceptible washing away, and entitles the patentee to lands subsequently added to accretion. (Mo.) *Frank v. Goddin*, 493.

See *Boundaries*, 3, 4.

WAYS.

See *Easements*.

WHARVES.

See *Carriers*, 25, 26.

WILLS.

1. HOLOGRAPHIC WILL—Finding Among Valuable Papers.—A writing is not found among the "valuable papers" of a decedent, as those words are used in a statute defining a holographic will, when it is found in a box in which he kept stamps and stationery belonging to a postoffice of which he had charge, while he kept his deeds, notes and the like in a trunk at his residence some distance away. (Tenn.) *Brogan v. Barnard*, 822.

2. WILLS—Cutting Down Fee to Life Estate.—A devise of a fee may be restricted by subsequent words in the will and changed to an estate for life. (Ill.) *Hill v. Gianelli*, 182.

3. WILLS—Creation of Life Estate.—If the first sentence in one section of will, standing alone, vests a fee simple in the husband of the testatrix, although there are no words of inheritance in the devise, but the second sentence provides that after his death the property shall revert to her heirs upon their paying his heirs the value of the improvements thereon, he takes an estate for life only. (Ill.) *Hill v. Gianelli*, 182.

4. A LEGACY Lapses on the Death of the Legatee Though It Purports to be Given in Consideration of the care by the legatee of the testator's mother and child, and it is not competent to show by extrinsic evidence that the intention of the legatee was to give the legacy in payment of the debt. (Ohio St.) *McNeal v. Pierce*, 695.

See *Deeds*, 1, 2; *Perpetuity*.

WITNESSES.

Husband and Wife.

1. HUSBAND AND WIFE—Witnesses—Evidence.—A wife is not a competent witness against her husband in a prosecution for his crime not committed by personal violence upon her. (W. Va.) *State v. Woodrow*, 1001.

2. HUSBAND AND WIFE as Witnesses in Criminal Case.—A wife is not a competent witness against her husband in a prosecution against him for the murder of their infant child, though the pistol ball which killed the child wounded the wife while such child was in her arms. (W. Va.) *State v. Woodrow*, 1001.

Privilege of Witness—Criminatory Questions.

3. WITNESSES—Incrimatory Evidence.—The immunity of a witness to not answer incrimatory questions is a personal privilege, which may be and is waived if not seasonably asserted, and the testimony regarded as voluntary. (Vt.) *State v. Duncan*, 922.

4. **WITNESS, Compulsory Giving of Incriminatory Evidence by, What Does not Show.**—A plea that the accused was subpoenaed before a grand jury, and being without counsel and ignorant that any charge against him was being inquired into, was required and compelled to, and did, give his testimony and was fully interrogated as to such charge, and testified to facts material and necessary to sustain the indictment, and that upon his testimony and that of other witnesses the indictment was found, does not show that he was compelled to incriminate himself, because it does not state that he claimed his privilege or refused to answer any questions. (Vt.) *State v. Duncan*, 922.

5. **WITNESS—Privilege, Presumption of Waiver of.**—Whenever a witness testifies without objection, he is deemed to do so voluntarily. (Vt.) *State v. Duncan*, 922.

6. **LAW, Presumed Knowledge of.**—Everyone is presumed to know the law, and the grand jury has the right to act on the presumption that one called as a witness before it knows that he cannot be compelled to answer incriminatory questions. (Vt.) *State v. Duncan*, 922.

7. **WITNESS, Persons Accused of Crime, When not a.**—If, when a person is called as a witness, it appears that a crime has been committed and he is in custody as the supposed criminal, he is not regarded as a mere witness, but as a party accused, called before a tribunal vested with power temporarily to investigate the question of his guilt, and he is to be treated the same as though brought before a committing magistrate, and if his examination is not taken in conformity to the statute, without oath and on advice of privilege, it cannot be used against him. The rule is otherwise if, when the witness is called and sworn, it has not been ascertained that a crime has been committed and no one has been arrested charged with the crime. (Vt.) *State v. Duncan*, 923.

8. **WITNESS, Incriminatory Answers —When May be Used Against.** If an ordinary witness is on the stand and a self-criminatory act relative to the issue is desired to be shown by him, the question may be asked, and it is then for him to say whether he will answer or claim his privilege, and if he answers without claiming his privilege, his answer may be used against him. (Vt.) *State v. Duncan*, 923.

9. **WITNESS—Criminatory Questions, Necessity of Warning.**—If an ordinary witness is asked a criminatory question, it is not necessary to notify him of his privilege and warn him of the possible consequences of his answering, and if without such warning or notice he answers without objection, his answer may be used against him. (Vt.) *State v. Duncan*, 923.

10. **WITNESS—Criminatory Answer—Ignorance of Rights.**—The fact that a witness asked a criminatory question was wholly ignorant of his rights with respect to his privilege is not material. If he answers without objection, his answer may be used as evidence against him. (Vt.) *State v. Duncan*, 923.

Impeachment of Witness.

11. **WITNESS, Instruction Respecting Impeached.**—If evidence has been offered and received tending to impeach a witness, the court may instruct the jury that if any witness has been impeached, they are not bound to disregard his testimony, but are at liberty to disregard the whole or any part thereof or to believe or disbelieve him, as they believe he has testified truly or falsely in the cases. (Mo.) *State v. Feeley*, 511.

WORK AND LABOR.

LABOR—Right to—Property Right.—The right of a workman to freely use his hands and to use them for whom he pleases, upon such terms as he may choose, is his property, and an absolute right, of which he cannot be deprived. (Pa.) *Purvis v. United Brotherhood of Carpenters*, 757.

See Conspiracy.

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